



[2020] JMSC Civ 259

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV03349

BETWEEN	CLEON ALLEN	CLAIMANT
AND	RACHAEL LEE FRANCIS	1ST DEFENDANT
	DWAYNE SCOTT	2ND DEFENDANT

IN CHAMBERS

Ms Georgia Hamilton instructed by Georgia Hamilton & Co. for the Applicant/Claimant

Heard: August 31, 2020

Civil Procedure Rules 2002 (CPR 2002) – Further extension of the validity of the Claim Form – Whether the Claim Form can properly be extended since it is no longer valid – Whether the rule in Glasford Perrin v Donald Cover Applies – Does incomplete Jurat affect validity of Affidavit – Rules 8.14(1) and 8.15 26.1 (2)(6) 30.4 of the (CPR 2002).

MASTER P. MASON

Background

[1] The background to this claim arose out of a motor vehicle accident on 21st July 2013 in which the Claimant, Mr. Cleon Allen, was a driver of a motor vehicle which was allegedly rear-ended at the intersection of Sir Florizel Glasspole

Boulevard and Harbour Drive in the parish of St. Andrew. A claim form was filed on September 4, 2018.

- [2] On 25th February 2019, an application, supported by affidavit, was filed to extend the validity of the claim form and for substituted service. Evidence was submitted that process servers were unable to serve the defendants due to the rising violence in the area where the defendants lived. The matter was heard on March 14, 2019 by Master T. Tulloch-Reid who granted an extension of the validity of the claim form to 3rd September 2019.
- [3] On 26th August, 2019, a second application was made for court orders requesting that the validity of the claim form be extended from 3rd September 2019 and further orders regarding substituted service. On 19th November 2019, an amended application was made supported by affidavit. A 'further amended urgent without notice application for court orders' was filed on 18th August 2020 requesting an extension from 3rd September 2019 and 'for such further period as this Honourable Court deems just'.
- [4] On August 31, 2020, the application for court orders was heard and the application to extend the validity of the claim form filed on August 26, 2019 was refused. These are my reasons.

Issues

- [5] The primary issues are-
- a. Whether the court had the power to extend the validity of the Claim Form when the matter was heard on August 31, 2020; and
 - b. Whether the reasons proffered by the Applicant/Claimant satisfied the requirements under Rule 8.15(4) of the Civil Procedure Rules, 2002 (CPR).

Law

[6] The law on the validity of claim forms are encapsulated in Rules 8.14 and 8.15 of the Civil Procedure Rules, 2002.

a. *Rule 8.14:*

(1) *The general rule is that a claim form must be served within 6 months after the date when the claim was issued or the claim form ceases to be valid.*

b. *Rule 8.15:*

(1) *The claimant may apply for an order extending the period within which the claim form may be served.*

(2) *The period by which the time for serving the claim form is extended may not be longer than 6 months on any one application.*

(3) *The application under paragraph (1)*

(a) must be made within the period

a. *(i) for serving the claim form specified by rule 8.14 or*

b. *(ii) of any subsequent extension permitted by the court, and*

(b) may be made without notice but must be supported by evidence on affidavit.

(4) *The court may make an order for extension of validity of the claim form only if it is satisfied that:*

(a) the claimant has taken all reasonable steps

(b) to trace the defendant; and

a. *(ii) to serve the claim form, but has been unable to do so; or*

(c) there is some other special reason for extending the period

[7] The rules stipulate that once an application is made when a claim form is valid, that is within 6 months of filing or during the time of extension granted by the

Court, the Court has the power to further extend the validity of the claim form by a period of 6 months.

[8] The Court has a discretion whether to grant the order of extension and may weigh the reasons presented. However, problems arise, when an application is made after the expiration of the validity of the claim form. In such cases, the Court has no power to order extensions by virtue of the mandatory nature of rule 8.15(3)(a). This view is supported by numerous cases including-

- a. **Julianne Ricketts v Garfield Ewers Claim No. 2001/R 216.** Sinclair-Haynes, J. stated at page 9:

The settled approach in exercising the discretion to renew the Writ is to take into consideration all relevant issues. A period of six months has elapsed since the validity of the Writ has expired. Some consideration must be given to the fact that a defendant, after some reasonable time has passed must be able to rely on the defence of limitation. The claimant failed to proceed with the matter with any vigour having waited 6 months to apply. She has not even proffered a reason, more so, satisfactory reason for not having applied within the specified period. In balancing the scales of hardship and prejudice, I am of the view that the scales must be tipped in the favour of the defendant.

