IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G 33 of 2022

BETWEEN

JERMAINE POWIS

Plaintiff

AND

~~**(1) BRITISH CAYMANIAN INSURANCE COMPANY LTD**~~
(2) DAVID HARVEY CRAWFORD

Defendant

IN CHAMBERS AS OPEN COURT

Appearances:	**Mr Dennis Brady of Bradys for the Plaintiff, Mr Colm Flanagan and Ms Niamh McMahon of Nelsons for the Second Defendant**
Before:	**Hon. Justice Alistair Walters (Actg.)**
Date Heard:	**27 September 2022, 2 November 2022 and 14 December 2022**
Further Submissions	**14 February 2023**
Draft Circulated:	**13 March 2023**[1]
Judgment Delivered:	**24 March 20023**

HEADNOTE

Limitation period for personal injury claims caused by motor vehicle accidents set by s.17 Vehicle Insurance (Third Party Risks) Act (2021 Revision) ("Vehicle Insurance Act") - Discretion provided for by s.39 Limitation Act not applicable to such claims - Writ filed via E-Filing Platform on last day of limitation period - Rejected by Registry and not issued until after limitation period expired - When is action "brought" for purposes of limitation period under Vehicle Insurance Act? - Continuing with proceedings despite failure by Plaintiff to serve notice pursuant to s.15(2)(b) Vehicle Insurance Act amounts to an abuse of process - claim struck out.

---

[1] Comments received form Nelsons. Despite reminders, no response received from Bradys.

JUDGMENT

1. It is alleged by the Plaintiff that on 14 February 2019 he was involved in a road traffic accident with the Second Defendant (the "Defendant"). The details of the alleged accident are not relevant to the current applications before the court but, in summary, the Plaintiff claims that the Defendant was negligent and that, as a result of his negligence, the Plaintiff suffered personal injury in relation to which he claims general and special damages.

2. The present applications were brought by way of the Defendant's summons dated 27 July 2022 (the "Summons") seeking, in summary, the following orders:

   2.1 that the Plaintiff's claim against the First Defendant (the Defendant's insurer against which no direct cause of action lies) be struck out on the basis that the Plaintiff has no cause of action against it;

   2.2 that the Plaintiff's claim is struck out on the basis that it is statute barred because the writ was not issued until after the limitation period had expired; and/or,

   2.3 that the Plaintiff's claim is struck out on the basis that it is an abuse of process.

3. The first order was made at a hearing on 27 September 2022 which was the first occasion upon which the Summons came on for hearing. There was no serious argument to the contrary as the First Defendant being the insurer of the Defendant should not have been named as a party.

4. The application to strike out the claim proved to be more complicated. And resulted in two further hearings on 2 November 2022 and 14 December 2022 to enable evidence to be obtained from the Clerk of the Court in relation to the process of electronic filing of court documents. The background to that issue is set out below.

Background

5. The Plaintiff's attorney, Mr Dennis Brady is a sole practitioner. Although appearing on behalf of the Plaintiff, Mr Brady swore an affidavit dated 26 October 2022 detailing the background in relation to the filing of the writ in this case and his wife, Mrs Claudia Brady filed an affidavit dated 26 October 2022. He also provided additional information during the course of oral submissions.

E-Filing Platform

6. On 14 December 2020, Grand Court Practice Direction 11 of 2020 (the "Practice Direction") was published. The Practice Direction came into effect on 8 January 2021 and provided the procedure for electronic filing and electronic service of documents via the Judicial Administration e-filing platform (the "E-Filing Platform").

7. The introduction to the Practice Direction states that the intention is that it will further the objectives of GCR O. 63, r. 3 (filing of documents) and GCR O. 5, r.1 (5) and (6). The relevant provisions of the Practice Direction are set out below:

> *"5. Electronic Submission of Documents*
> *5.1 . In order to file documents using the Platform, a party must*
> *a. Access the Portal by visiting the Judicial Administration website at www.judicial.ky and clicking on the link to the e-fling Portal;*
> *b. Register a new account or log into an existing account in the fields of data required by the Platform.*
> *c. Enter details of a new case or an existing case as required by the fields of data of the Platform;*
> *d. Upload the document(s) associated with that case;*
> *e. Pay the appropriate fee online by way of the e-filing Portal; and*
> *f. Submit the document(s).*
>
> *10. Fees*
> *10.1. The prescribed fees set out in the Court Fee Rules 2009 are payable for all documents filed electronically as they would be for documents filed nonelectronically and at the time of filing, whereupon a receipt from the Clerk of Court will be generated through the online payment system.*
>
> *11 . Processing by the Registry*
> *11.1. The Registry will review all documents submitted for filing for compliance with the Grand Court Rules ("GCR") and this Practice Direction.*
> *a. Where a document has been submitted using the Platform, an automated notification will be generated which will appear in the message centre of the account registered to the filing party and also sent to that party by email.*
> *b. A document submitted using the Platform that complies with the GCR and this Practice Direction shall be filed.*
> *c. A document submitted for filing that does not comply with the GCR and this Practice Direction shall not be filed and a notice of the reasons for non- acceptance shall be sent to the message*

centre of the filing party and by email to that party with a notice of the reason(s) for non-acceptance. The document may be amended and resubmitted for filing accordingly.

