

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN

Cause No: G289/2011

6 IN THE MATTER OF THE LIMITATION LAW (1996 REVISION)

8 BETWEEN:

APRIL FISHER



PLAINTIFF

13 AND:

FIREWORKS LIMITED

DEFENDANT

19 Appearances:

Ms. Andrea Dunsby of Turner & Roulstone
for the Plaintiff/Applicant

Mr. James Kennedy of Samson and
McGrath for the Defendant/Respondent

26 Before:

The Hon. Mr. Justice Charles Quin

27 Heard:

20th February 2012

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JUDGMENT

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1. This is an application by the plaintiff by way of her Originating Summons issued on the 25th July 2011 pursuant to GCR O.32 r.9A for a direction under s.39 of the Limitation Law (1996 Revision) to direct that the three-year limitation period imposed by s.13 of the Limitation Law should not apply to the plaintiff's action issued in Cause Number 470 of 2010. The plaintiff's application is grounded by her Affidavit filed on the 25th July 2011.

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- 1 7. On the 14th March 2011 the plaintiff filed an amended Writ of Summons, adding
2 Fireworks Ltd. as the second defendant in Cause Number 470 of 2010 and claiming
3 damages for personal injury, loss and damage, as a result of the negligence of both
4 TAL and Fireworks Ltd.
- 5 8. On the 21st April 2011 the plaintiff filed her Statement of Claim in Cause 470 of
6 2010 against TAL and Fireworks Ltd. and served the Writ and Statement of Claim
7 on them.
- 8 9. On the 3rd May 2011 TAL filed an acknowledgment of service, indicating that it
9 intended to contest the proceedings.
- 10 10. On the 11th May 2011 Fireworks Ltd. filed an acknowledgment of service
11 indicating that it intended to contest the proceedings.
- 12 11. On the 19th May 2011 TAL filed its Defence in Cause 470 of 2010 and pleaded that
13 the plaintiff's injuries loss and damage were caused or contributed to by the
14 negligence of, and breach of duty of Fireworks Ltd. Also on the 19th May 2011,
15 TAL filed a claim for contribution or indemnity against Fireworks Ltd., and
16 Fireworks Ltd. filed its Defence denying the plaintiff's claim.
- 17 12. On the 25th May 2011 Fireworks Ltd. filed its application for an Order that the
18 amendments, made under GCR O.20 r.1 by the plaintiff to the Writ, on the 14th
19 March 2011, be struck out as frivolous, vexatious and an abuse of the Court,
20 pursuant to GCR O.15 r.6(2) and O.18 r.19(1).
- 21 13. On the 24th August 2011 the Court acceded to the application made by Fireworks
22 Ltd. and struck out the amendments made by the plaintiff to the Writ of Summons.
23 (See written ruling in Cause 470/10 dated the 24th August 2011.)

1 14. Also on the 24th August 2011 this Court set down directions, pursuant to the
2 plaintiff's Originating Summons, filed in this Cause, Cause 289 of 2011, on the 25th
3 July 2011. This Court ordered that the plaintiff's Originating Summons be heard
4 before the proceedings in Cause Number 470 of 2010 could proceed, and
5 consequential directions were ordered.

6 ***Jurisdiction***

7 15. Section 13(4) of the Limitation Law (1996 Revision) ("the Law") imposes a three-
8 year limitation period in respect of claims for damages for personal injury arising
9 from, *inter alia*, negligence. The three-year limitation period runs from the date on
10 which the cause of action accrued, or the date of knowledge (if later) of the person
11 injured.

12 16. Section 39(1) of the Law confers on this Court a general discretion to disapply the
13 provisions of s.13 and reads:

14 "39. (1) *If it appears to the court that it would be equitable to allow an*
15 *action to proceed having regard to the degree to which -*

16 (a) *section 13 or 16 prejudices the plaintiff or any person whom*
17 *he represents; and*

18 (b) *any decision of the court under this subsection would prejudice*
19 *the defendant or any person whom he represents,*

20 *the Court may direct that those provisions shall not apply to the action, or shall*
21 *not apply to any specified cause of action to which the action relates.*

22
23 17. Section 39(3) provides that, in acting under s.39:
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1 “39. (3) ...the court shall have regard to all the circumstances of the
2 case and, in particular, to –

3 (a) the length of, and the reasons for, the delay on the part
4 of the part of the plaintiff;

