[2022] JMSC Civ 136

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV06148

BETWEEN	**RICARDO JONES**	**CLAIMANT/RESPONDENT**
AND	**WARREN JAMES WALTERS**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Mr. Lance Lamey instructed by Bignall Law for the Claimant/Respondent

Mr. Daniel Gyles instructed by Angelle Powell-Hylton for the Defendant/Applicant

Heard: May 18th 2022, June 27th 2022 and July 6th 2022

Civil Procedure — Whether time has expired for making application to challenge the jurisdiction of the court - Whether the defendant has waived the right to challenge the jurisdiction of the Court - Service of a claim form after the period of validity – Civil Procedure Rules 8.14, 9, 10 and 26.9.

MASTER H. CARNEGIE (Ag)

Introduction

[1] Ricardo Jones (hereinafter referred to as the respondent) filed a claim on December 16, 2014, against Warren Walters (hereinafter referred to as the applicant) for damages for negligence arising out of a motor vehicle collision which occurred on April 10, 2011. The respondent alleged that the applicant's Toyota Camry motor vehicle collided into the respondent, who was at the material time a pedestrian.

[2] A Notice of Application for Court Orders was filed on July 10, 2015, by the respondent to extend the period of validity and to dispense with personal service of the Claim Form and for the Court's permission to serve the Claim Form on the Defendant's insurers, British Caribbean Insurance Company Limited (BCIC).

[3] The Court made an order in January 11th 2016, for the validity of the claim form to be extended for a further period of six months from the date thereof. The order made on January 11th 2016, included orders for substituted service of the claim form and particulars of claim on BCIC. On February 13, 2017, BCIC filed an Acknowledgment of Service which indicated that they were served with the Claim Form and Particulars of Claim, on January 30, 2017. BCIC subsequently filed a defence on March 13, 2017.

[4] On November 9, 2021, the applicant filed a Notice of Application for Court Orders seeking:

1. A Declaration that this Honourable Court has no jurisdiction to try the claim.

2. That service on British Caribbean Insurance Company Limited of the Claim Form, Particulars of Claim, Notice to the Defendants, Prescribed Notes for the Defendants, Defence Form and Acknowledgement of Service of Claim Form and effected on pursuant to the Order of this Honourable Court made on the 17th day of May, 2021 be set aside.

3. That the Claim Form and Particulars of claim be struck out.

4. An extension of time for the filing of this application.

Submissions

Written submissions were made by attorney-at-law for the applicant in support of the application and oral submissions were made by the respondent. They are summarised accordingly.

The Applicant

[5] Relying on CPR 8.14(1) and 8.15(1) and (2), the attorney-at-law for the applicant submitted that the application for court orders filed on behalf of the applicant on November 9th 2021, was grounded in whether:

1. the claim form was valid at time of service on the defendant; and
2. the applicant is permitted to dispute the court's jurisdiction

[6] The main submission made by the attorney-at-law on behalf of the applicant was that BCIC was served by substituted service on January 2017, six months after the extension of time for the claim which was filed on December 16, 2014. The attorney-at-law for the applicant submitted that at the time of service, no further extension of time to serve the claim form was granted to the claimant, and, at the time of service of the claim form, it would have expired and was therefore a nullity. The attorney-at-law for the applicant relied on CPR 9.6 and 26. 9 for making the application.

[7] The attorney-at-law for the applicant submitted that it is not an issue of service only, as the issue of service is secondary if there is no valid statement of case, as an invalid statement of case cannot be served on the claimant. Reliance was placed on CPR 8.14 (1) by the attorney-at-law for the applicant who submitted that by virtue of same the claim form served on their client would be invalid.

[8] The attorney-at-law for the applicant submitted that the claim form served on the applicant was invalid for the following reasons:

1. time on the validity of the claim form started to run from the claim was filed on July 10th 2015

2. further the application to extend the validity of the claim form was heard 11th day of January 2016, extending the validity for six months to July 11th 2016.

3. service took place on January 30th 2017, seven months after the period of validity of the claim form.

