[2019] JMSC Civ 114

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 00290

BETWEEN	**WINSOME ELIZABETH MCFARLANE**	**CLAIMANT**
AND	**EARLE SELBOURNE MCFARLANE**	**DEFENDANT**

IN CHAMBERS

Laura and Kerri Edwards, instructed by Kerri Edwards, for the Claimant

Stacey Mitchell, instructed by Frater, Ennis and Gordon, for the Defendant

HEARD: March 12, 2018 and May 6, 2019

MARITAL PROPERTY DISPUTE – SERVICE OF CLAIM DOCUMENTS ON DEFENDANT OVERSEAS – WHETHER CLAIM IS STATUTE-BARRED – PRACTICE AND PROCEDURE – MANDATORILY EXPRESSED PROVISIONS OF CIVIL PROCEDURE RULES (CPR) – INTERPRETATION – APPLICABILITY OF RULE 26.9 OF THE CPR – DISPUTE TO COURT'S JURISDICTION TO TRY THE CLAIM

ANDERSON, K.J

[1] This claim was initiated by means of fixed date claim form, and pertains to a property dispute as between parties who were once married. Affidavit evidence which has been filed by the parties, has disclosed that a petition for dissolution of marriage, was filed by the claimant and that a decree absolute was pronounced in December of 2003. That decree would have made the divorce, final.

[2] It is a claim for division or partition of property which the claimant has claimed, was purchased by the parties and which is now registered in their joint names, on a title, as joint tenants.

[3] The disputed property can properly be described as: Lot 34, 17 Oxford Road, St. Andrew, now called, 'Gallery' and in respect of that property, the claimant is now claiming a half share of same.

[4] The claimant has, in more than one affidavit which she has deponed to, specified that her true place of abode and postal address, is: 46N Oxford Manor, 16 Oxford Road, Kingston 5, whereas the defendant has, in his affidavit evidence, specified his true place of abode and postal address, as: 9451 Fondren Road, Houston, Texas, 77074, United States of America. The parties are Jamaican citizens and have, in the past, both resided in Jamaica. The claimant is employed as an administrative assistant, whereas the defendant is a broadcast journalist.

[5] This claim was filed on January 27, 2016 and an amended fixed date claim form, was filed on February 3, 2016. In that amended fixed dated claim form, the claimant broadened her initial claim, to claim for, 'her equal share of any and all properties acquired by her, during her marriage to the defendant.' The only property so referred to, though, by the claimant, in any of her affidavit evidence, is the disputed property.

[6] The parties became married on May 2, 1984. The disputed property was transferred to the parties, by means of transfer number 409515, which was registered on December 20, 1982.

[7] It is worthwhile noting that the defendant has deponed to affidavit evidence, specifying that the parties became permanently separated from one another, on September 16, 1986, which is when he claims that the claimant moved out of the apartment in which they both them lived, after a heated exchange between them, surrounding an alleged extra-marital affair, which the claimant was then engaged in.

[8] The claimant has not, in any of her affidavit evidence as yet, specifically refuted the defendant's allegation, that she was involved in an extra-marital affair and has

also, not been specific either as to the date when the parties had permanently separated from one another, as marital partners, or in refutation of the specific date deponed to, by Mr. McFarlane, as being the date of that permanent separation.

[9] Since the defendant's known address at the time when this claim was filed, was in the United States of America, the claimant needed to obtain this court's permission, in order to serve same, on the defendant. See **rule 7.3 of the Civil Procedure Rules (hereafter referred to as, 'the CPR.')**, in that regard, in particular, **rule 7.3 (6)** as the whole subject – matter of this claim, is land which is located in Jamaica.

[10] An application for that permission to be granted by this court, was filed by the claimant on January 27, 2016. That application had not only sought this court's permission to be granted to the claimant, to serve the claim form and other related documents outside of the jurisdiction of Jamaica, but also had sought this court's permission, for personal service of the claim form and other documents herein to be dispensed with and that service be, by means of registered post. That application was made without any notice of it, having been given to the defendant.