5 (b) the extent to which, having regard to the delay, the
6 evidence adduced or likely to be adduced by the
7 plaintiff or the defendant is, or is likely to be less
8 cogent than if the action had been brought within the
9 time allowed by section 13 or 16 (as the case may be);

10 (c) the conduct of the defendant after the cause of action
11 arose, including the extent, if any, to which he
12 responded to requests reasonably made by the plaintiff
13 for information or inspection for the purpose of
14 ascertaining facts which were or might be relevant to
15 the plaintiff’s cause of action against the defendant;

16 (d) the duration of any disability of the plaintiff arising
17 after the date of the accrual of the cause of action;

18 (e) the extent to which the plaintiff acted promptly and
19 reasonably once he knew whether or not the act or
20 omission of the defendant, to which the injury was
21 attributable, might be capable at that time of giving
22 rise to an action for damages; and

23 (f) the steps, if any, taken by the plaintiff to obtain
24 medical, legal or other expert advice and the nature of
25 any such advice he may have received.”

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27 18. The Court notes that for the purpose of this Judgment, the three-year limitation
28 period imposed by s.13(4) of the Limitation Law (1996 Revision) is the same three-
29 year limitation period as under the old Limitation Act (1939) in England and Wales
30 and under the Limitation Act 1980 of England and Wales. Furthermore, s.39 of the
31 Law mirrors the language contained in s.2D of the Limitation Act 1939, and s.33 of
32 the Limitation Act 1980 in England and Wales, which is the section empowering
33 the Court to direct that the primary limitation period shall not apply to a particular
34 action or cause of action.

1 *PLAINTIFF'S POSITION*

2 19. The plaintiff contends that the delay in this case is short. The plaintiff's counsel
3 submits that the plaintiff's claim is both meritorious and of significant value to the
4 plaintiff and further, that the delay has not caused any prejudice to the defendant in
5 its ability to defend the claim. Accordingly, the plaintiff's counsel submits that the
6 Court's discretion should be exercised in favour of the plaintiff, and that the loss of
7 the limitation defence should not, in itself, properly be regarded as prejudice to the
8 defendant.

9 20. Letters were sent by the plaintiff's former attorneys to the first defendant, TAL, in
10 August 2008, January 2009 and March 2009, seeking an admission of liability and
11 interim damages. During this period of time the plaintiff assumed that, in light of
12 the negotiations between her attorneys and the attorneys for TAL, her claim was not
13 being contested and it was only a matter of quantum. Furthermore, during the
14 primary limitation period the plaintiff was never advised that she ought to bring a
15 claim against Fireworks Ltd., the second defendant in Cause Number 470 of 2010.

16 21. The plaintiff's evidence is that she waited for a lengthy period of time to obtain full
17 medical evidence and a report regarding her condition and her future prognosis. The
18 plaintiff accepts that she should have brought an action against TAL earlier, but she
19 waited until a medical report was obtained, and this was just before the primary
20 limitation period had expired.

21 22. The Statement of Claim in Cause Number 470 of 2010 issued against TAL on the
22 24th December 2010 was not served until the 21st April 2011. In its defence TAL
23 pleads that the plaintiff's accident resulted from an unforeseeable malfunction of
24 the fireworks that struck the plaintiff. Furthermore, TAL's defence in Cause

1 Number 470 of 2010 adopts the allegations made against Fireworks Ltd. by the
2 plaintiff, namely that the injury to the plaintiff's right eye was caused, or materially
3 contributed to by the negligence of Fireworks Ltd., and TAL also pleads that the
4 injuries were caused by the contributory negligence of the plaintiff.

5 23. The Court notes that in addition to its defence, on the 19th May 2011 TAL filed a
6 claim for contribution or indemnity against Fireworks Ltd., then pleading that any
7 injury, loss and damage sustained by the plaintiff was caused or materially
8 contributed to by the negligence of Fireworks Ltd.

9 24. The plaintiff draws the Court's attention to the fact both TAL and Fireworks Ltd.
10 were served with the Writ and Statement of Claim on the 21st April 2011, and, that
11 Fireworks Ltd. was aware of the claim from the 14th March 2011. Accordingly, the
12 plaintiff submits that the delay from the expiry of the primary limitation period, to
13 when Fireworks Ltd. received notice of the plaintiff's claim, was ten weeks.

