

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A. D. 2014

Claim No. SKBHCV2013/0304

In The Matter of the Fatal Accidents Act Cap. 23.10 of
the laws of St. Kitts and Nevis (2002 Revised Edition)

In the Matter of the Law reform (Miscellaneous
Provisions) Act Cap. 5.08 of the Laws of St. Kitts and
Nevis (2002 Revised Edition)

Between:

HAZELINE MAYNARD and DONASHA WATTLEY
As Administratrices of the Estate of Terrence Johnson deceased

Claimants

And

OLIVER MAYNARD

1st Defendant

THE SAINT CHRISTOPHER AND NEVIS SOLID WASTE MANAGEMENT
CORPORATION

2nd Defendant

Before:

Master Fidela Corbin Lincoln (Ag.)

On Written Submissions:

Arudranauth Gossai of counsel for the claimant

Perry Joseph of counsel for the 2nd defendant

2015: February 3

Striking out – Limitation Period – Whether the limitation period for commencing claims against public authorities under the Public Authorities Protection Act Cap. 5.13 applies to claims brought under the Fatal Accidents Act Cap. 23.10.

JUDGMENT

[1] **Corbin-Lincoln M (Ag)**: The application before the court is an application filed by the 2nd defendant to strike out the claimant's claim as an abuse of process.

Background

[2] The claimants are the Administratrices of the Estate of Terrence Johnson (**"the deceased"**).

[3] The 2nd defendant is a body corporate established by the **Saint Christopher and Nevis Solid Waste Management Corporation Act** Cap 11.05 of the Laws of Saint Christopher and Nevis (**"the Solid Waste Act"**).

[4] The deceased and the 1st defendant were at all material times employees of the 2nd defendant. The deceased was employed as a loader and the 1st defendant as a driver. On 13th November 2012 a truck owned by the 2nd defendant and being driven by the 1st defendant in the course of his employment was involved in an accident. The deceased, who was a passenger in the truck, died as a result of injuries sustained in the accident.

[5] On 12th November 2013 the claimants commenced the instant claim against the defendants for damages under the **Fatal Accidents Act** Cap 23.10 of the Laws of Saint Christopher and Nevis (**"the FAA"**) and costs arising from the negligent driving of the 2nd defendant's motor vehicle by the 1st defendant which resulted in the death of the deceased.

The Defendant's Application

[6] The 2nd defendant's application seeks the following relief:

- (1) A declaration that the 2nd defendant is a public authority for the purposes of section 2 of the **Public Authorities Protection Act** Cap. 5.13 of the Revised Laws of St. Christopher and Nevis;
- (2) A declaration that the action is an abuse of process as it is statute barred pursuant to section 2 of the **Public Authorities Protection Act** Cap.5.13 of the Revised Laws of St. Christopher and Nevis 2009;
- (3) An order that the claim in the within action be struck out as an abuse of process; and
- (4) Costs.

[7] The 2nd defendant contends that it is a 'public authority' pursuant to section 3 of the **Solid Waste Act** and that the 1st defendant and the deceased were employed by the 2nd defendant for the purpose of carrying out the 2nd defendant's public duty of waste disposal. Consequently, both defendants fall within the class of persons covered by the **Public Authorities Protection Act** Cap. 5.13 of the Revised Laws of St. Christopher and Nevis ("the PAPA") and that pursuant to Section 2 of the said Act any claim against the defendants must be commenced within 6 months after the act complained of.

[8] The 2nd defendant contends that the claimants' claim is barred having been commenced more than 6 months after the death of the deceased.

The Claimants' Opposition To The Application

[9] The claimants oppose the application on the following grounds:

- (1) The 2nd defendant's application ought not to be entertained by the court since the application for declarations by way of a Notice of Application is

misconceived. The use of the Notice of Application procedure under Part 11 of the Civil Procedure Rules 2000 (“CPR”) is for interlocutory applications and ‘seeking relief by way of declarations cannot by any stretch be deemed to be interlocutory relief.’

- (2) By using Form 6 and not a fixed date form as mandated by CPR Rule 56 the 2nd defendant has accepted and conceded that it is not a public authority as Rule 56.1 (1) (b) and 56.7 (1) (a) provides for declarations where one of the parties is a public body.
- (3) The **PAPA** does not apply to the defendants; and
- (4) The limitation period contained in the **PAPA** does not apply to claims under the **FAA** and consequently the time limit for bringing claims under the **FAA** is one year rather than the 6 month period created by the **PAPA**.