- b. **Battersby and others v Anglo-American Oil Co Ltd and others (1944) 2 All ER 387** Lord Goddard, delivering the judgment of the court, stated at page 389 and 391:

With all respect, we are unable to agree that the issue of a writ which has become a nullity by reason of nonservice within the prescribed time satisfies the section. If the writ has ceased to be in force the position is the same as if it had never been issued; otherwise we see no reason for the concluding words of Ord. 8 R.1 which provides for a renewed writ preventing the operation of statutes of limitation. These words would be unnecessary if a writ which had expired and had not been renewed would answer that purpose. New writ issued more than 12 months after the date, would clearly be out of time, so either the writ originally issued must be renewed or the action is barred.

...In the present case the court is apprised of the fact that the period of limitation had run when the application for renewal was made. To grant the renewal would, therefore, be to disregard the statute, which no court has a right to do merely because its operation works hardship in a particular case.

- c. **Doyle v Kaufman (1877) 3 QBD 7** Cockburn, CJ explained at page 8.

The power to enlarge the time given by Ord. 57. R. 6 cannot apply to the renewal of the writ when by virtue of a statute the cause of action is gone.

- d. **Izeth Roberts v Devon Harmon and Conway Robinson [2019] JMSC Civ 119** Master T. Tulloch-Reid stated at paragraph 5 and 7:

Once the claim form ceases to be valid, that is the end of the matter...The application to extend the life of the claim form must be made when the claim form is valid. A claim form is valid only for the period in which it can be served and it can be served within 6 months after issue or during the time for which time for service has been extended. The extensions to the validity of the claim form can only be for two 6 month periods unless the defendant is shown to be deliberately evading service or for some other compelling reason. Each 6 month extension must be on its own application.

[9] One has to now ask: what is the position when matters are heard outside the period of validity? This was illustrated in case of **Glasford Perrin v Donald Cover [2019] JMCA Civ 28 (Perrin)** whereby an application was filed within the validity of the claim form but the hearing of the application was on a date where the claim form would have otherwise been invalid. The Supreme Court had initially ordered that the validity be extended from the date of the hearing. The Court of Appeal held that the extension of validity was from the date of filing and amended the error made by the Supreme Court.

[10] Although *Perrin* seems to suggest that the hearing date has no impact on the validity once the application is filed in the requisite time, does this position hold true for all cases regardless of the date of the hearing? The date of hearing is an administrative issue, outside the powers of the Claimants. Is it therefore possible that the court has a discretion to extend the validity of a claim form years after the application to extend was filed, because at the time of filing the claim form was valid?

[11] Rule 26. 1(2)(c) grants the court the power to:

Extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.

- [12] This power, however, has to be weighed with competing interests such as those provided in the Statute of Limitation, 1881. Wallace, J in the St. Christopher and Nevis case of **Kenneth Williams v Leslie Change and Surrey Paving and Aggregate Co. Ltd Claim No. NEVHCV 2010/0153** highlighted the issue in paragraph 15:

The need for placing these time limits on service of the claim form is dictated by the need for finality to litigation and by the existence of limitation periods. The period allowed for service seeks to ensure the uncertainty of litigation is not unreasonably extended. These rules also reflect the recognition that the objective of limitation rules would be thwarted if, having issued proceedings, claimants could in definitely put off service and thereby keep their claim alive infinitely into the future.

- [13] Considering the uncertainty adopting such discretionary powers could pose to a mandatory rule such as Rule 8.15, I find that the policy outlined above would be defeated. I note that the English Court of Appeal recognized this issue in **Steele v Mooney** (2005) 2 All ER 256 and held that general discretionary powers cannot be used to achieve an aim prohibited under another rule. I believe such a position exists in Jamaica.

Analysis

- [14] There is no dispute that the application to extend the validity of the Claim Form was filed within the period of validity. Under normal circumstances this would not pose an issue as illustrated in the case of *Perrin*.
- [15] The peculiarity highlighted in the case at bar, however, is that the application was filed August 26, 2019 but the matter was heard August 31, 2020. The original application requested an extension from 3rd September 2019. This means, therefore, that the extension may have been granted to March 2020 in accordance with Rule 8.15 which mandates that any extension granted by the court must be for a maximum of 6 months.
- [16] Being guided by the case of *Perrin*, should I have been minded to grant the application for extension, I would be constrained to make the order of extension from the date of filing of the application which was August 26, 2019 to March

2020. A third application with compelling reasons would have had to have been made extending the validity from March 2020 to September 2020. Taking the literal and ordinary reading of the Rules, the Claim Form would, on August 31, 2020, still be invalid, as I had neither the power to order a third extension since no new application was before me nor power to order an extension of more than six months. In the circumstances, I am not empowered to order a third extension of the claim form to September 3, 2020, since no new application was filed by the Applicant exhibiting or proffering any compelling reasons for a further extension pursuant to Rule 8.15(6)(b) of the CPR. As such, I am of the view that the application to further extend the life of the claim form should be refused.