14 25. The plaintiff contends that there is no evidence of prejudice arising by reason of the
15 plaintiff not joining Fireworks Ltd to the proceedings in Cause 470 of 2010 within
16 the primary limitation period. The plaintiff maintains that she is unaware of when
17 the boxes containing the fireworks had been destroyed, but it may well be long
18 before the primary limitation period expired, and therefore no prejudice has been
19 sustained as a result of her late service of her Writ and Statement of Claim on
20 Fireworks Ltd.
21 Fireworks Ltd.

22 26. The plaintiff maintains that the three employees of the defendant are still available
23 to give evidence, whether they are still resident in the Cayman Islands or are
24 overseas. Furthermore, the plaintiff submits that the Court can take judicial notice

1 of the fact that the “Rollover”, which Fireworks Ltd. claims could affect its
2 witnesses, has now been suspended by the current government.

3 27. The plaintiff maintains that the two former employees of the Cayman Islands Fire
4 Service still reside in the Cayman Islands and can easily be identified and brought
5 to Court to give their evidence on behalf of Fireworks Ltd.

6 28. The plaintiff contends that Fireworks Ltd. has now had eleven months from the
7 notification of the claim in which to try to gather evidence, which it considers to be
8 important.

9 29. The plaintiff also contends that the Fireworks Ltd. representative, Mr. Trott, who
10 swore the affidavit on the 9th September 2011, has failed to state when the boxes
11 containing the fireworks were destroyed. In any event, the plaintiff submits that, the
12 fact that Mr. Trott confirms in his evidence that there was no evidence of
13 malfunction, means that Fireworks Ltd. will be unable to pass liability to the
14 manufacturer in any event. Consequently, the plaintiff maintains that there should
15 be no prejudice to Fireworks Ltd.

16 30. The Court notes that the plaintiff does not maintain that the duration of any
17 disability affecting her has affected this case.

18 31. The plaintiff maintains that once she realized that TAL was denying any liability
19 and pleading that Fireworks Ltd. was liable for the injuries to the plaintiff, together
20 with her own contributory negligence, she was advised by her new and present
21 attorneys that she should then bring an action against Fireworks Ltd. The plaintiff
22 submits that she then instructed her attorneys to join Fireworks Ltd. to the
23 proceedings.

1 32. The plaintiff submits that her claim is not for a minor injury. It is not a frivolous
2 claim and, indeed, she maintains that she is lucky to have sight in her right eye. The
3 plaintiff submits that, on the face of it, her claim has merit, and is of significant
4 value to the plaintiff, and these are factors which should be weighed in the
5 plaintiff's favour. The plaintiff submits that if her claim was plainly unmeritorious
6 and/or of low value, these are factors which should be weighed against her.

7 33. The plaintiff maintains that should the Court decline to exercise its discretion, she
8 will be deprived of the opportunity to pursue a genuine claim with good prospects
9 of success and high value in circumstances where the impact of the injury has
10 resulted in permanent ramifications for the plaintiff in terms of pain, suffering and
11 loss of amenity, as well as in relation to her long-term employment prospects.

12 34. The plaintiff submits that she acted promptly and reasonably once it became
13 apparent that there was an act or omission on the part of Fireworks Ltd. which may
14 have been the cause of, or a contributing factor to, her injuries. The plaintiff argues
15 that, to the extent that legal advice was given or not given, that should not be visited
16 against the plaintiff.

17 35. It is the plaintiff's position that the omission of the plaintiff's attorneys in failing to
18 advise that she ought to join Fireworks Ltd. to the action, should not be visited upon
19 her. The plaintiff relies on *Das v. Ganju* [1999] PIQR 260, where the English
20 Court of Appeal in exercising its discretion in favour of the plaintiff (with a claim
21 which they issued five to six years outside of the primary limitation period) in
22 circumstances where the failure to issue in time was the fault of her solicitor, held
23 that in the Judgment of Buxton LJ on page 12, and in the holding at paragraph (d)
24 on page 1 that:

1 *“The failings of the plaintiff’s lawyers are not, in that respect to be visited upon*
2 *her ... there was no other way in which the plaintiff’s conduct could be*
3 *properly criticised.”*

4

5 Sir Christopher Staughton noted on page 11 that if the plaintiff’s claim were struck
6 out

7 *“... and she is left with a claim which must be somewhat speculative against*
8 *her solicitors and counsel. She will then have two hurdles to overcome – proof*
9 *of the merits of action against Dr. Ganju, and proof that her counsel and*
10 *solicitors were negligent. She will also, as the judge said, have to start again.*
11 *He added that she will have to demonstrate that this action would have*
12 *succeeded. That is not an absolute requirement. But it is necessary if she is to*
13 *recover the full amount of any damages that she would have been entitled to in*
14 *this action.”*

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16 36. The plaintiff maintains that there is no evidence to suggest that Fireworks Ltd’s
17 ability to meet the plaintiff’s claim has been prejudiced in any way by the short
18 period of delay.