CPR.26.3- The Principles Governing Striking Out of a Statement of Case

[10] The Civil Procedure Rules (“CPR”) Part 26.3 (1) (c) states that:

“In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that ...the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct a just disposal of the proceedings ” .

[11] In **St. Kitts, Nevis, Anguilla National Bank v Caribbean 6/49 Limited**¹ Barrow J.A confirmed that issuing a claim after the expiration of limitation period is one of the circumstances that could amount to an abuse of process contemplated by Part 26 (3) (1) (c).

¹ unreported Civil Appeal No. 6 of 2002, Saint Christopher and Nevis

[12] It is well established that the power to strike out should be used sparingly. In **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al**² Sir Byron J put it thus *“this summary procedure should only be used in clear and obvious cases, when it can be seen on the face of it (emphasis mine), that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.”*

The Public Authorities Protection Act

[13] The PAPA states that it is an Act **“to provide for the protection of public authorities: and to provide for related or incidental matters.”**

[14] Section 2 of the PAPA states:

“ Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.”

The Fatal Accidents Act

[15] The FAA states that it is an **“Act to provide for the institution of actions in respect of fatal accidents caused by wrongful act etc.”**

² Civil Appeal No 20A of 1997

[16] Section 3 of the **FAA** states :

“Where the death of a person is caused by [sic] wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death is caused in such circumstances as amount in law to [sic] felony”

[17] Section 5 of the **FAA** states that an action under the Act must be commenced within **12 calendar months** after the death of a deceased person.

Issues

[18] The issues arising for consideration are as follows:

- (1) Is the 2nd defendant a public authority within the meaning of the **PAPA**?
- (2) If, so, were the acts complained of done in pursuance or execution of any Act, or of any public duty by the defendants so as to entitle the defendants to avail themselves of the provisions of the **PAPA**?
- (3) Even if the defendants are covered under the **PAPA** does the limitation period contained in the **PAPA** apply to claims under the **FAA**?
- (4) Whether the 2nd defendant's application, made by Notice of Application, should be entertained by the court.

Is the 2nd Defendant is a Public Authority

- [19] While the **PAPA** states that it is an Act to provide for the protection of “public authorities” the term “public authority” is not defined in the Act and there is no criteria set out therein for determining what constitutes a “public authority”. The provisions of the **PAPA** mirror section 1 of the **Public Authorities Protection Act 1893** of the United Kingdom and similar legislation of Commonwealth jurisdictions. Useful guidance on determining whether a particular body is a public authority for the purposes of the **PAPA** is therefore available not only from cases within this jurisdiction but also from UK and Commonwealth cases.
- [20] In *Littlewood v George Wimpey & Co. Ltd*,³ Parker J stated that “in determining whether the corporation is or is not a public authority, I must consider the duties imposed as opposed to the powers given, the degree, if any of public control; and to whose benefit any profit earned is going to accrue.”⁴
- [21] In *Millen v University Hospital of the West Indies Board of Management*⁵ the Jamaican Court of Appeal favoured the approach of the court in the *Littlewood v George Wimpey* case. The court held that “the factor on which attention should be focused is a consideration of the nature of the duties being performed, or the authority being exercised: is it for the benefit of the public rather than for private profit?”⁶
- [22] Counsel for the 2nd defendant submits that the 2nd defendant is a public authority for the purposes of the **PAPA** because of the nature of the duties performed by the 2nd defendant and the exclusivity of the role. Counsel submits further that the statutory functions of the 2nd defendant give the 2nd defendant an exclusive role and public responsibility for waste disposal and management and it is in the course of its execution of this statutory responsibility that the 2nd defendant owned and operated the truck that was involved in the accident.