[9] The attorney-at-law for the applicant submitted that where certain applications are not done to bring life to a claim, it ceases to be valid at the end of the validity period. In concluding, the attorney-at-law for the applicant submitted that filing a defence cannot cure a nullity, where no statement of case is before the court and no valid statement of case was served.

The Respondent

[10] The attorney-at-law for the respondent submitted that 2017 to 2021, would have been four years since the date of service of the claim form and particulars of claim, to the filing of the Notice of the Application challenging the court's jurisdiction, and by that token the defendant would have submitted to the jurisdiction of the court, to the extent that the applicant filed a defence and attended mediation. The attorney-at-law for the respondent submitted that the actions of the applicant were to the extent that the respondent would have a legitimate expectation that the matter would be progressing, and therefore the applicant would be barred from filing an application challenging the court's jurisdiction under CPR 9.6.

[11] The attorney-at-law for the respondent further submitted that CPR 10.3 provides that where there is a challenge to the court's jurisdiction an application, should be made no later than 42 days after service and the application turns on that nuance.

[12] The attorney-at-law for respondent submitted, that it is only because the respondent filed an application to strike out the defence that the applicant is only now seeking to challenge the court's jurisdiction.

[13] The attorney-at-law for the respondent submitted that the passage of time for filing the application to challenge the jurisdiction of the court is egregious and the court should rightly proceed with the application to strike out the claim. The attorney-at-law submitted that the applicant should not be allowed at this stage to challenge the court's jurisdiction.

[14] The attorney-at-law for the respondent challenged the assertion "thereof" means from the date of the order January 11th 2016 for extending the validity of the claim form in any determination of time in respect of the application at bar.

Law and Analysis

[15] The issues to be determined by the court are whether:

1. an extension of time should be granted in hearing the application.
2. the defendant has waived his right to challenge the jurisdiction of the court.
3. the service of the claim form after the period of validity amounts to a nullity

Whether an extension of time should be granted in hearing the application

Had the claim form been valid at the time of service, I would agree with the submission made on behalf of the respondent that the applicant has failed to file the application within the time prescribed in 9.6(3). However, CPR 26. 9 (1) is to be a considered in making a determination of whether an extension of time should be granted for hearing this application. CPR 26.9(1) states:

"26.9(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice directions or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in proceedings, unless

the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.

[16] In the case of **Texan Management Limited & Ors. v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46** The Privy Council, in considering an appeal from the Eastern Caribbean Court Appeal, stated in paragraph 30 of the judgment:

> 30. The case management powers of the court are included in EC CPR Part 26, and the material provisions are substantially similar to those in the English CPR Part 3. First, by EC CPR r.26.1(2)(q), as part of the court's general powers of management: "Except where these rules provide otherwise, the court may … stay the whole or part of any proceedings either generally or until a specified event or date." **Second, the court may extend the time for compliance with any rule, even if the application for extension of time is made after the time for compliance has passed: EC CPR r.26.1(2)(k). Third, the court may exercise its powers of its own initiative: EC CPR r.26.2(2).** (Emphasis added)

[17] The Court continued in paragraphs 73 and 74:

> 73. The overall effect is this. A defendant served within the jurisdiction who has reasons for applying for a stay on forum conveniens grounds at that time should normally make the application under EC CPR r.9.7/English CPR Part 11**. It is doubtful whether failure to make such an application in time means that the defendant has conclusively accepted that the court should exercise its jurisdiction, but that will not normally matter because the court has a power to extend the time for compliance with any rule, even if the application for extension of time is made after the time for compliance has passed**: EC CPR r.26.1(2)(k). It has been held that even though English CPR r. 11(5) (EC CPR r.9.7(5)) contains a provision deeming the defendant to have accepted the jurisdiction of the court, the court has power to extend the period in EC CPR r.9.7(3) retrospectively after the period for defence has expired: Sawyer v Atari Interactive Inc [2005] EWHC 2351 (Ch), [2006] ILPr 129, at [46] (a case of service outside the jurisdiction).