19 37. The plaintiff submits that when considering the potential prejudice to the defendant,
20 from the exercise of the Court’s discretion, it should have regard to the fact that
21 TAL would be at liberty to join Fireworks Ltd. to the proceedings by way of a
22 Third Party Notice and indeed has already issued a Notice of Contribution and/or
23 Indemnity. Accordingly, the extension of time causes no real prejudice to Fireworks
24 Ltd. in that the claim, if struck out, will be reasserted by TAL by way of a claim for
25 contribution in any event.

26 38. In conclusion the plaintiff maintains that, in all the circumstances of this case there
27 is considerable prejudice to the plaintiff by the operation of s.13 of the Limitation
28 Law, and no detriment to the defendant by exercising the discretion conferred by

1 s.39 to disapply the three-year limitation period. The plaintiff therefore submits that
2 to exercise discretion in this case would be equitable and in the interests of justice.

3 *DEFENDANT'S POSITION*

4 39. Fireworks Ltd's counsel quite properly accepts that the delay in this case is
5 reference to delay since the expiry of the limitation period.

6 40. Counsel for Fireworks Ltd. submits that the fact that the plaintiff's doctor advised
7 her to wait is not a matter that should be considered by the Court, because the
8 plaintiff had the advice of legal counsel from shortly after the accident. Fireworks
9 Ltd. also submits that there is no evidence that the plaintiff received any legal
10 advice to postpone the bringing of a claim.

11 41. Counsel for Fireworks Ltd. complains that the plaintiff has been parsimonious with
12 providing information and correspondence from her former or present attorneys in
13 relation to the strength of her claim against either TAL or Fireworks Ltd. Counsel
14 for Fireworks Ltd., submits that the need to put such material before the Court is
15 obvious if the Court is being asked to indulge the plaintiff and also submits that the
16 plaintiff seeks to blame her advisers merely to find a reason for the delay beyond
17 the expiration of the limitation period.

18 42. Counsel on behalf of Fireworks Ltd. submits that the plaintiff's failure to waive
19 privilege in relation to this correspondence fatally undermines her reasons for the
20 delay. The position of Fireworks Ltd. is that the plaintiff is not discharged from the
21 heavy burden of providing an adequate explanation for her failure to commence
22 proceedings on time.

1 43. Counsel for Fireworks Ltd. submits that the plaintiff should be fixed with the
2 actions of her legal adviser and relies on the dicta of Lord Diplock in *Thompson v.*
3 *Brown* [1981] 1 WLR 744 where he stated at page 752 letter C:

4 *“In contrast to paragraph (c), I think it is apparent that paragraphs (e) and (f)*
5 *are referring to the conduct of the plaintiff himself, as well as that of his*
6 *lawyers, after he has consulted them for the first time. If he has acted promptly*
7 *and reasonably it is not to be counted against him, when it comes to weighing*
8 *conduct, that his lawyers have been dilatory and allowed the primary limitation*
9 *to expire without issuing a writ. Nevertheless, when weighing what degree of*
10 *prejudice the plaintiff has suffered, the fact that if no direction is made under*
11 *section 2D he will have a claim over against his solicitor for the full damages*
12 *that he could have recovered against the defendant if the action had proceeded,*
13 *must be a highly relevant consideration.”*

14
15 44. Fireworks Ltd. submits that the plaintiff has not acted promptly and reasonably and
16 does not adduce any evidence from her past or present attorneys to explain how the
17 limitation period came to pass without her issuing a Writ on Fireworks Ltd. as the
18 second defendant in Cause Number 470 of 2010.