d. *Each filed document shall be stamped, dated and paginated sequentially based on the case number under which the document is filed or based on the case number that is assigned to the document if the document filed commences a new case.*

e. *An electronic certificate will be applied to all documents accepted by the registry for filing. The electronic certificate validates the authenticity of the document as being duly filed in the Registry.*

f. *Once a document has been duly filed in the Registry, an automated notification will be generated which will appear in the message centre of the account registered to the filing party and will also be sent by email, as the case may be, to the filing party to confirm that the document has been filed and to confirm the date and time of filing.*

g. *Once a document has been duly filed in the Registry, copies will be generated electronically for placement on the Public Registers in keeping with GCR Order 63 Rule 8 unless embargoed by direction issued under GCR Order 63 Rule 3(4).*

11.2 *Subject to paragraph 9 above, a document to which an electronic certificate has been applied shall be deemed to be filed on the date and time that the document was submitted to the Platform, provided that where a document has not been accepted for filing and is resubmitted through the Platform, the date and time of filing shall be the date and time of resubmission of that document."*

8. Apparently Mr Brady is not very au fait with technology, so his wife assists him with the E-Filing Platform. What appears to have happened in this case is set out in the affidavits from Mr and Mrs Brady and two affidavits sworn at my request by Ms Shiona Allenger the Clerk of the Court on 9 November 2022 and 6 January 2023.

9. It appears that, although dated 12 February 2022, the generally endorsed writ prepared on behalf of the Plaintiff was filed on 14 February 2022, the last day of the limitation period. The endorsement states that the Plaintiff's claim is for:

> *"Damages for personal injuries sustained by the Plaintiff, pain and suffering and loss and damages suffered caused by the negligence or breach of statutory duty and common law duty, of the Second Defendant who is the insured of the First Defendant; on the 14th day of February 2019."*

10. The position on behalf of the Plaintiff is that the issue fee for the writ was paid on 14 February 2022 and the writ was uploaded to the E-Filing Platform the same day.

11. It appears that Mr Brady's account with the E-Filing Platform was accessed by Mr Brady (assisted by his wife) on 14 February 2022 and a new "Case" was created at 12.04. However, the "Commencement Date" of the case is shown as 6 June 2022.

12. The 2-page writ was uploaded as a .pdf document but accompanying it as a third page was the receipt for the filing fee. Ms Allenger says that the receipt was not germane to the writ itself and if remaining as part of the .pdf file would form part of the Court's record for originating processes. Ms Allenger explains that on the same date as the writ was uploaded, a note was left in the message section of the E-Filing Platform stating:

> *"Writ of Summons to be uploaded as a separate document from the payment confirmation. Kindly re-upload documents as two separate PDF."*

13. Mr Brady explained that he did not access the E-Filing Portal unless it was necessary to upload a document so neither he nor his wife accessed in again until June 2022 in relation to an entirely separate matter. Apparently Mr Brady works in loose association with a number of other sole practitioners, one or more of whom may have subsequently accessed his account on the E-Filing Platform prior to June 2022 but in relation to other matters that they were dealing with and not those being dealt with by Mr Brady. The message on the E-Filing Platform was not therefore drawn immediately to Mr Brady's attention. Paragraph 11.1 (c) of the Practice Direction states that if a document is not accepted, not only will a message be sent to the message centre of the E-Filing Platform, but an email shall also be sent to the party seeking to upload the relevant documents setting out the reasons for non-acceptance. Ms Allenger has confirmed that an email to that effect was not sent to Mr Brady until 26 April 2022.

14. At some point between 14 February 2022 and 26 April 2022 Mr Brady attended the Civil Registry to enquire about the writ[2]. Ms Allenger says that the filing issue was explained to him and he agreed

[2] The precise date is unclear but the delay on the part of Mr Brady is relied on by the Defendant in relation to his abuse of process argument.

to re-upload the writ. As mentioned above, on 26 April 2022 an email was sent to Mr Brady advising him as follows:

> *"Dear Mr Brady,*
> *Kindly note, in respect of GC 33 of 2022 – Jermaine Powis (personal injury) – The case status was updated, and you would have receive [sic] a notification with action required.*
> *Kindly log into the case and make the changes required for processing of the document.*
> *Required (Payment confirmation to be uploaded as a separate document from the Writ)."*

15. Ms Allenger confirmed that on the evening of 31 May 2022[3] the original writ was uploaded again with the required changes. It was processed on 1 June 2022. The writ remained manually dated 12 February 2022 but was marked with a processing date of 1 June 2022.