> 74. In addition, except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule**, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right**: EC CPR r.26.9. (Emphasis added)

[18] In this regard, the failure of the applicant in filing the application challenging the court's jurisdiction within the time prescribed under CPR 9.6, does not preclude the court hearing the application at bar by virtue of CPR 26.9. I therefore do not agree with the attorney-at-law for the respondent that the inordinate delay in filing the application challenging the court's jurisdiction is the determining factor of whether the application filed should be heard. Each case turns on its own facts.

Whether the defendant has waived the right to challenge the jurisdiction of the court

[19] The basis for which the application was filed on behalf of the applicant is reflected in CPR 9.6:

> "9.6(1) A defendant who –
>
> (a) disputes the court's jurisdiction to try the claim; or
>
> (b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.
>
> (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.
>
> (3) An application under this rule must be made within the period for filing a defence. (Rule 10.3 sets out the period for filing a defence.)
>
> (4) An application under this rule must be supported by evidence on affidavit.
>
> (5) A defendant who –
>
> (a) files an acknowledgement of service; and

(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.

(6) Any order under this rule may also –

(a) strike out the particulars of claim;

(b) set aside service of the claim form;

(c) discharge any order made before the claim was commenced or the claim form served; and

(d) stay the proceedings.

7) Where on application under this rule the court does not make a declaration, it –

(a) must make an order as to the period for filing a defence; and

(b) may –

(i) treat the hearing of the application as a case management conference;

(ii) fix a date for a case management conference.

(8) Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the court under paragraph (7) (a) and such period may be extended only by an order the court."

[20] The court file reflects that the applicant filed an acknowledgement of service on February 13, 2017, indicating that it was served the claim form and also indicating an intention to challenge the claim.

CPR 9.5 provides that –

"A defendant who files an acknowledgement of service does not by doing so lose any right to dispute the court's jurisdiction."

[21] The requirement to file an acknowledgment of service under CPR 9.5, means that it is a requirement that a person being served with a claim form and particulars is to file an acknowledgement of service. CPR 9.5, operates to fulfil the requirement to file an acknowledgement of service under CPR 9.3, and therefore could not operate to take away the applicant's right to dispute the court's jurisdiction. The filing of the acknowledgment of service by the applicant on February 13, 2017, is in compliance with rule CPR 9.3(1) and is a step that must be taken under CPR 9.6(2).

[22] The acknowledgement of service filed on behalf of the applicant indicated that the applicant intended to defend the claim as prescribed under CPR 9.4 (1). The defence was filed on behalf of the applicant thereafter, which triggered the mediation process under CPR 74.3(3).

[23] In the case of **SSQ Europe S.A. v Johann & Backes OHG [2002] 1 Lloyd's Rep 465**, the defendant, after being served with a claim form, filed an acknowledgment of service, followed by a defence and counterclaim. A challenge to the jurisdiction of the English Court was made though the time for making the application had expired. In addressing the issue of whether the defendant had submitted to the jurisdiction of the court, the learned judge Farquharson LJ stated in paragraph 28 of the judgment:

> "28. The principle that the right to contest the jurisdiction may be waived by the taking of a step inconsistent with that right is familiar in English common law. The test of waiver in this context is, as Lord Justice Farquharson held in Sage v Double A Hydraulics Ltd, The Times, Apr 2, 1992 (CA):
>
> > …whether a disinterested bystander with knowledge of the case would have regarded the acts of the defendant or his solicitors as inconsistent with the making and maintaining of the challenge."

[24] Similarly, in **Global Multimedia International Ltd. v Ara Media Services [**2006] EWHC 3612 (Ch), [2007] 1 ALL ER ((Comm)1160 which involved facts similar to

the case at bar, the court held the test to be applied in considering whether such conduct amounted to a submission was an objective one, and that on the facts this conduct was consistent with an acceptance of the jurisdiction of the court.

[25] In this regard, the steps taken by the applicant after filing the acknowledgment of service which indicated an intention to defend the claim, arrangements for taking part in mediation by virtue of letters were sent to the respondent's attorney-at-law for a convenient date for mediation between July 2018 and July 2019; and filing a Notice of Change of Attorney filed on January 30, 2020, to borrow the word of Lord Justice Farquharson would be consistent with the making and maintaining of the challenge.

