



[2024] JMSC Civ. 142

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2023CV02218**

<b>BETWEEN</b>	<b>NICOLE LEWIS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DAPHNE BARBEE-WOOTEN</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**VIA VIDEO LINK (ZOOM PLATFORM)**

Ms. Ashley Clarke instructed by Georgia Hamilton & Co. for the Claimant/Respondent

Mr. John Givans instructed by Givans & Co. for the Defendant/Applicant

October 28 and November 8, 2024

**Civil Practice and Procedure – Application to Amend Defence – Late Stage Amendment – Whether Amendment to Defence Permissible – Principles Applicable to Late Stage Amendment**

**Civil Practice and Procedure – Commencement of Action – Filing of Claim Form – Rule 8.1 – When is a Claim Commenced – Whether Date for Commencement of Action can be extended under rule 3.2(5).**

**D. Staple; J**

## BACKGROUND

[1] It is appropriate for us to remember the words of Harman LJ in the case of ***Baker v Bowketts Cakes Ltd***<sup>1</sup>,

*“...Now it is true that you may wait until the 364th day of the [last year of the limitation period] before issuing your [claim form] and until the [last day of the validity of the claim form] before serving it and you will still be in time. But if you choose to wait until the last moment like that, you must be very careful to be right, and there is no reason why you should be given any further indulgence. The nearer you get to the last moment, the stricter ought to be the attitude of the court...”* (emphasis mine)

[2] There was an unfortunate single-vehicle motor vehicle incident involving a vehicle being driven by the Defendant in which the Claimant, an acquaintance of the Defendant, was travelling at the time.

[3] It was an idyllic vacation spoiled by this unfortunate incident and the Claimant claims that as a consequence of this incident she has suffered serious injuries.

[4] The incident took place on the 8<sup>th</sup> July 2017. The Claimant filed the Claim on the 7<sup>th</sup> July 2023 at 3:24 pm. The 7<sup>th</sup> July 2023 was a Friday. It was not disputed by the Claimant that the Claim Form was filed on the 7<sup>th</sup> July 2023 at 3:24 pm.

[5] In due course the Defendant was served with the pleadings and she acknowledged service and filed a Defence. A Reply was filed in a timely manner and the parties were summoned to a case management conference by the Court.

[6] At the Case Management Conference held on the 16<sup>th</sup> July 2024, orders for the trial of the Claim were made and a Pre-Trial Review date set for the 28<sup>th</sup> October 2024.

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<sup>1</sup> [1966] 1 WLR 861 at 867

- [7] The parties set about complying with the orders made at the Case Management Conference, but the Defendant, on the 13<sup>th</sup> August 2024, filed an application to amend his defence to include a defence under the **Limitation of Actions Act**.
- [8] This application came on for hearing on the 28<sup>th</sup> October 2024 and there was spirited argument between counsel.
- [9] The question that the Court must decide now is whether to allow this amendment at the Pre-Trial Review stage.

## ISSUES

- [10] The issue I have identified for resolution is whether the Court should allow the amendment to the Defence at this stage. A corollary to this is the merits of the proposed defence.

## SHOULD THE COURT ALLOW THE AMENDMENT?

- [11] Rule 20.4(2) empowers the Court to amend a statement of case after a case management conference. Ideally (and by Rule 20.4(1)) applications for amendments to statements of case should be made at the case management conference. Parties are reminded of this.
- [12] The question is whether the Court should allow the amendment at this late stage. The answer to this question depends on several factors.
- [13] The celebrated case of *Beep Beep Tyres Batteries and Lubes Limited v DTR Automotive Corporation*<sup>2</sup> set out the principles governing the question of whether

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<sup>2</sup> [2022] JMCA App 18

a judicial officer should accede to an application by a party to amend their statement of case.