³ *Littlewood v George Wimpey & Co. Ltd and British Overseas Airways Corporation* [1953] 1 WLR 426

⁴ *ibid* at page 431

⁵ (1986) 44 WIR 274 cited with approval in *Arinna Nazli v Mount St. John's Medical Centre Board and Uretha Gasper*, Claim No. ANUHCV2013/0006

⁶ *Millen v University Hospital* (1986) 44 WIR at page 288

[23] Counsel for the claimants submits that :

- (1) The defendants are not covered under the PAPA.
- (2) Section 20 of the **Solid Waste Act** states that the 2nd defendant is not to be regarded as the servant or agent of the Crown or as enjoying any status immunity or privilege of the Crown.
- (3) The provisions of **PAPA** only apply to servants and/or agents of the Crown and "Section 2 (2) of **PAPA** expressly provides that "*this section shall not affect any proceedings by the Crown*" and the converse to that being that it shall affect *proceedings against the Crown*. The 2nd defendant having been expressly declared [sic] by Parliament not to be a servant or agent of the Crown cannot benefit from the provisions of **PAPA** "
- (4) Support for this proposition can be found in section 6 of the First Schedule of the Solid Waste Act which provides for the transfer of public officers.
- (5) By virtue of section 6 of the First Schedule of the said Solid Waste Act the servants and agents of the 2nd defendant are not public servants or public officers and consequently the 1st defendant, not being a public officer cannot benefit from the provisions of the **PAPA**.

[24] The **Solid Waste Act** expressly states that the 2nd defendant is not a servant or agent of the Crown. I am however unable to agree with counsel for the claimant that **the PAPA** only applies to servants and/or agents of the Crown. I see nothing in **the PAPA** which states so expressly and I can find no reason to interpret the express words used in the Act or read words into the said Act.

[25] The **PAPA** states that it is intended to provide for the protection of '**public authorities**'. Section 2 of **the PAPA** identifies the class of persons and the scope of actions covered by the said Act. The issue is therefore whether the defendants and the act complained of falls

within parameters of the **PAPA**. A body that is not a servant or agent of the Crown can still be deemed a public authority for the purposes of **the PAPA**.

[26] In determining whether the 2nd defendant is a 'public authority' for the purposes of **PAPA** I have taken into consideration that:

- (1) The 2nd defendant was established by the **Solid Waste Act**.
- (2) Every member of the corporation is appointed by the Minister of Health and "holds office for such period not exceeding three years as the Minister may direct and shall be eligible for re-appointment."⁷
- (3) The Minister of Health may at any time revoke the appointment of any member if 'he or she thinks it expedient to do so.'⁸
- (4) The remuneration of every member is fixed by the Minister of Health.⁹
- (5) The Minister of Health is empowered to give general directions as to the policy to be followed by the 2nd defendant in the performance of its functions as appears to the Minister to be necessary in the public interest and the 2nd defendant must give effect to any direction given by the Minister under the Act.¹⁰
- (6) The function of the 2nd defendant is to oversee the management of solid waste collection and disposal in both the islands of Saint Christopher and Nevis¹¹.
- (7) The funds and resources of the 2nd defendant consist of; (a) funds provided by the Government annually; (b) grants by the Government or, with the approval of the Minister, by a person or international organization; (c) sums accrued from payment of fees, charges and rent for services provided or other monies which may become payable; and (d) monies borrowed.¹²
- (8) The 2nd defendant is required to keep accounts of its transactions to the satisfaction of the Minister of Health and the said accounts must be audited

⁷ Section 1 (2) of the First Schedule of the Solid Waste Act.

⁸ Section 3 of the First Schedule of the Solid Waste Act.

⁹ Section 1 (3) of the First Schedule of the Solid Waste Act.

¹⁰ Section 6 of the Solid Waste Act.

¹¹ Section 5 of the Solid Waste Act

¹² Section 8 of the Solid Waste Act

annually by such persons as the 2nd defendant, with the approval of the Minister, may appoint. The 2nd defendant must present an annual report to the Minister of Health who must then lay a copy of the report before the National Assembly.¹³

(9) The Minister of Health may, after consultation with the 2nd defendant, make regulations for the proper carrying out of the provisions and purposes of the Act.¹⁴

[27] In my view, from the extent of the powers conferred upon the Minister of Health by the **Solid Waste Act** the 2nd defendant is mainly controlled by the Government through the Minister of Health. Further, the main source of funds for the 2nd defendant is the Government. I also find that the nature of the duties conferred upon the 2nd defendant by the **Solid Waste Act** is for the benefit of the public rather than for private profit.

[28] Taking all the circumstances into consideration I find that the 2nd defendant is a '**public authority**' within the meaning of the **PAPA**.

