



[2017] JMSC Civ 71

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV02876

BETWEEN	DONALD DAVID COVER	CLAIMANT
AND	GLASFORD PERRIN	DEFENDANT

IN CHAMBERS

Mr Jeffrey Mordecai for the Defendant/Applicant

Ms. C Franklin and Ms. Lannaman instructed by Marion Rose-Green & Co for the Claimant/ Respondent

Heard: March 21 and May 12, 2017

Application for declaration that court has no jurisdiction to try claim where Claim Form having expired, was not renewed by an order taking effect on or before its expiration - whether order made to take effect after claim form had expired should be set aside as being void and of no effect – whether claim form stands struck out as its twelve month lifetime expired on June 12, 2015 and it was not renewed on or prior to that date

LINDO J

[1] On June 12, 2014 the Claimant issued the Claim Form in these proceedings together with a Particulars of Claim. This was just within the period of six years following the date of the accident giving rise to the claim, as the accident is said to have occurred on or about July 1, 2008.

- [2] Nine or so days before the expiration of the claim form, on June 3, 2015, the claimant filed an application seeking an order for the claim form to be renewed for six months “ from the date hereof”. There was also an application for an order that the claim form to be served by way of substituted service.
- [3] The application was heard on July 13, 2015 and an order made in terms of the application. The formal order reads as follows: Permission be granted for the Claim Form filed herein on the 12th day of June 2015 (sic) to be renewed for a period of six (6) months from the date hereof; That personal service on the defendant of the sealed Claim Form dated and filed June 12, 2014 with prescribed notes for Defendants (Claim Form), Acknowledgement of Service of claim Form, Defence and Counterclaim and particulars of Claim dated and filed June 12, 2014 together (“the Documents” be dispensed with and that service of the documents and all other proceedings be effected by registered post on the defendant, Glasford Perrin of 102 Angels Drive, Spanish Town in the parish of Saint Catherine; that the time for filing of acknowledgement of service be twenty one (21) days from the date of service by registered post and the time for filing defence be fifty-six (56) days from the date of service by registered post; Costs to be costs in the claim.
- [4] On September 14, 2015 the defendant filed an acknowledgement of service which disclosed an intention to contest the court’s jurisdiction. He filed an application seeking *inter alia*, a declaration that the Claim Form having expired on June 12, 2015 and not having been extended or renewed by an order taking effect on or before June 12, 2015, the court had no jurisdiction to try the claim; that the order of the Supreme Court per Justice Lindo (Ag.) on July 13, 2015 be set aside as being void and of no effect as it is purported to take effect when the claim form has already expired; and that the Claim Form filed on June 12, 2014 stand struck out as its twelve (12) month lifetime expired on June 12, 2015 and was not renewed on or prior to that date.

[5] Counsel for the claimant and the defendant made submissions to the court in respect of the application. The essence of the submissions by the applicant is that the express wording of the order made by the court on July 13, 2015, could not validly extend the claim form which had already expired on June 12, 2015 while the claimant is contending that the court made an order which validly extended the lifetime of the claim form.

“Counsel for the claimant pointed to the Judicature (Civil Procedure Code) Law (CPC) for guidance, where at Section 30 it said: *“No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of twelve months, apply to the court or a Judge for leave to renew the writ; and the court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed...”*”.

[6] However I cannot agree with Counsel on this point. Under the CPC there were provisions for the writ to be extended even after it had expired, whereas there is no such provision in the Civil Procedure Rules, 2002 as amended (CPR).

[7] The CPR, provide a strict regime in relation to the service of claim forms. By Rule 8, the general rule is that a claim form must be served within twelve months after the date when the claim was issued or the claim form ceases to be valid. Unlike the CPC before it, the CPR does not contemplate service outside of the permissible period of service of twelve months but allows for an application to be made prior to the expiration of the twelve months.

[8] In the instant case, there is no dispute that the claim form was valid at the time of the application, and as required by the rules, the application was made during the currency of the claim form. It is the view of Counsel for the applicant, a view also held by the court, that the application to extend the validity of the claim form could validly be heard after the twelve month lifetime of the claim form had expired, the

application having been made prior to its expiration. This is in fact what took place. The application was heard by the court on July 13, 2015 when the claim form had expired on June 12, 2015.