[17] This may, however, be seen as a technicality and unjust as the hearing date was no fault of the claimant. I, therefore, sought to look at the powers of discretion the court may have under Rule 26.1 (2) (c). Again, there was constraint as a discretionary provision such as Rule 26.1 (2) (c) could not properly be said to apply to the mandatory section of Rule 8.15. Furthermore, one has to consider the competing interest of the Defendant in having the protection of the Statute of Limitation. In order to weigh these interests and reach a final determination, I inquired into the reasons presented to the court for the failure to serve the Claim Form within time.

[18] Paragraphs 7 and 8 of the Affidavit in support filed on August 26, 2019, stated the reasons as:

- a. Having difficulty procuring the formal order of the court from March 14, 2019 to August 12, 2019; and
- b. Issues regarding payment of Bailiff's fees.

[19] A further affidavit filed November 19, 2019 elaborated on Paragraph 8 of the previous affidavit and explained that the Bailiff made attempts to serve the Defendants but was unsuccessful. The 2nd Defendant did not live at the stated address and an inaccurate address was given for the 1st Defendant.

Unfortunately, I noted that this affidavit was not sworn to or affirmed by a Justice of the Peace.

- [20] A third 'further amended urgent notice of application' was filed August 18, 2020. The major change noted is regarding the time for service of the Claim Form be 'for such further period as this Honourable Court deems just'. Adding this phrase does not constitute a third application and as such does not justify the court extending the life of the claim form.
- [21] Being guided by Rule 8.15(4) an order is made only if the court is satisfied that all reasonable steps were taken to trace the defendants and serve them with the claim form. The Affidavit filed August 26, 2019 proffers two reasons aforementioned which to my mind do not have any relevance to the issue of tracing the defendants or serving them. These issues, although unfortunate, are administrative. Furthermore, no detail is offered on how often attempts were made to obtain the formal order or with whom correspondence was made in order for me to consider exercising a discretion.
- [22] The Affidavit filed November 19, 2019, answers the relevant issues that the court must consider. It is clear that some steps were taken by the bailiffs. Regrettably, the affidavit does not adhere to Rule 30.4.

Rule 30.4

1. An affidavit must:

- (a) be signed by each deponent;
- (b) be sworn or affirmed by each deponent;
- (c) be completed and signed by the person before whom the affidavit is sworn or affirmed; and
- (d) contain the full name of the person before whom it was sworn or affirmed.

- [23] The Court of Appeal in **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42 clearly emphasized the position

a Jamaican court should take when interpreting the Rules to give effect to the Overriding Objective. Philips J at paragraph 43 stated:

“... The CPR must not be used as an avenue for difficult stances to be taken and a means to increase litigation. Rule 1.2 of our CPR states clearly that the court should when interpreting the rules, seek to give effect to the overriding objective, and rule 1.3 states that it is also the duty of the parties to help the court to further the overriding objective.”

[24] Although I have considered the overriding objecting in interpreting the rules, the issue of an incomplete jurat does not seem to be in the realm of a mere formality/technicality but an essential component of adducing evidence in court. Sykes, J explained at paragraphs 8 and 9 of **Sandra Moore v Patrick Cawley** Claim No. 2006 HCV02776:

“Again I turn to Black’s Law Dictionary (8th, 2004) which defines a jurat in these terms:

1. *A certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made.*

This definition provides important clues of the purpose and importance of a jurat which leads to the meaning of authenticating in rule 30.4(2). The jurat tells us when, where and before whom the affidavit was sworn. The jurat assists in determining whether the affidavit was sworn before a person authorized to administer oaths. Thus authentication means giving validity. The jurat therefore gives authenticity to the document purporting to be an affidavit. When the person before whom the affidavit is sworn completes the jurat, that person is saying to the court or tribunal before which the affidavit is to be used that the court or tribunal can rely and act on the facts alleged in the affidavit. The person completing the jurat is certifying to the court or tribunal that on the stated date, at a stated place, the particular deponent swore or affirmed the truth of the facts alleged in the affidavit. In other words, the jurat is the seal of authenticity that guarantees that the evidence contained in the affidavit was properly taken upon oath or affirmation. The jurat, therefore, is not an empty formality. It is little wonder that rule 30.4(1) begins with mandatory words, that is to say, an affidavit must.”

Conclusion

[25] In conclusion, therefore, I am of the view that the application heard on August 31, 2020 for the further extension of the validity of the claim form cannot be entertained. I believe that in the instant case the decision in **Perrin v Cover (supra)** is distinguishable because at the time of the hearing of the further extension of the validity of the claim form, I would have only been able to extend the life of the claim form to March 2020. In order for the court to further extend the life of the claim form for a third time, an application outlining compelling reasons for such extension would have had to been made before March 2020. No such application was made. In the circumstances, the application for the further extension of the validity of the claim form was refused.

Order:

1. Application for extension of validity of claim form filed on August 26, 2019 is refused
2. Leave to appeal granted.