Was the act complained of by the claimants done in pursuance or execution of any Act, or of any public duty by the defendants so as to entitle the defendants to avail themselves of the provisions of the PAPA?

[29] The **PAPA** does not protect every act done by a public authority. ¹⁵ It is therefore necessary to consider whether the act complained of by the claimants in this case was done in '**pursuance or execution or intended execution of any Act or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or authority.**'

¹³ Sections 10 and 11 of the Solid Waste Act

¹⁴ Section 18 Of the Solid Waste Act

¹⁵ Bradford Corporation v Myers [1916] 1 AC 242

[30] In **Firestone Tire and Rubber Co. Ltd v Singapore Harbour Board** ¹⁶ Lord Tucker cited with approval a passage from *Griffiths v Smith* and stated as follows:- "it is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power."¹⁷

[31] The 2nd defendant is expressly required by the **Solid Waste Act** to, among other things, provide storage facilities for solid waste, to procure equipment for the collection, transportation and disposal of solid waste; provide collection and storage facilities at ports, harbours and anchorages for the reception of ship-generated waste; convert existing dumps into sanitary landfill sites; provide facilities for the treatment and disposal of medical and hazardous waste and introduce measures to encourage recovery of recyclable item from solid waste.

[32] The claimants' statement of claim avers that :

- (1) The 1st defendant was at all material times an employee of the 2nd defendant acting in the course of his employment and at the material time was the driver of motor vehicle with registration number P7661 which is owned and operated by the 2nd defendant ;
- (2) At all material times the deceased was employed by the 2nd defendant as a loader in the 2nd defendant's garbage collection services; and
- (3) On 13th November 2012 the deceased, who was travelling in the 2nd defendant's motor vehicle, was killed as a result of the negligent driving of the said motor vehicle by the 1st defendant.

¹⁶ [1952] A.C. 452

¹⁷ *ibid* at page 465

[33] It is therefore not disputed that the deceased and the 1st defendant were acting in the course of their employment with the 2nd defendant at the time the accident occurred and that the nature of the function being carried out by the 2nd defendant, through its servants, was garbage collection. The deceased was injured in the course of the 2nd defendant, carrying out its public duty conferred by the **Solid Waste Act**. The duty of waste disposal and management cannot be viewed as an incidental to the powers and duties conferred on the 2nd defendant by the Solid Waste Act. The act of the 2nd defendant therefore falls within the acts covered by section 2 of the **PAPA**.

[34] In **Nelson v Cookson**¹⁸ Atkinson J stated:

“It has been recognized as law for a long time that if some duty or act is done in pursuance of a public authority and is being carried out by a public authority through a servant or agent, that servant or agent has the same right to the benefit of this section as the public authority would have.”

[35] The 2nd defendant was carrying out its public duty through the 1st defendant, its servant, and consequently the 1st defendant is also covered by section 2 of the **PAPA**.

Does the limitation period contained in the PAPA apply to claims under the FAA?

[36] Counsel for the claimant submits that there are “two competing periods of limitation existing in the instant case” namely - the 6 month limitation period contained in the **PAPA** and the 12 month limitation period contained in the **FAA**. Counsel submits further that the 6 month limitation period contained in the **PAPA** does not apply to claims under the **FAA**. Counsel submits that the Privy Council resolved this issue more than 100 years ago in **British Electric Railway Company Limited v Gentile**.¹⁹

¹⁸ [1940] 1 KB 100

¹⁹ [1914] AC 1034

[37] Counsel places heavy reliance on **Gentile**, a Privy Council case which he states this court is bound to follow, and a number of subsequent cases which counsel submits applied **Gentile**. One of the key subsequent cases relied upon by counsel is **Venn v Tedesco**.²⁰

[38] A closer examination of **Gentile** - the key case upon which counsel relies and which counsel correctly submits would bind this court - and some of the subsequent cases referred to by counsel is necessary to ascertain the relevant legal principals.