16. Overall, the position of Ms Allenger is that in accordance with the Practice Direction, the date that the writ was filed is 1 June 2022, being the date that it was processed.

Vehicle Insurance (Third Party Risks) Act (2021 Revision)

17. The Vehicle Insurance (Third Party Risks) Act (2021 Revision) ("Vehicle Insurance Act") states as follows:

> ***"Duty of insurers to satisfy judgments against persons insured in respect of third party risks***
>
> *15 (1) If, after a certificate of insurance has been issued under section 4(3) in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 4(1) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any law relating to interest on judgments.*
> *(2) No sum shall be payable by an insurer under subsection (1) —*

[3] An unexplained delay on which the Defendant also relies.

(a) liability for which is exempted from the cover granted by the policy under any proviso to section 4(1);

(b) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; such notice to be deemed to be given by the posting of a registered prepaid envelope containing the notice to the address of the insurer given in the certificate of insurance and such notice being deemed to have reached the insurer within fourteen days of the time at which it was posted;

...

Clerk of Court to give notice to insurer

16. The Clerk of the Court shall, within ten days of the commencement, by a third party injured or whose property has been damaged by a vehicle required to be insured by this Law, of any proceedings in any such Court, give notice to the insurer of such proceedings: Provided that every insurer shall notify the Clerk of the Court of his address and shall inform the Clerk of the Court of any change therein.

Limitation of actions

17. Notwithstanding anything contained in any other law or in any rule of law or equity, no action shall be brought in any court by or on behalf of any person after the end of the period of three years from the date on which a cause of action accrued for any injury or damage against or in respect of which a vehicle is required to be insured under this Law." (emphasis added)

18. The form of notice of proceedings for the purposes of s.16 of the Vehicle Insurance Act was uploaded to the E-Filing Platform by Mr Brady on 1 June 2022 and was signed and sealed electronically by the Clerk of the Court on 7 June 2022. The writ and notice of proceedings were served by the Court Bailiff on the Defendant's insurer on 16 June 2022. No notice pursuant to s.15 (2) (b) appears to have been given.

Limitation Act (1996 Revision)

19. By virtue of s.13 of the Limitation Act (1996 Revision) (the "Limitation Act") claims for damages for personal injury cannot be brought after the expiration of three years from the date upon which

the cause of action accrued; or the date of knowledge (if later) of the person injured[4]. In this case, the limitation period expired on 14 February 2022.

20. Partly at my request, at the final hearing, counsel addressed the question of whether the discretion given to the court under s. 39 of the Limitation Act applies in cases involving personal injury caused by a motor vehicle accident. S.39 provides as follows:

> *"39.(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which —*
> *(a) section 13 or 16 prejudices the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,*
> *the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.*
> *(2) The court shall not, under this section, disapply section 16(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 13.*
> *(3) In acting under this section, the court shall have regard to all the circumstances of the case and, in particular, to —*
> *(a) the length of, and the reasons for, the delay on the part of the plaintiff;*
> *(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 13 or 16 (as the case may be);*
> *(c) the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;*
> *(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*
> *(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and*
> *(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."*

[4] Ss. 13 (3) and (4) of the Act.

21. As can be seen from the above quoted extract of the Vehicle Insurance Act, s.17 of that statue provides for a limitation period of three years in relation to a claim for damages in relation to injuries caused by a motor vehicle accident. The question of the relationship between s.17 of the Vehicle Insurance Act and s.13 of the Limitation Act was considered in some detail by Ramsay-Hale J. (as she then was) in *Andrade v Frederick*[5]. The judgment considers the argument that s.17 of the Vehicle Insurance Act had been impliedly repealed by s.13 of the Limitation Act as decided by McMillan J. in *Bennett v Diaz*[6]. Ramsay-Hale J. declined to follow *Bennett* and reached the conclusion that s.17 Vehicle Insurance Act was not impliedly repealed by s.13 the Limitation Act and that both sections stand together. In her summary of findings the judge said:

> *"112. None of the factors identified in the authorities support a finding that the Legislature had impliedly repealed section 17: the* ***Motor Traffic Insurance Law (Third Party Risks) Law*** *1990 and the* ***Limitation Law*** *1991 were brought into force within 3 months of each other; though the statutes make different provisions for barring actions for personal injury, they can stand together and indeed have stood together from 1991; the mere fact that section 17 does not allow the exceptions and extensions to the limitation period as are allowed by section 13, where personal injury arises from other torts, is not absurd; section 17 is a specific provision and section 13 a general one so there is a strong presumption against implied repeal which in this case was not displaced; section 13 does not cover damage to property so the sections do not, in fact, cover the same ground and finally, the* ***Limitation Law*** *by section 44 (1) expressly saved section 17 which prescribed a different period of limitation for actions for personal injury and damage arising from the use of a motor vehicle which was required to be insured.*
>
> *113. Between 1991 and 2011, the* ***Insurance Law*** *was amended three times and the amendments were conciliated and published in 2004, 2007 and 2012.*
>
> *114. Section 17 remained in force in its original form until 2011 when it was amended and extended to electric vehicles by the legislature. The 2007* ***Insurance Law*** *and the 2011 amending law were consolidated and republished in 2012 as the* ***Vehicle Insurance (Third Party Risks) Law (2012 Revision)****. Section 17 of that law provides the Defendant with an indefeasible defence to the claim."*

[5] Cause G 26 of 2014, unreported 18 August 2020.
[6] Unreported 28 January 2020.