19 45. Fireworks Ltd. relies on the affidavit of Mr. Eugene Trott. Mr. Trott submits that
20 Fireworks Ltd. has discarded the boxes from which the fireworks were shot.
21 Furthermore, Mr. Trott and Mr. Williams are both due to leave the Cayman Islands
22 in the near future. If these persons depart, Fireworks Ltd. says the men will have to
23 return for the trial and this will be a considerable expense for Fireworks Ltd. In this
24 regard, counsel for Fireworks Ltd. relies on the dicta of Lord Griffiths in the House
25 of Lords case of *Donovan v. Gwentys Ltd.* [1990] 1 WLR 472 where he stated at
26 page 479D:

27 *“In weighing the degree of prejudice suffered by a defendant it must always be*
28 *relevant to consider when the defendant first had notification of the claim and*
29 *thus the opportunity he will have to meet the claim at the trial if he is not to be*
30 *permitted to rely upon his limitation defence.”*

1 46. Counsel for Fireworks Ltd. submits that this is a primary limitation case. Fireworks
2 Ltd. was given no notice of the potential claim until March 2011. Counsel argues
3 that Fireworks Ltd. took no steps to prepare this matter for a trial or claim until
4 March 2011, and therefore, Fireworks Ltd. is clearly prejudiced. Accordingly,
5 Fireworks Ltd. maintains that the plaintiff should seek redress against her attorneys,
6 whether former or present.

7 47. In addition, Fireworks Ltd. maintains that the plaintiff retains her valid and
8 subsisting claim against TAL as the occupier, and therefore the prejudice in
9 applying the limitation period is minimal.

10 48. Counsel for Fireworks Ltd. maintains that it has exhibited the NFPA code for
11 fireworks displays as approved by the Cayman Islands Fire Service. It is Fireworks
12 Ltd's case that compliance with this code was a pre-requisite for holding the display
13 and, Mr. Eugene Trott in his affidavit states the code was complied with, and no
14 adverse findings were made by the Cayman Islands Fire Service after the display.

15 49. Fireworks Ltd. also maintains that the plaintiff has adduced no expert evidence to
16 support her claim and, in all the circumstances, her claim can only be described
17 speculative, at best. In addition, Fireworks Ltd. takes issue with the plaintiff's claim
18 for US\$317,204.56, which it describes as being "incredible."

19 50. Fireworks Ltd. maintains that the plaintiff has been dilatory in the extreme in
20 failing to bring this matter within the primary limitation period. Fireworks Ltd.
21 maintains that such delay is inexcusable, as it was made with full knowledge of the
22 claim and with a fully formed intention to pursue damages from the outset. Counsel
23 for Fireworks Ltd. submits that the plaintiff seeks to deflect the blame in this regard

1 to her medical and legal advisers and yet she deliberately withholds the very
2 information that the Court needs to assess the merits of her reasons.

3 51. Fireworks Ltd. maintains that it has suffered evidential prejudice due to the delay of
4 the plaintiff, and also submits that is unlikely to recover the costs of defeating the
5 plaintiff's claim.

6 52. Finally, Counsel for Fireworks Ltd. submits that the exercise of the discretion is an
7 exceptional indulgence and the plaintiff has allowed the limitation period to expire
8 in full knowledge of her claim, and thereafter has put before the Court a claim that
9 is grossly excessive as to quantum, and wholly unsubstantiated as to liability, while
10 blaming all around her for her errors in failing to bring her claim in timely manner.

11 *Analysis and Conclusion*

12 53. In reaching my decision in this matter I find it convenient to draw together and
13 consider s.39(3)(a) and (3)(e) of the Limitation Law, namely, the extent of and the
14 reasons for the delay on the part of the plaintiff and then the extent to which the
15 plaintiff acted promptly and reasonably once she knew whether or not the act or
16 omission of the defendant to which the injury was attributable might be capable of
17 giving rise to an action for damages.

18 54. The plaintiff had issued the proceedings against TAL within the primary time
19 period. I accept her evidence that she had not been advised to bring an action
20 against Fireworks Ltd., and that she was not aware that there was a cause of action
21 against Fireworks. It is apparent from the evidence that the plaintiff mistakenly
22 thought that TAL was accepting liability. Some ten weeks after the primary
23 limitation period deadline it became apparent to the plaintiff that TAL was denying

1 liability and further averring that Fireworks Ltd was solely responsible for the
2 plaintiff's injuries. As soon as the plaintiff became aware of these facts, she acted
3 promptly and instructed her new attorneys to issue proceedings against Fireworks
4 Ltd.

5 55. Accordingly, the Court considers the delay to be short and that the plaintiff acted
6 promptly as soon as she received proper legal advice in relation to a possible case
7 of action against Fireworks and she fully understood her position.