Gentile's Case

[39] In **Gentile** the respondent brought a claim in negligence against the appellant, a railway company, on behalf of the parents of the deceased by virtue of the provisions of the **Families Compensation Act** of British Columbia. The appellant pleaded that the action was barred by section 60 of the **Consolidated Railway Company's Act 1896** ("**CRCA**") having been commenced more than 6 months after the death of the deceased. Section 60 of the **CRCA** states:

"All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of any by authority of this Act." (emphasis my own)

[40] The trial judge's decision to reject the appellant's claim, founded on section 60 of the **CRCA**, was upheld by the Court of Appeal. The appellant was given leave to appeal to the Privy Council. In delivering the judgment of the Court, Lord Dunedin noted that to

²⁰ [1926] KBD 227

get the benefit of the limitation expressed in section 60 of the CRCA the appellants had to first establish that the suit was one for “indemnity for damages sustained by reason of the railway or the operations of the company”.

[41] The court found that the word “indemnity” used in section 60 of the CRCA meant an

“Indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the company”.

[42] Lord Dunedin stated :

“The question therefore comes to turn on whether a suit raised in virtue of the provisions of the Families Compensation Act answers to the description above set forth. The Families Compensation Act is for all practical purposes textually the same as the Act known as Lord Campbell’s Act in the United Kingdom, of which Act it is indeed a copy. Now the character of the right given by Lord Campbell’s Act has been the subject of much judicial decision. As early as 1852, in the case of Blake v Midland Ry Co 18 Q.B 93 at 110 Coleridge giving the judgment of the court said “ But it will be evident that this Act does not transfer this right of action (of the deceased) to his representative, but gives to the representative a totally new right of action on different principles....In Seward v Vera Cruz (owners of) Lord Selborne LC said “Lord Campbell’s Act gives a new cause of action clearly and does not merely remove the operation of the maxim ‘actio personalis moritur cum persona’ because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor” And Lord Blackburn said : “I think that when the Act is looked at it is plain enough that if a person dies under the circumstances mentioned,

when he might have maintained an action if it has been for the injury to himself which he has survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which , as pointed out in Pym v Great Northern Ry. Co. is new in its species, new in its quality, new in its principle, in every way new”

[43] The Privy Council held that the dicta in the cited cases were applicable to the **Families Compensation Act** and since the right conferred on representatives of a deceased by the said Act was *a new right of action*, it therefore followed that a suit brought under the provisions of **Families Compensation Act** was not ‘a suit for indemnity for damages’ i.e. it was *not* a suit for **indemnity to the plaintiff in the suit, in respect of a wrong done to the plaintiff and damages sustained by him** owing to the railway or the operations of the company. Consequently the limitation period contained in section 60 of the **CRCA** had no application to a suit brought under the **Families Compensation Act**. The defendant’s were therefore unable to rely on the limitation period contained in section 60 of the **CRCA** because the suit fell outside the ambit of the suits covered by that section.

[44] In my view **Gentile** was decided on the particular facts and, more significantly, on the wording of the limitation statute being considered by the court i.e. section 60 of the **CRCA**.

[45] **Gentile** in my view is authority for the propositions that :

- (1) a claim by representatives of a deceased under the Families Compensation Act is not a claim for an ‘*indemnity for damages*’ as defined by the court and therefore was not within the ambit of section 60 of the **CRCA** which provides for a claim falling within the definition of section 60 to be commenced within 6 months ;
- (2) a claim under the Families Compensation Act is a separate and distinct cause of action against the person who would have been responsible to the deceased; and

(3) the point of time at which the test of whether the deceased man would have had a right of action is at the moment of death.

[46] It is not in my view authority for the submission by counsel for the claimants that the limitation period contained in the **PAPA** does not apply to claims under the **FAA**.

[47] It is significant in my view that the words used in section 60 of the **CRCA** are different from the words used in section 2 of the **PAPA**. Section 60 of the **CRCA** confines the application of that Act to a claim for an “**indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him**”. Section 2 of the **PAPA** on the other hand extends to ‘**any action, prosecution or other proceeding**’ by any person against a public authority.

[48] In further support of the claimants’ case, counsel submitted that the Privy Council in **Gentile** expressly disagreed with the earlier decision of **Markey v Tolworth Joint Isolation Hospital District Board**.²¹

Markey’s case

[49] In **Markey** the defendant asserted that the claim, founded under the **UK FAA** was barred by virtue of **the UK PAPA**. The plaintiff asserted that the claim was not barred since under the **UK FAA** the foundation of the action is the *damage suffered by the family of the deceased* and there was no damage to the plaintiff up to the time of the death of the deceased - after his death the damage commences and there is a continuance of damage and injury within the meaning of s 1 (a) of the **UK PAPA** which may last during the lifetime of the plaintiffs.