22. Mr Brady sought to argue that *Bennett* was rightly decided. However, having considered the detailed judgment in *Andrade* and, in particular, the express provisions of s.17 Vehicle Insurance Act (set out above) and which commence with the words *"Notwithstanding anything contained in any other law or in any rule of law or equity"* and s.44 of the Limitation Act which states:

> *"44.(1) This Law does not apply to any action or arbitration for which a period of limitation is prescribed by or under any other Law, or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other Law."*

I see no basis to suggest that *Andrade* was wrongly decided; quite the opposite. Therefore, the discretion provided for in s.39 Limitation Act does not arise in this case.

When is an action "brought" for limitation purposes?

23. The position at this point therefore is that the writ was not issued until 1 June 2022, a considerable period after the limitation period has expired. That might have been the end of the analysis but for two authorities that Mr Flanagan quite rightly brought to the court's attention which although not necessarily helpful to his client are relevant. The authorities are *Barnes v St Helens Metropolitan BC*[7] and *Page v Hewetts Solicitors*[8], both of which are decisions of the English Court of Appeal. *Barnes* relates to a claim for damages for personal injury as a result of what was alleged to be the negligence of the defendant. It was not a road traffic related case. The relevant limitation period was set out in s.11 of the English Limitation Act 1980 which is in similar terms to s.13 of the Limitation Act. S.11 states:

> ***"Special time limit for actions in respect of personal injuries.***
>
> *(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.*
>
> ...

[7] [2006] EWCA Civ 1372.
[8] [2012] EWCA Civ 805.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from—

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured."

24. *Page* relates to a claim for an account subject to the limitation period provided for in s.23 of the Limitation Act 1980 which reads as follows:

"Time limit in respect of actions for an account.

An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account."

The Court of Appeal in *Page* considered *Barnes* in some detail. Both cases involved arguments that the relevant court documents had been submitted to the court office to be issued prior to the expiry of the relevant limitation periods but in neither case were they date stamped with a date that was within those periods. That therefore prompted consideration of what *"brought"* means in the context of the relevant provisions of the Limitation Act 1980; the same expression that is used in s.17 Vehicle Insurance Act and in the Limitation Act.

25. That consideration took place with the backdrop of the English Civil Procedure Rules ("CPR"). The court set out the relevant provisions:

21. CPR Part 7.2 provides:

"(1) Proceedings are started when the court issues a claim form at the request of the claimant.

(2) A claim form is issued on the date entered on the form by the court."

22. CPR Part 7 is supplemented by a Practice Direction. PD 7 para 5 says:

"5.1 Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is 'brought' for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date.

5.2 The date on which the claim form was received by the court will be recorded by a date stamp either on the claim form held on the court file or on the letter that accompanied the claim form when it was received by the court.

5.3 An inquiry as to the date on which the claim form was received by the court should be directed to a court officer.

5.4 Parties proposing to start a claim which is approaching the expiry of the limitation period should recognise the potential importance of establishing the date the claim form was received by the court and should themselves make arrangements to record the date."

26. The court went on to review what Tuckey LJ said in *Barnes*

"29. ···When an action is "brought" for the purpose of the Limitation Act 1980 is, in my judgment, a question of construction of the Act. It is not a question of construction of the CPR, let alone a question of construction of a Practice Direction. The CPR (and perhaps the Practice Direction) may inform the construction, but the question remains: what does the Act mean?

30. In Barnes v St Helens Metropolitan Borough Council [2006] EWCA Civ 1372 [2007] 1 WLR 879 Tuckey LJ (with whom Arden and Lloyd LJJ agreed) said:

"I start simply by looking at the words used in the statute and the Rules. I approach them by expecting to find the expiry of a limitation period fixed by reference to something which the claimant has to do, rather than something which someone else such as the court has to do. The time at which a claimant "brings" his claim form to the court with a request that it be issued is something he has to do; the time at which his request is complied with is not because it is done by the court and is something over which he has no real control. Put another way one act is unilateral and the other is transactional. Looked at in this way I do not agree with the judge or Mr Norman that in this context the verb "to bring" has the same meaning as the verb "to start". The 1980 Act can perfectly properly be construed so that in the context of the CPR a claim is brought when the claimant's request for the issue of a claim form (together with the court fee) is delivered to the court office. Paragraph 5 of the Practice Direction gives sensible guidance to ensure that the actual date of delivery is readily ascertainable by recording the date of receipt." (Emphasis added)

31. Tuckey LJ makes it clear that the legal question is the meaning of the word "brought" in the Limitation Act. The Practice Direction is no more than sensible guidance. In addition one must not forget that proceedings can be started on line, and that the Practice Direction cannot apply to such cases.