- [9] Mr Mordecai submitted that the court did not make an error by merely granting the orders requested by the claimant and that the error was in the ex-parte notice seeking and obtaining an order that did not have the effect the claimant's attorneys intended. He noted that the claimant obtained an order which does not validly extend the lifetime of the claim form and it is not unjust that the defendant should receive the benefit of a potentially successful statute of limitations defence, where the claimant's attorneys filed the proceedings just before the expiration of the limitation period.
- [10] This submission, I find, is one which does not advance the overriding objective of the CPR. It is clear that the attorney for the applicant made an error in stating that the order being sought should be from "the date hereof" and it is also clear that the court in granting the order in the terms as sought, did not make an order which would be valid.
- [11] "I examined the decision in *Watson v Fernandes* [2007] CCJ 1 where reference was made to *Baptiste v Supersad* (1967) 12 WIR 140 at 144B, in which Wooding CJ cautioned that: "the law is not a game, nor is the court an arena. It is...the function and duty of a judge to see that justice is done as far as may be according to the merits". It has also been said that "the attainment of true justice is over the highway of realities and not through the valley of technicalities": Musmanno J in *Potter Title & Trust Co. v Lattavo Bros Inc.* 88 A.2d 91 at 93.
- [12] Additionally, it was stated that: "...Courts exist to do justice between litigants through balancing the interests of an individual litigant against the interests of litigants as a whole... Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys..."

- [13] I am persuaded by dicta in the above case. I find that the claimant in this case would be deprived of having his case heard on its merit because of an error on the part of his Counsel which went undetected by the court at the time the application was heard.
- [14] I also examined the case of **Vinos v Marks & Spencer** [2001] 3 All ER 784, referred to by Mr Mordecai. In seeking to paraphrase the words of May LJ, he concluded by noting that there is nothing unjust in a system which says that if you leave issuing proceedings to the last moment and fail to comply with a time requirement of the CPR, your claim will be statute barred. This I find would not apply as in this matter although the claim was filed close to the date at which it would have become statute barred, the application to extend the validity of the claim was made in time but was heard after the expiration of the claim form and having sought the order “from the date hereof” meant that having been heard after the expiration of its validity, service at any time thereafter would mean the claim form would still be invalid.
- [15] An examination of the substance of the notice of application and the affidavit in support on which the order extending the validity of the claim form and order for substituted service was made, shows that the application is one seeking an extension of the validity of the claim form. The application was clumsily drafted but what is clear is that the claimant intended for the court to extend the life of the claim form so that service could be effected. By applying for an extension of the validity of the claim form and seeking the court’s permission to serve it on the defendant by a method other than by personal service, the claimant in my view was showing an intention to pursue the claim.
- [16] The order made by the court therefore does not give effect to what was being sought and as stated earlier, is solely based on the manner in which the request was worded. The order made by the court was therefore of no effect. As I understand Mr Mordecai to be saying, the application was defective in that it

requested an order “from the date hereof” which would mean the claim form would have already expired when the order was given and that the order should

have been requested for a period of six months “from the 12th day of June 2012”.

With this I am in total agreement.

[17] I believe however, that it would be absurd if an error of this nature, made by the attorneys, had the potentially far-reaching effect of preventing the claimant from prosecuting his claim and this could not be rectified by the court.

[18] The question therefore arises whether this court can cure the defect to give life to the claim form or in other words, whether any order could be made to set matters right in order to give effect to the overriding objective of ensuring that justice is done. The administration of justice would be advanced by the court seeking to cure the defect in the drafting of the application by the attorneys for the claimant and rectify the subsequent order made on July 13, 2015.

[19] I believe the court retains the jurisdiction to correct or cure certain defects depending on the circumstances, and if the interests of justice require it, and it is my view that the formal defect in the application in this matter may be cured by the court and in fact should have been so cured at the date of the hearing of the application. I find that it amounted to a procedural inadequacy which should not be fatal as the court should in the circumstances be able to exercise its discretionary powers to put things right in order to give effect to the overriding objective.

[20] If the court fails to correct the error made by the attorneys who drafted the application the claimant would be prejudiced as he would be prevented from pursuing his claim. The only prejudice to the defendant, on the other hand, would be a deprivation of a statutory defence which notwithstanding the lateness in the filing of the claim, came about as a result of the poor drafting of the application.

[21] The interpretation of the application made and the order made thereon must therefore be tempered with reason and with due regard to the purpose for which it was sought. I therefore find that this is a case in which the court has jurisdiction to try the claim.

[22] The application for a declaration that the court has no jurisdiction to try the claim and for the order made on July 13, 2015 to be set aside as being void and of no effect is therefore refused.

[23] The period for filing the defence in this matter is within forty two (42) days of the date of this order. Leave to appeal is granted.