[50] There were two (2) key issues raised and considered by the court in **Markey**, namely:

²¹ [1900] 2 Q.B 454

(1) The nature of the plaintiff's cause of action and when time began to run against the plaintiffs. In addressing this issue the court stated and found as follows:

(a) Under the UK **PAPA** an action must be brought within 6 months of the injury *"or in case of a continuance of injury or damage, within six months next after the ceasing therefore"*. The words *"or in case of a continuance of injury or damage, within six months next after the ceasing therefore"* used in the **UK PAPA** do not apply to the **UK FAA** or to acts to which the **UK FAA** relate.

(b) The scheme of the **FAA** is that there is a cause of action in the deceased person but since he is dead and cannot take advantage of **his right a legal remedy in respect of that cause of action is given to his widow**.

(c) The 'continuation of injury or damage' is not that in respect of which the **UK FAA** gave a remedy.

(d) The calculation of the 6 months under the **UK PAPA** commences from the death of the deceased.

(e) The use of the words *"continuance of injury or damage"* in the **UK PAPA** cannot mean that the case is taken out of the **PAPA** and that an action can be brought at any time because the potential earnings of the husband must be considered as lost to the widow at any time before her death.

(2) Whether the limitation period contained in the **UK PAPA** applied to claims made under the **UK FAA**. With respect to this issue the court stated:

" Then the plaintiffs' counsel contends that, as the Fatal Accidents Act gives a limit of twelve months for bringing an action and the Public Authorities Protection Act gives one of six months, we ought to hold that the latter Act does not touch the earlier. I do not agree with this contention. It is true, as

he says, that the action must be brought under the Fatal Accidents Act within twelve months, and the Act of 1893 does not interfere with that limitation except as to actions against certain specified persons who must be sued within six months; the Act does not interfere with the Fatal Accidents Act, except that as to certain classes a different time limit is imposed—a limit which affects not only an action under that Act, but also any action under any Act. The two Acts do not conflict in any way.”

- [51] It is not readily apparent to me from a perusal of **Gentile** specifically which aspect of the decision in **Markey** the Privy Council did not agree with.
- [52] In an effort to ascertain which of the findings in **Markey** the Privy Counsel did not agree with, I have considered the common issues under consideration in the two cases.
- [53] In **Gentile** the Privy Council was not considering the words of the **UK PAPA** but a differently worded limitation statute – the **CRCA**. In my view it is unlikely that the Privy Council would be have been establishing legal principles with respect to a statute not under consideration and which was not in similar terms to the Act under consideration.
- [54] I note that the common issue under consideration in both **Gentile** and **Markey** was the nature and character of a cause of action under two similarly worded statutes i.e. the **Families Compensation Act** and the **UK FAA**. While the court in **Markey** found that the cause of action which a person has under the **UK FAA** is **the same** as the deceased would have had if he lived, the Privy Council in **Gentile** held that the cause of action given to persons under the **Families Compensation Act** is a **separate cause of action** from that which the deceased person would have had if he had lived. This appears to me to be the issue on which the Privy Council disagreed with **Markey**.
- [55] Counsel for the claimant submits further however that the decision of **Gentile** was applied by McCardie J in **Venn v Tedesco**²²

²² [1926] 2 K.B 227

Venn v Tedesco

[56] In **Venn v Tedesco** McCardie J had to consider whether the plaintiff's claim, brought under the **UK FAA** was barred by virtue of the **UK PAPA**. After considering several authorities which found that the **UK PAPA** applied to claims brought under the **UK FAA** the learned trial judge stated that he felt bound by the 'weight' of the Privy Council's decision in **Gentile** and also by the fact that the English Court of Appeal in **Nunan v Southern Ry Co** ²³ "apparently treated **Gentile's** case as an authority to be followed by them". The learned trial judge therefore held that the plaintiff's claim was not barred.

[57] In the course of the decision McCardie J stated :

" I must now refer to the leading decision relied on by counsel for the plaintiff – namely *British Columbia Electric Ry Co. v Gentile*...It was held by the Privy Council that the action was not barred, inasmuch as the time limit was fixed by the Families Compensation Act 1911 and not by the Consolidated Railway Companies Act 1896...The advice of the Privy Council was delivered with fullness by Lord Dunedin. I need not analyse the judgment in detail."