32. Taken literally, the ratio of Barnes v St Helens Metropolitan Borough Council is that once the claimant has delivered his request for the issue of a claim form to the court office, he has "brought" his action. If Mr Last's evidence is correct, Messrs Page did that in the present case.

33. However, literalism is not fashionable, so it is also necessary to consider the policy that underpins the decision. Tuckey LJ dealt with this too. He pointed

out that this meant that a claimant had the full period of limitation within which to "bring" his claim; and that it would be unjust if he had to take the risk that the court would fail to process it in time. It does not seem to me that the reason why the court fails to process the request in time alters the justice of the case. If it is unjust for the claimant to take the risk that the court staff are on strike, it seems to me to be equally unjust for him to have to take the risk that a member of the court staff might erroneously put his request in the shredder or the confidential waste, or that his request is destroyed by flood or fire in the court office, or is taken in a burglary. Each of these might be reasons why the court failed to process the request in time. Essentially the construction of the Act that this court favoured in Barnes v St Helens Metropolitan Borough Council is based on risk allocation. The claimant's risk stops once he has delivered his request (accompanied by the claim form and fee) to the court office. PD 7 cannot, in my judgment, alter the correct construction of the Act.

34. *This is not a new approach. In Aly v Aly (1 January 1984), which also concerned time limits in the context of limitation periods, Eveleigh LJ said:*

> *"It would be indeed surprising and harsh if a party who had done all that was required of him, should find himself unable to obtain the assistance of the court because the court itself had failed in some matter of procedure. Furthermore, when the rules lay down a time limit which has to be observed by a party to the litigation, their aim is to achieve whatever particular purpose is in mind by controlling the action of the party, and where on the reading of the appropriate rule that seems to be its intention it would be quite ridiculous, as I see it, to make the party responsible for anything that has subsequently to be done by the court. "*

35. *Thus the Court of Appeal held that:*

> *"... one can only treat the words "apply to the Court" as meaning doing all that is in your power to do to set the wheels of justice in motion according to the procedure that is laid down for the pursuit of the relief which you are asking."*

36. *Likewise in Riniker v University College London (31 March 1999) the Court of Appeal held that when a draft writ was in the custody of a proper court officer and in proper form the court had an inherent jurisdiction to treat it as issued on the day on which it was received. The underlying theme is, in my judgment, that a would-be litigant is not responsible for any shortcomings of the court.*
37. *Mr Stacey has referred us to a number of cases in which it has been said that proceedings are begun when the originating process is issued by the court. Under normal circumstances that is, of course, right. But those cases do not touch upon the circumstances that the court is itself responsible for delay in issuing or loss of the originating process.*
38. *If, therefore, the claimants establish that the claim form was delivered in due time to the court office, accompanied by a request to issue and the appropriate fee, the action would not, in my judgment, be statute barred. ..."*

27. It seems to me to be appropriate to apply the same approach to the question of when proceedings are "brought" for the purposes of the Vehicle Insurance Act and the Limitation Act. It is not in my view the most desirable practice to leave the issuing of proceedings to the last day of the limitation period. That is especially the case where, as in this case, the writ was endorsed generally with a very generic claim for damages which could most likely have been prepared and issued well before 14 February 2021. There may well be good reasons for the delay but, as this case demonstrates, the risks of delay increase as the expiry of the limitation period approaches.

28. Using the analysis from *Page,* the question in essence is whether the Plaintiff's counsel did all that could be expected of him to facilitate the issuing of proceedings thereby discharging his responsibility and passing the risk on to the court registry?

29. GCR O. 5, r.1 deals with the mode of beginning proceedings and provides as follows:

> *"1. (1) Subject to the provision of any Law and of these Rules, civil proceedings in the Court may be begun by writ, originating summons, originating motion or petition, which are referred to collectively in this rule as originating process.*
> *(2) Every originating process must be issued.*
> *(3) The issue of an originating process takes place upon it being - (a) sealed by the Clerk of the Court with a seal indicating the date upon which it was sealed; and (b) filed in accordance with paragraph (4).*
> *(4) Upon issuing an originating process the Clerk of the Court shall - (a) assign to it a cause number, using a chronological sequence recommencing on the 1st January each year; (b) establish a court file in respect of the cause or matter in accordance with Order 63, rule 2; (c) place an office copy of the originating process on the Court file; and (d) place a second office copy of the originating process on the Register of Writs maintained in accordance with Order 63, rule 8.*
> *(5) A person seeking to issue an originating process shall present to the Clerk of the Court at least three copies thereof, each signed by or on behalf of the plaintiff, applicant or petitioner, as the case may be.*
> *(6) The Clerk of the Court shall not issue any originating process without first being satisfied that the prescribed fee has been paid."*

30. GCR O.6 sets out the requirements for the form and content of a writ and its issue. Specially for claims involving damages arising from a road traffic accident, GCR O. 6, r.4 requires that:

> ***"Indorsement as to insurers of motor vehicles (O.6, r.4)***

4. (1) Any writ which includes a claim for damages arising out of the use of a motor vehicle or vehicles on any road shall be endorsed with the name and address of the insurer or insurers of such vehicles.