8 56. Although the plaintiff had obtained medical and legal advice, it is clear that she was
9 not advised by either her former or her new attorneys to issue the proceedings
10 against Fireworks Ltd. within the primary limitation period. The plaintiff's failure
11 to appreciate the significance of the three-year limitation period is a highly relevant
12 consideration, however, it is not necessary for me to read the correspondence
13 between the plaintiff and her attorneys to find that she did not receive advice
14 regarding Fireworks Ltd's possible liability until after the three-year limitation
15 period had expired. Based on the authority of the English Court of Appeal decision
16 referred to in paragraph 35 above, namely *Das v. Ganju* [1999] PIQR 260 and the
17 Judgment of Sir Christopher Staughton, I find that the failings of the plaintiff's
18 attorneys are not to be visited upon her and further, I can find no evidence in which
19 the plaintiff's conduct could be properly criticized.

20 57. In *Coad v. Cornwall and Isles of Scilly Health Authority* [1997] 1 WLR 189,
21 where proceedings were issued nine years after the event and six years after the
22 expiry of limitation, the English Court of Appeal held that the test for what is a
23 "genuine" reason for the delay was subjective. It is not for the Court to enquire into
24 the reasonableness of the plaintiff's belief. In this case the English Court of Appeal

1 considered that s.33(3)(a) and (f) of the UK Limitation Act 1980 were relevant to
2 the plaintiff's conduct. As Ward LJ noted at paragraph G on page 196, the Judge at
3 first instance concluded that,

4 *“The evidence at trial will undoubtedly be less cogent on account of the delay,*
5 *as those that can remember the incident will have to stretch their memories that*
6 *much further back..... What will be difficult from the health authority's point of*
7 *view will be the evaluation of the claim, in deciding whether the plaintiff's*
8 *claim is overwhelming and unanswerable or one which it has a reasonable*
9 *prospect of defending. It may also be more difficult to establish whether there is*
10 *an element of contributory negligence and if so what the extent is.”*

11
12 58. In spite of finding that the defendant would be prejudiced, not only by loss of a cast
13 iron defence of limitation but also by being obliged to defend this very stale claim,
14 Anthony Thompson J. at first instance in *Coad v. Cornwall and Isles of Scilly*
15 *Health Authority* came firmly to the conclusion that the plaintiff should be allowed
16 to continue with this action and that he should exercise his discretion under the UK
17 Limitation Act 1980 to disapply the limitation provisions. The English Court of
18 Appeal unanimously agreed with Anthony Thompson J's decision.

19 59. I turn now to the effect of the delay on the cogency of the evidence and in this
20 regard I draw assistance from the House of Lords decision of *Thompson v. Brown*
21 [1981] 1 WLR 744. This was a case involving a delay of approximately one month.
22 The House of Lords considered the extent to which a disapplication of the
23 limitation period would amount to prejudice to the defendant. Lord Diplock said at
24 page 750 that s.2D of the then Limitation Act 1932:

1 “...empowers the court to direct that the primary limitation period shall not
2 apply to a particular action or cause of action. This is by way of exception, for
3 unless the court does make a direction the primary limitation period will
4 continue to apply. The effect of such a direction, and its only effect, is to
5 deprive the defendant of what would otherwise be a complete defence to the
6 action, viz that the writ was issued too late. A direction under the section must
7 therefore always be highly prejudicial to the defendant, for even if he has a
8 good defence on the merits he is put to the expenditure of time and energy and
9 money in establishing it, while if, as in the instant case, he has no defence as to
10 liability he has everything to lose if a direction is given under the section. On
11 the other hand if, as in the instant case, the time elapsed after the expiration of
12 the primary limitation period is very short, what the defendant loses in
13 consequence of a direction might be regarded as being in the nature of a
14 windfall.”

15
16 60. In this case the House of Lords remitted the case to the High Court for further
17 consideration, and it is understood that the Judge then disapplied the limitation
18 period (see reference in *Hartley v. Birmingham City Council* at page 982).