[14] At paragraph 53, Sinclair-Haynes JA, writing for the Court, said as follows:

*“Although a judge is imbued with wide discretion to determine whether to grant or refuse a proposed amendment, in the exercise of that discretion a judge must seek to achieve fairness and justice between parties. That end is achieved by taking account of all relevant factors in the particular case and, in so doing, having regard to the court’s overriding objective. The factors for the court’s guidance in its quest to dispense justice and to further the overriding objective of the court can also be derived from the relevant authorities. Some relevant factors for the judge’s consideration are listed below. This list is, however, by no means exhaustive and is merely intended as a guide.*

*[sic] (i) the importance of the proposed amendment in resolving the real issue(s) in dispute between the parties;*

*(ii) the nature of the proposed amendment, that is, whether it gives rise to entirely new and distinct issues or whether it is an expansion on issues that were already pleaded or otherwise foreshadowed;*

*(iii) the stage of the proceedings at the time the application to amend is made. If the application to amend is made at a late stage, for example close to the trial date with the result that there may be an adjournment or if the application is made after trial has commenced, it should be considered with greater scrutiny;*

*(iv) whether there was delay in making the application to amend, the extent of the delay and the reasons for the delay;*

*(v) the prejudice to the respective parties to the claim, consequent on the decision to grant or refuse the proposed amendment;*

*(vi) whether any prejudice to the parties may be appropriately compensated by an order for costs;*

*(vii) the arguability of the proposed amendment;*

*(viii) the potential effect of the proposed amendment on the public interest in the efficient administration of justice;*

*(ix) the reason(s) advanced by the applicant for seeking an amendment; and*

*(x) the importance of having finality in litigation.*

- [15] The aim is to ensure that all amendments that are necessary to ensure that the real question in controversy between the parties is resolved are granted.
- [16] There can be no doubt that this proposed amendment is highly consequential to both the Claimant and the Defendant. If granted, the Claimant's claim is in serious jeopardy of being extinguished. This amendment would resolve the issue between the parties. But not the real issue of causation.
- [17] The Court accepts that the amendment would introduce something new in the matter and not something that was at all foreshadowed by the Defendant. But Counsel Mr. Givans, in his affidavit, explained that it was not until the case management conference on July 16, 2024 that they realised the exact time at which the Claim Form was filed. He stated, and I accept, that the Claim Form served on the Defendant did not contain this information and so he could not have taken the point before now.
- [18] I find that this was a reasonable argument. It is exceedingly rare that a party has to examine the Court's file itself to ascertain the time when a matter is filed and the time is not usually endorsed on the copy of the Claim Form for service. So I find that though it raises something new, it was not something that was likely to have been apparent and obvious on its face that it could have been foreshadowed.
- [19] We are now quite late in the trial process. We are at the Pre-Trial Review. However, nothing prevents the amendment being granted at this stage. Indeed, the Court had regard to the case of *Topaz Jewellers et al v National Commercial Bank Jamaica Limited*<sup>3</sup> on this point.

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<sup>3</sup> [2011] JMCA Civ 20

**[20]** In that case the parties were about to start the trial when the Respondent raised an application to amend their defence to raise a limitation defence with respect to the Claimant's Claim. The learned trial judge acceded to the Respondent's application, allowed the amendment and dismissed the Appellants' claim.

**[21]** The Appellants appealed on the bases that it was an amendment made at a very late stage and was prejudicial thus disregarding the overriding objective; and the delay in seeking and making the amendment amounted to a waiver. The Court of Appeal dismissed the appeal.

**[22]** Their reason, in summary, was found at paragraph 15 of the judgment as follows,

*In summary, we accepted that the trial not having commenced, and given the stated position of the appellants on the question of whether the action was statute-barred, there was no injustice done to the appellants in allowing the amendment. In any event, limitation is a very relevant point as if it is valid it will bring an end to litigation that ought not to have been started. In the circumstances, it cannot be said that the discretion of the learned trial judge had not been properly exercised. There was clearly no merit in the appeal.*

**[23]** This was an application made when the trial was about to start. In the case at bar, we are much earlier in the process. I too can see no reason why the Defendant could not advance a defence of such import at this point in the matter.