(2) The Clerk of the Court shall send a copy of any writ indorsed in accordance with paragraph (1) to the insurer or insurers whose names are indorsed thereon within 10 days of the date upon which such writ is issued."

31. GCR O.1, r.12 deals with the status of practice directions and explains that:

"Practice directions (O.1, r.12)

12.(1) The Chief Justice may issue practice directions for the purpose of –

(a) supplementing these Rules, provided that no practice direction shall revoke or vary any rule;

(b) establishing forms to be known as "practice forms" in respect of any matter in which no prescribed form is contained in Appendix I; and

(c) providing for the practice and procedure of the Court in respect of any matter not governed by these or any other rules."

32. There is no doubt that the form of writ that was issued on 1 June 2022 was exactly the same as that originally submitted to the E-Filing Portal and there is no doubt that the fee was paid on 14 February 2022. This is despite the fact that the Second Defendants insurer was improperly named as a party and that there was no endorsement as required by GCR O. 6, r.4. Regardless of that, the requirements of GCR O.5, r.1 were met on 14 February 2022 and to that extent, in my view, the Plaintiff's counsel had done everything that could be expected of him as at that point in time.

33. However, the Practice Direction had introduced a new method of electronic filing. Mr Brady's position is that although by 14 February 2022 the Practice Direction had been in place for just over a year the electronic filing system was relatively new and he remained unfamiliar with its operation.

34. Paragraph 11 of the Practice Direction indicates that upon receipt of documents submitted for filing the Registry will review them for compliance with the GCR and the Practice Direction. In this case the writ complied with the GCR. As set out above, the Practice Direction requires that:

*"**5.1** . In order to file documents using the Platform, a party must*

***a.** Access the Portal by visiting the Judicial Administration website at www.judicial.ky and clicking on the link to the e-fling Portal;*

***b.** Register a new account or log into an existing account in the fields of data required by the Platform.*

c. Enter details of a new case or an existing case as required by the fields of data of the Platform;
d. Upload the document(s) associated with that case;
e. Pay the appropriate fee online by way of the e-filing Portal; and
f. Submit the document(s)."

Setting aside for a moment the inclusion of the receipt for the fee in the scanned file containing the writ, this is exactly what Mr Brady did on 14 February 2022. The Registry took the decision to reject the filed document and did put a note to that effect on the message centre on the E-Filing Platform. We know that Mr Brady would not have seen that. The time when the message was posted has not been determined. The explanatory email that should have also been sent pursuant to paragraph 11.1 (c) of the Practice Direction was not sent until 26 April 2022. It is not clear whether even if it had been sent on 14 February 2022, it would have come to Mr Brady's attention in sufficient time to have re-submitted the writ within business hours on 14 February 2022.

35. As set out above, paragraph 11.2 of the Practice Direction states:

> *"11.2 Subject to paragraph 9 above, a document to which an electronic certificate has been applied shall be deemed to be filed on the date and time that the document was submitted to the Platform, provided that where a document has not been accepted for filing and is resubmitted through the Platform, the date and time of filing shall be the date and time of resubmission of that document."*

Paragraph 9 provides:

> *"**Filing outside business hours***
> ***9.1.** Any document submitted through the Platform for filing outside business hours (8:30 am to 5:00 pm Mondays to Fridays) or on a public holiday, Saturday, or Sunday, or any other period during which the Registry is closed, will be deemed filed as soon as the Registry is next open.*
> ***9.2.** Documents will be ascribed times of e-filing and if for any reason the Platform becomes non-operational the time of filing will be regarded as the time ascribed when the document was filed rather than when the process of filing was completed." (emphasis added).*

There is no provision which is the equivalent of CPR Part 7, paragraph 5.1 (quoted above) which provides expressly for when an action is regarded as having been brought when there is a delay between date of filing and the date of issuance. Therefore, if as discussed in *Page,* the Registry is closed for an unexpected reason during business hours or if a submitted document is wrongly rejected by the Registry, the effect of the Practice Direction is that for limitation purposes, the risk is left with

the filing party even if they may have done everything that they can to bring proceedings on or by a certain date. In light of *Barnes* and *Page*, it seems to me that this is unreasonable and potentially unfair to filing party and should be reviewed.