19 61. In the English Court of Appeal case of *Hartley v. Birmingham City Council* where
20 the delay was very similar to the delay in this case, and it would appear, due to the
21 fault of the solicitors, it was held that where a plaintiff’s action becomes time
22 barred because of a short delay which is no way caused by his fault, but is entirely
23 the fault of his solicitors, and the delay does not affect the defendant’s ability to
24 defend the action on the merits, the Court is justified in exercising its discretion
25 under s.33 of the UK Limitation Act 1980 in favour of the plaintiff, even though he
26 would have a cast iron case against the solicitors if the action were not allowed to
27 proceed. In that case Parker LJ emphasized at paragraph B on page 980 that:

28 *“In my view, however, as the prejudice resulting from the loss of the limitation*
29 *defence will always or almost always be balanced by the prejudice to the*
30 *plaintiff from the operation of the limitation provision, the loss of the defence as*
31 *such will be of little importance. What is of paramount importance is the effect*
32 *of the delay on the defendants’ ability to defend.”*

1 Parker LJ also stated at paragraph C that:

2 *“...If it is, as it is legitimate to take into account when considering prejudice to*
3 *the plaintiff that he will have a claim against his solicitors it must in my judgment*
4 *follow that it is legitimate to take into account that the defendant is insured. If he is*
5 *deprived of his fortuitous defence, he will have a claim against his insurers.”*

6

7 62. The Court takes notice of the fact that Defence counsel has very properly conceded
8 that Fireworks Ltd. has insurance coverage. In *Hartley v. Birmingham City*
9 *Council* Parker LJ referred to a passage from **Preston & Newsom’s Limitation of**
10 **Action** at paragraph G on page 980;

11 *“A defendant will normally suffer prejudice if an order is made, but he will only*
12 *have lost a windfall unless his ability to defend has been affected by the delay:*
13 ***Thompson v Brown.** Consequently, if the delay (however long) does not*
14 *seriously affect the evidence, the power will generally be exercised.”*

15

16 In *Hartley v. Birmingham City Council* Parker LJ approved this passage, save that
17 he felt that it would be better to omit the words “*however long.*”

18 63. In this case there is no evidence that Fireworks Ltd. has suffered any significant
19 prejudice by the relatively short delay of 10 weeks. Fireworks Ltd. can still rely on
20 the fact that it appeared to have followed the Guidelines issued by the NFPA Code
21 for fireworks displayed as approved the Cayman Islands Fire Service. The
22 witnesses are all alive and the majority, if not all, are either resident in the Cayman
23 Islands or can be contacted.

24 64. Accordingly, the Court finds that there is no evidence to suggest that the delay has
25 affected the cogency of Fireworks’ evidence and therefore its ability to defend the
26 plaintiff’s claim has not been prejudiced.

1 65. In *Firman v. Ellis* [1978] QB 886 the Court of Appeal in England again confirmed
2 the wide nature of the discretion conferred by the old s.2D of the UK Limitation
3 Act 1932. It is not confined to a residual class of exceptional cases. In *Firman v.*
4 *Ellis* four conjoined appeals involve plaintiffs in personal injury cases who are
5 granted applications by Judges of the High Court to be allowed to proceed with
6 claims that otherwise would have been statute barred. In the first three cases Writs
7 had been issued in time, but the solicitors had neglected to serve them in time or
8 renew them. In each case the defendants were well aware of the claims. In the
9 fourth case in the conjoined appeals, namely *Pheasant v. S.T.H. Smith (Tyres)*
10 *Ltd.*, a defendant driver had joined the tyre manufacturers as third parties. The
11 plaintiff wished accordingly to join the tyre company as defendants, but the
12 solicitors neglected to do so in time.

13 66. Lane LJ (as he was then) noted at paragraph B on page 915 that the appellant
14 sought to argue that the discretion to disapply the time limits, should only apply to:

15 “ “out of the usual run” or to “difficult cases”.... They suggest that having
16 specified the set term of three years, Parliament would not have taken it upon
17 themselves to emasculate the set term by giving a largely unrestricted
18 discretion to the court to exempt a plaintiff from complying with it..... The
19 words “If it appears to the court that it would be equitable to allow the action
20 to proceed...the court may direct that those provisions [i.e. 2A and 2B] shall
21 not apply to the action” and “the court shall have regard to all the
22 circumstances of the case” seem to me to give the court as wide a discretion as
23 could well be imagined. I find it impossible to understand how any restriction
24 to “difficult” or “unusual” cases can be read into them.”

25 67. In *Firman v. Ellis* the English Court of Appeal permitted the claims to proceed in
26 each of the four appeals, saying that the Court had an unfettered discretion to
27 extend time, and in each case there was an overwhelming case for exercising that
28 discretion in favour of the plaintiffs; the plaintiffs would be greatly prejudiced by

1 being statute barred due to their solicitors' mistakes, whereas the defendants had
2 known the nature of the claims throughout and would not be prejudiced at all.