[58] As addressed earlier in this judgment, the wording of the limitation provision under consideration in **Gentile** - the **CRCA** - is different from the wording of Section 2 of the **PAPA** and therefore that case was decided on its facts and by an application of those facts to the statutory provision under consideration. I respectfully disagree with McCardie J's interpretation of the decision in **Gentile** and his finding that **Gentile** is authority for the proposition that the limitation period contained in the **UK PAPA** does not apply to claims brought under the **UK FAA**.

²³ [1924] 1 K.B 223

[59] McCardie J stated that he also felt bound by the Court of Appeal decision of **Nunan v Southern Rly Co.**²⁴ In **Nunan** the only express reference to **Gentile** was in the judgment of Bankes LJ who cited the case with respect to the issue of the point in time when a deceased person had a right of action under the UK FAA. Bankes LJ stated:

"The first material question is: At what point of time is it necessary to consider whether the deceased man would have had such a right of action as is indicated in the section? That point has been settled by the Privy Council. LORD DUNEDIN refers to it specifically in *British Columbia Electric Rail Co, Ltd v Gentile* (5) where he says ([1914] AC at p 1041):

"Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea, fictionally, that death has not taken place."

So one starts upon the authority of that decision, with the question: What was the deceased's position at that particular moment? "

[60] In my view neither the decision in **Gentile** nor **Nunan v Southern Rly Co**, the cases which the learned trial judge in **Venn v Tedesco** felt compelled to follow, establish as a general proposition that claims under the **UK FAA** do not fall within the ambit of claims covered by the **UK PAPA**.

The Claimants' Claim

[61] Having found that the key authorities being relied upon by counsel for the plaintiff do not support counsel's submission, I must now consider whether the claimants' claim, which is brought under the **FAA** falls within the description of claims to which the **PAPA** applies.

[62] I find that the claim commenced by the claimants under the **FAA** is an action "commenced against a person for an act done in pursuance or execution of any Act or any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or

²⁴ [1924] 1 K.B 223

authority” and consequently the claim falls within the ambit of claims covered under section 2 of the **PAPA**.

[63] The provisions of the **PAPA** are “general and far reaching and there is no hint of any exception with respect to proceedings”²⁵ under the **FAA**. The evident hardship created by the **PAPA** can only be alleviated through the actions of Parliament.

[64] A claim which falls within the scope of actions covered by the **PAPA** must be commenced within 6 months of the act or neglect complained of. In this case the claimants’ claim was commenced more than six (6) months after the death of the deceased and consequently is barred by virtue of section 2 of the **PAPA**.

[65] Consequently, notwithstanding the evident hardship created by the operation of the **PAPA**, I am compelled, given the present state of the law, to strike out the claimants’ claim as an abuse of the process of the court.

[66] While the application to strike out the claim was filed by the 2nd defendant, having regard to my finding that the 1st defendant is covered under Section 2 of the **PAPA**, I must also strike out the claim against the 1st defendant.

The Form of the Defendant’s Application

[67] One of claimants’ other grounds for opposing the application is that the 2nd defendant has used the incorrect form – Form 6 - to seek declaratory relief. Counsel for the claimants submits that based on the form of the application the application is not properly before the court and ought not to be entertained by the court.

[68] It is not immediately apparent to me why the 2nd defendant has sought declarations in addition to an order that the claim be struck out as an abuse of the process of the court. The court would be required to consider whether the 2nd defendant is a public authority

²⁵ McCardie J in *Venn v Tedesco* [1926] 1 .K.B 227 a 229

under the **PAPA** in the course of determining whether the claimants' claim should be struck out as an abuse of process. Indeed counsel for the 2nd defendant agreed with this observation by the court during the hearing of the application.

[69] I am however satisfied that the 2nd defendant's application is properly before the court and can be entertained by the court since notwithstanding the fact that the application includes an application for a declaration, it also includes an application for an order that the claim to be struck out as an abuse of the process of the court. The application for the claim to be struck out is properly before the court by way of Notice of Application.

Costs

[70] While a successful party is usually entitled to costs given the facts of this case I depart from this principle and make no order as to costs.

[71] It is therefore ordered as follows:

(1) The claimants' statement of case is struck out as an abuse of the process of the court.

(2) No order as to costs.

Fidela Corbin-Lincoln
Master (Ag).