36. The Practice Direction does not make reference to an issue such as the inclusion of an incorrect page with a submitted document and, in my view, it is not necessary to determine if the writ in this case was rejected in error or not. In view of the then relative novelty of the E-Filing Platform and the fact that Mr Brady appears to have done everything that he reasonably could to facilitate the issuing of proceedings on 14 February 2022, I think that it would be unfair to the Plaintiff to not treat the action as having been brought on 14 February 2022, within the limitation period as provided for in s.17 of the Vehicle Insurance Act.

37. That does however raise a further issue pursuant to s.15 (2) (b) of the Vehicle Insurance Act; namely, was the Plaintiff obliged to give notice to the Plaintiff's insurer of the "bringing" of proceedings on 14 February 2022. That subsection requires that unless before or within 30 days after the "commencement" of proceedings the insurer had notice of the "bringing" of proceedings then it shall have no liability under any judgment against its insurer. As Ramsay-Hale J. said in *Andrade*[9] the intention behind this provision was to give insurers some commercial certainty that claims in relation to motor vehicle accidents would be filed within a certain time limit and when they are filed. Mr Brady clearly knew that he was intending to file proceedings and could have given notice of that to the insurer on or before 14 February 2022. He was aware that the proceedings were not commenced until 6 June 2022. It is unfortunate that the statute uses the two terms, "bringing" and "commencement" in the same sub-section. It is only in the context of an unusual case such as this that any distinction between the two terms might arise. Generally, one would expect that proceedings will commence at the time that they are brought or shortly thereafter. I will come back to this point after I have considered the failure to file a s.15 (2) (b) notice after the proceedings were issued on 1 June 2022.

38. In *Ingram v Turner*[10] I considered both s.15 (2) (b) and s.16 of the Vehicle Insurance Act, the latter of which requires the Clerk of the Court to give an insurer notice within 10 days of the

[9] Paragraph 39.
[10] GC 59 of 2017, unreported 8 March 2022.

"commencement" of proceedings. I expressed the view in that case that the sections impose separate and distinct obligations on a plaintiff and on the Clerk of the Court respectively. Pursuant to s.15 (2) (b), prior to bringing proceedings a plaintiff can give an insurer notice that they intend to do so or they have to give such notice within 30 days of taking that step. The Clerk of the Court notifies the insurer that the proceedings have been commenced, whether or not proximate to the date that they were brought.

39. In that case I also considered a number of authorities that dealt with what constitutes notice under s.15 (2) (b) and the consequence of the failure to give notice. In *Wake v Page*[11] which dealt with a similar but shorter notice period in equivalent English legislation[12] Rix LJ summarized[13] the authorities in relation to the question of notice:

> *"... it seems to me that certain conclusions can be drawn from the authorities.*
>
> *(1) To show that the insured had notice of the bringing of the proceedings there must be more than evidence of a casual comment to someone who at times acted as an agent for the insurers.*
>
> *(2) Any notification relied upon must not be subject to a condition which may or may not be fulfilled... but if the condition is one which required action from the recipients which they choose not to take then by making that choice they render the notice unconditional and thus effective.*
>
> *(3) The notice can be oral, and it need not even emanate from the claimant. It can be given before proceedings have commenced, and it need not be specific as to the nature of the proceedings, or the court.*
>
> *(4) Whether in any given case it is shown that the insurer had notice of the bringing of the proceedings (as opposed to the making of a claim) is a matter of fact and degree.*
>
> *(5) The essential purpose of the requirement of notice is to ensure that the insurer is not suddenly faced with a judgment which he has to satisfy without having any opportunity to take part in the proceedings in which that judgment was obtained."*

40. Referring to the facts of that case, he went on to say that:

---

[11] [2001] RTR 291.
[12] S. 152 Road Traffic Act 1988.
[13] Page 8.

> *"The insurers were kept in the picture from the start, and were never in danger of being faced with a judgment which they had to satisfy without having had an opportunity to take part in the proceedings, but that does not of itself entitle the claimant of the court to ignore the statutory requirement which makes it a condition precedent to liability that "before or within 7 days after the commencement of proceedings ... the insurer has notice of the bringing of the proceedings"……*
>
> *"There may well be other cases in which contact, even an informal contact, shortly before the commencement of proceedings would put the insurer in the position of having notice of the bringing of the proceedings – everything would depend on the facts of the case, but a prudent solicitor would be well advised to ensure that the insurer received written notice within 7 days after the commencement of proceedings. There can be no room for argument."*

41. It was held by the Court of Appeal in that case that the notice had not been given to the insurers in accordance with the legislation. It was also held that the insurers were entitled to defend the action on behalf of the defendant right up to judgment, and then, when the judgment was entered and the claimant turned to them to recover, to raise for the first time the statutory notice point.