Had the claim form been valid at the time of service on BCIC, I would have agreed with the submission made on behalf of the attorney-at-law for the respondent, that the actions of the applicant amounts to an acceptance of the jurisdiction of the court to try the claim. However, the effect of the validity of claim form and particulars claim served several months after the period of validity is central to the determination of this application.

Whether the service of the claim form after the period of validity amounts to a nullity

[26] The court's approach to a procedural irregularity versus, a nullity is dealt with in the case of **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2,** and is relevant in this application at bar because of the principle in respect of a claim form that is invalid. In that case, the appellant was served with the claim form by registered post, along with the accompanying particulars of claim and a form for acknowledgment of service. However, a form of defence and the prescribed notes for defendants required by the rules were not served. The appellant subsequently filed an acknowledgment of service, indicating that the claim form and particulars of claim were received and that it intended to defend the claim.

[27] The respondent obtained a default judgment, in circumstances where the appellant failed to file a defence to the claim. By notice of application, the appellant sought an order to set aside the default judgment, which was refused by McDonald-Bishop J (as she then was).

[28] On appeal, the appellant stated as a ground of appeal, that the judge was incorrect in treating the issue of non-service of the relevant documents as a procedural irregularity rather than as a nullity. The appellant submitted that non-compliance with rule 8.16(1) rendered the claim form a nullity and that it was therefore immaterial that an acknowledgment of service was filed on behalf of the appellant. The Court found that this ground failed as there was no basis to conclude that the claim form was a nullity, because it was not served with required accompanying documents in accordance with rule 8.16(1).

[29] Morrison P (as he then was) made reference to paragraph 39 of the lower court judgment of McDonald-Bishop J where she stated "[it] is well established in the law of civil practice and procedure that while an irregularity can be waived, a nullity cannot be".

[30] In paragraph 37 of his judgment, Morrison P (as he then was) in distinguishing the case from Dorothy Vendryes v Richard Keane and Karene Keane [2011] JMCA Civ 15, stated:

> "Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes J and this court found in Vendryes, **I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR, which governs how to start proceedings**." (emphasis added)

[31] Morrison P held that the effect of a claim form not served in accordance with the factors as prescribed in Part 8, would operate to invalidate a claim, and therefore

make it more than a mere irregularity. One such important factor is found in rule 8.14(1) of the CPR which states:

> 8.14 (1) The general rule is the claim form must be served within 6 months after the date when the claim was issued **or the claim form ceases to be valid** (emphasis added)

[32] In **Rayan Hunter v Shantell Richards and Stephanie Richards [2020] JMCA Civ 17.** The respondents initiated two separate claims in July 2014, which were July 2015, one year later. At the time of service, there was no order made by the court extending the period of service. The appellant filed acknowledgments of service in both claims. It was indicated by an endorsement at the top of each form as follows:

> **"This Acknowledgment of Service is filed for the sole purpose of making an application to set aside service of the Claim Form and Particulars of Claim pursuant to rule 9.6 of the Civil Procedure Rules 2002."**

[33] At the time of filing the acknowledgments of service, the appellant also filed a notice of application for court orders in respect of each claim seeking, inter alia, that there be an extension of time for filing the application and that the service of the Claim Form and Particulars of Claim be set aside.

[34] While the Court of Appeal ordered that the time be extended for the filing of the acknowledgment of service and the notice of application, the court refused to set aside the service of the claim forms and particulars of claim on the appellant. One of the reasons given by the judge was that by filing an acknowledgment of service to the claim, the appellant waived any irregularity and therefore could not now seek to set aside the service.