#### *Was the Action Commenced After the Limitation Period?*

**[24]** Ms. Clarke argued that the amendment ought not to be allowed as the limitation defence does not arise since the Claim was filed in time.

**[25]** The Claim Form was filed on the 7<sup>th</sup> July 2023. The Court takes judicial notice of the fact that July 7, 2023 was a Friday. It was filed at 3:24 pm. No dispute was raised about this evidence from Mr. Givans' affidavit. On a Friday, the Civil Registry of the Supreme Court closes for business at 3:00 pm. This fact is known to counsel who practice at the Civil Division of the Supreme Court.

**[26]** Ms. Ashley argued that rule 3.2(5) could save her. I will set it out here:

When the period specified by –

- (a) these Rules;
- (b) a practice direction; or
- (c) any judgment or order,

for doing any act at the registry ends on a day on which the registry is closed, it shall be in time if done before close of business on the next day on which the registry is open.

- [27] Her argument was that since the Claim Form was filed at a time when the Registry was closed, the rule operates to treat the document as if filed in time as it would be done before the close of business on Monday the 10<sup>th</sup> July 2023.
- [28] But this argument is invalid. The rule only applies to periods specified by **the rules, a practice direction or a judgment or order of the Court (emphasis mine)**. It does not apply to any period specified by statute.
- [29] The time for bringing a claim is specified by the **Limitation of Actions Act**. The Civil Procedure Rules cannot extend this time limit as they are subsidiary legislation.
- [30] Rule 8.1(2) states that proceedings are started when the claim is filed. Rule 3.7(2) states that, “A document is filed on the day when it is received at the registry or, *where it is received at a time when the registry is closed for whatever reason, on the next day on which the registry is open.*” So rules 3.2(5) and 3.7(2) speak to two connected but completely different things.
- [31] Insofar as commencement of a Claim is concerned, the relevant and operative rules are 8.1(2) and 3.7(2).
- [32] In the case at bar, the Claim Form was received at the Registry on the 7<sup>th</sup> July 2023 at 3:24 pm. The Claim Form was therefore filed at a time when the Registry was closed for business. In that case, it would be treated as being received on the

next day the registry was open for business. That would have been Monday the 10<sup>th</sup> July 2023. So the Claim was not commenced until Monday the 10<sup>th</sup> July 2023.

**[33]** Accordingly, the Claim Form was filed and the action therefore commenced outside of the limitation period of within 6 years of the day the cause of action arose.

**[34]** Therefore, contrary to the argument of Ms. Clarke, limitation is quite a live issue.

### *Finality in Litigation*

**[35]** No trial date has been set. To allow the amendment now has the potential to save the parties the expense of further litigation in a case that is highly likely to be statute barred.

**[36]** It is also in keeping with the good administration of justice and in furtherance of the overriding objective to allow a defence of this nature to be considered as it has the effect of removing matters from the Court that are no longer viable thus freeing up judicial time for other matters.

### **CONCLUSION**

**[37]** In all the circumstances, it is my view that the Defendant's application for amendment to add a limitation defence is meritorious.

**[38]** The Claimant may well feel hard done by this decision, however, it is important to bear in mind the caution issued by Harman LJ as quoted above. The Claimant took the risk of commencing the Claim on the last day on which it could have been filed. She therefore had no room for error in the commencement process. Unfortunately, she did err and the result is that her claim is on the verge of being declared statute barred.



## **DISPOSITION**

- [39]** The Defendant is given permission to amend her defence and the Amended Defence that was filed on the 30<sup>th</sup> July 2024 and already served on the Claimant shall stand as validly filed and served.
- [40]** Costs to the Defendant to be taxed if not agreed.
- [41]** Defendant's Attorneys-at-Law are to prepare, file and serve this Order on or before the 15<sup>th</sup> November 2024 by 4:00 pm.

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**Dale Staple**  
**Puisne Judge**