42. I was also referred in that case to the case of *Capital Insurance v Fraser*[14] in which the Court of Appeal of Trinidad and Tobago held that the local equivalent of section 15 (2) (b) had to be *"pretty strictly fulfilled*". The insurers had to be given notice of proceedings before or within seven days after proceedings were commenced. *"If given before, the notice had to express a clear intention to bring proceedings; if given after, the third party had to show that insurers had notice of those proceedings within seven days of issue."* The Court of Appeal made it clear that words such as *"may be taken" or are "likely to be taken"* are insufficient to constitute notice.

43. Mr Brady referred me to a property damage waiver prepared by the Second Defendant's insurer in relation to the damage to the Plaintiff's motor vehicle. The document was prepared in March 2019 and proposed a settlement of CI$5000 in relation to property damage resulting from the accident in question. The Second Defendant did not sign it. Mr Brady sought to argue that the waiver demonstrated that the Second Defendant's insurer was aware of the accident and associated claim. That may be the case but there is no suggestion that for the purposes of s.15(2) (b) the insurer was

[14] [1996] 71 WIR 382.

given anything constituting notice of the bringing of proceedings in June 2022 when proceedings were actually commenced. In my view the requisite notice was not given either before or within 30 days of 1 June 2022.

Abuse of process

44. On that basis, the Defendant's insurer has no legal requirement to satisfy any judgment that the Plaintiff may obtain against the Defendant. The basis for a party to seek to strike out a pleading is GCR O.18, r19 which states:

> ***"Striking out pleadings and indorsements (O.18, r.19)***
> *19.(1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
> *(2)No evidence shall be admissible on an application under subparagraph (1)(a).*
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."*

45. As I decided in *Ingram v Turner*:

> *"[On the basis that notice was not given under s.15 (2) (b)] CG BritCay does have the option to decline to satisfy any judgment that might be entered against the Defendant in this case. That is not the fault of the Defendant. In my view in the absence of a waiver from CG BritCay of its rights to decline to indemnify the Defendant it is an abuse of process for the Plaintiff to be allowed to continue with this action in circumstances where the Defendant has lost his right to be indemnified by his insurance company as a result of a failure by the Plaintiff's attorneys to give the requesting notice under section 15 (2) (b). Therefore, pursuant to the court's inherent jurisdiction under GCR O18, r.19 (1) (d), I also dismiss the Plaintiff's case on that basis."*

46. On the basis of the above, I am of the view that it would be an abuse of process for the Plaintiff to continue his claim against the Defendant and on that basis the claim is struck out. The Defendant also raised the question of the delay in the writ being uploaded the second time and the subsequent delay in the service of a statement of claim[15] as further grounds upon which to seek to have the action struck out. There clearly were unexplained and unsatisfactory delays that might make the action liable to be struck out as being an abuse of process. In light of my decision as set out above, I do not think that I need to explore this argument in detail suffice to say that I am not convinced that, on the facts of this case, the delays in question would themselves amount to grounds upon which to strike out the claim.

47. I referred above to the question of the s.15 (2) (b) notice in relation to the "bringing" of proceedings on 14 February 2022. Earlier I made reference to the comments of Ramsay-Hale J. in *Andrade* in relation to the policy underlying the Vehicle Insurance Act. The comments that I make below are no more than observations and I make no findings of law and make no further orders other than as set out above. Bearing in mind the need for commercial certainty on the part of insurers in relation to claims and their applicable limitation periods and considering the approach taken in *Barnes* and *Page* in relation to when, in certain circumstances, an action can be said to have been brought as opposed to commenced for limitation purposes, it seems to me that s.15(2) (b) may have to be approached on the basis that an insurer's commercial interest is protected if the section is taken to be requiring notice to be given of the bringing of proceedings as opposed to their commencement. That would then ensure that the insurer is aware that steps are being taken or have been taken within the limitation period to bring proceedings. However, the law in England and Wales and in the Cayman Islands has remained settled for some considerable time and I hesitate to do more than raise the issue in the way that I have, especially as it was not argued in detail before me.

Conclusion

48. Summarizing the above:

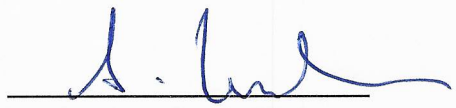
---

[15] The statement of claim was not served until 11 October 2022 after I had given directions at the hearing on 27 September 2022 for it to be served within 14 days.

48.1 The action in this case was "brought" for limitation purposes on 14 February 2021, the last day of the limitation period. The action was not however commenced until 1 June 2021.

48.2 No s.15 (2) (b) notices as required by the Vehicle Insurance Act were filed by the Plaintiff either when the proceedings were brought or commenced.

48.3 As a result of the failure by the Plaintiff to comply with the Vehicle Insurance Act, the Defendant's insurer is not bound to indemnify him and on that basis it is an abuse of process to allow the action to continue and it is therefore struck out.



Hon Justice Alistair Walters
Acting Judge of the Grand Court