[35] The core question for the court's consideration was whether the filing of acknowledgments of service by the appellant, in respect of the claims, precluded the appellant from raising the point that the service on him should be set aside on the ground that it was an irregularity or nullity. McDonald-Bishop JA, in her

judgment referenced Denning LJ in Sheldon v Brown Bayley's Steelworks Ltd [1953] 2 All ER 894 by stating:

> [42] Denning LJ, stated that the question whether the second defendant who had entered an unconditional appearance was entitled to have the service on him set aside depended on whether the service of the writ, after the 12 months permitted by the rule, was a nullity or an irregularity. He then stated at page 897:
>
> > "If it was an irregularity, then the irregularity was waived by the unconditional appearance. **But if it was a nullity, then it could not be waived at all. It was not only bad, but incurably bad**." (Emphasis added)
>
> [43] Denning LJ, in determining the question whether the writ was a nullity or an irregularity, took into account, as a material consideration, the fact that the writ could have been renewed although it had expired. Having done so, he concluded:
>
> "Now, if a writ can be renewed after the twelve months' have expired, that must mean that it is not then a nullity." (Emphasis added)

[36] McDonald-Bishop JA further stated at paragraphs 45 and 46:

> [45] In this case, the claim forms had expired, without there being any extension of time applied for before the expiration of the 12 months' period. Rule 8.15 provides that an application for an extension of time, within which the claim form may be served, must be made within the period for serving the claim form specified by rule 8.14. If an extension of time had already been granted, then an application for further extension must be made within any period of subsequent extension permitted by the court. It means then that in our rules, once the claim form has expired, an application cannot be made after its expiration to extend time for it to be served or to renew it. An expired claim form, without there being in place an order extending it (as in this case), ceases to be valid. This renders the position under the CPR different from the provisions of the RSC that were applicable in Sheldon v Brown Bayley's Steelworks Ltd. It is also different from the regime for service of a claim form under the UK CPR, which permit applications for extension of time to be made after the expiration of the time for the service of the claim form, albeit subject to specified conditions.
>
> [46] **Following the path of reasoning of their lordships in Sheldon v Brown Bayley's Steelworks Ltd, it leads one to the inevitable conclusion that the expired claim forms in this case were null and void and of no legal effect for all purposes, including service on the**

> **appellant. It is settled law that while an irregularity can be waived, a nullity cannot be**: see The Gniezno; Owners of the Motor Vessel Popi v Owners of Steamship or Vessel Gniezno [1967] 2 All ER 738. It follows then, that the step taken by the appellant to file an acknowledgment of service (even if not in the terms he had done) could not have operated as a waiver of the invalidity of the claim forms because he could not have waived what was in law a nullity. On this basis alone, the appellant would have been entitled to an order setting aside the service of the claim forms on him. (emphasis added).

[37] In the case at bar, the validity of the claim form filed by the respondent was extended to July 11, 2016, six months from the date of the order granting the extension. There were no further applications made by the respondent for an extension of the validity of the claim form prior to the service of expired claim form in 2017. It cannot therefore be denied that the claim form, at the time of service, was invalid, and that service of same would amount to a nullity which to borrow the words from Denning LJ would be “incurably bad”.

[38] In concluding, the submission by the respondent’s attorney-at-law as to motive for filing the application to challenge the court’s jurisdiction, cannot be a factor for determining whether the applicant has waived his right to challenge the court’s jurisdiction. The applicant having taken steps in the proceedings by filing of an acknowledgement of service signalling an intention to defend claim, and thereafter filing a defence and now at the point of mediation, is more than a suggestion that the defendant has waived his right to challenge the jurisdiction of the court. However, on these facts it is accepted the applicant having waived his right to challenge the jurisdiction of the court, the service of the claim form is a nullity and cannot be cured. The application filed on behalf of the applicant succeeds on the ground that service of the claim form and particulars of claim took place after the period of validity. The court therefore has no jurisdiction to hear the substantive claim as there is no valid claim form before the court.

[39] I make the following orders therefore:

1. An extension of time is granted for the filing of this application.

2. This Honourable Court has no jurisdiction to try the claim.

3. Service on British Caribbean Insurance Company Limited of the Claim Form, Particulars of Claim, Notice to the Defendants, Prescribed Notes for the Defendants, Defence Form and Acknowledgement of Service of Claim Form and effected on pursuant to the Order of this Honourable Court made on the 17th day of May, 2021 be set aside.

4. That the Claim Form and Particulars of claim be struck out for non-compliance with part 8.

5. No order as to costs.

6. The attorney-at-law to prepare, file and serve orders herein.