3 68. I have received further help and assistance from *Firman v. Ellis*, in the Judgment of
4 the Master of the Rolls, Lord Denning at paragraph G on page 905 where he stated:

5 *"The value of this wide discretion is well shown by the present series of cases.*
6 *They all arise out of circumstances which the various [law reform] committees*
7 *never had it in mind at all. In each of three cases there were negotiations for a*
8 *settlement, but the plaintiff's solicitors, by the merest slip, allowed time to run*
9 *out. They failed to renew the writ in time. This slip did not prejudice the*
10 *defendant or his insurers in the least. Yet as soon as the defendant's insurers*
11 *discovered it, they cried, "snap" and broke of the negotiations. They said to the*
12 *plaintiff: "You are statute-barred. We are not liable. You sue your own*
13 *solicitors for negligence. Make their insurers pay and not us." All of the judges*
14 *rejected this submission. Each of the judges exercised his discretion in favour*
15 *of the plaintiff. I think they were quite right. As a matter of simple justice, it is*
16 *the defendant's insurers who should pay the plaintiff's claim. They have*
17 *received the premiums to cover the risk of these accidents. They should not be*
18 *allowed to force their liability on to the plaintiffs' solicitors or their insurers by*
19 *calling "snap" as if it were a game of cards."*

20

21 69. Fireworks Ltd. and its servant and agent were aware of the accident and of the
22 resulting injuries sustained by the plaintiff. Fireworks Ltd. was notified of the claim
23 in March 2011 when the plaintiff sought to amend the Writ of Summons before
24 service. There has therefore been no delay of any consequence in seeking to bring
25 the claim against Fireworks Ltd. I find that the plaintiff acted promptly and
26 reasonably once it became apparent that there was an act or omission on the part of
27 Fireworks Ltd., which may have been the cause or a contributory factor to her
28 injury.

29 70. As Fireworks Ltd. was served with the claim at the same time as TAL, I find that
30 there has been no significant detrimental effect on the cogency of any of the
31 evidence which may be produced by any party in support of its case. I can find no

1 significant evidence to suggest that Firework Ltd's ability to meet the plaintiff's
2 claim has been prejudiced, in any way, by this short period of delay.

3 71. The loss of a limitation defence should not properly be regarded as prejudice, when
4 the delay is so short and should be regarded to use the words of Lord Diplock in
5 *Thompson v. Brown* "as being in the nature of a windfall."

6 72. In addition, should this Court decline to exercise its discretion, the plaintiff would
7 be deprived of the opportunity to pursue what appears to this Court to be a genuine
8 claim, with reasonable prospects of success, and significant value in circumstances
9 where the impact of the injury has resulted in ramifications for the plaintiff in terms
10 of pain, suffering and loss of amenity.

11 73. I take into account that TAL would be at liberty to join Fireworks Ltd. to the
12 proceedings by way of a Third Party Notice and indeed has already issued a Notice
13 of Contribution and or Indemnity. Accordingly, the extension of time causes the
14 defendant no real prejudice, in that, if the claim had been struck out it could be
15 reasserted by TAL by way of a claim for contribution in any event.

16 74. As Parker LJ said on page 980 in *Hartley v. Birmingham City Council*

17 *"the task of the Judge is to consider whether in all the circumstances it is*
18 *equitable, or fair and just that the action should be allowed to succeed."*

19

20 In conducting the inevitable balancing exercise I find that in all of the
21 circumstances of this case there is considerable prejudice to the plaintiff by the
22 operation of s.13 of the Limitation Law, and no significant prejudice to the
23 defendant by exercising the discretion conferred upon me by s.39 of the Law.
24 Accordingly, I accept the plaintiff's submission that to exercise my discretion in

1 this case would be equitable and in the interest of justice, having regard to all the
2 facts and circumstances set out above.

3 75. Accordingly, I grant the plaintiff the relief she seeks in her Originating Summons,
4 and order that s.13 of the Limitation Law should not apply to the plaintiff's action
5 issued in Cause 470 of 2010.

6 76. I will hear counsel on the question of costs in this action and in relation to any
7 further and necessary directions in Cause Number 470 of 2010 at their earliest
8 convenience.

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12 **Dated this the 20th March 2012**

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18 **Honourable Mr. Justice Charles Quin**
19 **Judge of the Grand Court**