[11] That application was heard by a Master-in-Chambers, on May 5, 2016 and was then granted. It is undisputed that the defendant received the following documents by post, on August 2, 2016. The amended fixed date claim form which was filed on February 3, 2016, along with an application for permission to serve the claim form out of the jurisdiction and by registered post and an affidavit of attorney Laura Edwards, both of which were filed on June 10, 2016. That affidavit of attorney Laura Edwards, was filed in support of said application. Also, the defendant then received, via post, the affidavit of the claimant, in support of amended fixed date claim form, which was also filed on June 10, 2016.

[12] The said application and affidavit which were filed on June 10, 2016, were each formulated in precisely the same terms as the application and affidavit which had

earlier been filed in January 27, 2016 and of course, it is worthwhile to recall, that said application was granted on May 5, 2016.

[13] Following on his receipt of said documents, the defendant made contact with an attorney in Jamaica and retained that attorney, for the purpose of resisting this claim. That attorney allegedly advised the defendant, that he had a sound legal basis to resist this claim. The defendant had, on August 18, 2016, filed an acknowledgement of service of claim form and that confirmed in that document, that he had received the claimant's claim form and affidavit in support on August 2, 2016. The defendant did not, in that acknowledgement of service, which was signed by counsel from the law firm of Frater, Ennis and Gordon, on his behalf, in any respect, challenge this court's jurisdiction to try this claim. The defendant though, was not required to have so done.

[14] As is the expected course, a case management conference, otherwise known as a, 'First Hearing' was scheduled by the Registrar. Same was first held on September 28, 2016, in the absence of the parties, but was then adjourned. On two (2) subsequent court hearing dates, which were case management conference dates, various case management orders were made as regards this application for court orders, which was filed on October 25, 2016. Those hearing dates were, respectively: March 30 and October 4, 2017. The defendant filed affidavit evidence, on October 25, 2016 and April 27, 2017.

[15] In both of those affidavits, at paragraphs 19 and 22, respectively, the defendant has contended that the claimant's claim is, as he has been advised by his attorneys and believes, barred by virtue of the provisions of Limitations Act, 1881. That is the statute which in common legal parlance, is described as the statute of limitations and sets out time limits within which claims for various reliefs, must be instituted, failing which, the claim cannot properly be pursued, provided that the defendant has, in reliance upon the statute of limitations, objected to the claimant's pursuit of same.

[16] The defendant's affidavits were both filed within the time period afforded to the defendant, by means of the case management order of Rattray, J extending time to the defendant, to file and serve affidavit evidence in reply to the defendant's application for court orders, which was filed on October 25, 2016. Both of the affidavits filed by the defendant though, clearly appeared to have set out the nature of the defendant's defence to this claim, which is that the claimant has no proper basis for claiming any relief in respect of the disputed property, as said property was at all times, purchased and maintained by the defendant, using funds which were exclusively, his. In addition, the defendant has clearly set out, in his affidavit evidence, his contention that this claim is statute-barred.

[17] A defence must be filed by a defendant, who wishes to contend that a claim is statute-barred and in that defence, that contention must be raised. See: **Ketteman and ors. v Hansel Properties Ltd.** [1988] 1 All ER 38.

[18] Thereafter, that defendant, who has raised that contention in his defence, should file an application for court orders, seeking to strike out the claim, pursuant to **rule 26.3 (1) (b) of the Civil Procedure Rules (CPR)**, on the basis that the claimant's claim constitutes an abuse of the process of the court and is frivolous and vexatious, since the defendant's defence has not yet been filed. The defendant has, in the application for court orders which this court is addressing its mind to, in those reasons, sought as alternative relief, '*an order that the defendant file a defence or affidavit in response within 42 days of the date of the order*.'

[19] In the circumstances, this court will not now, pronounce on the defendant's contention that this claim is statute-barred. Same has to be raised as part of the defendant's defence, before it can properly be considered by this court. At this time, the defendant does not yet have a defence to this claim.

[20] What is before this court for consideration now, is the defendant's application for court orders, which was filed on October 25, 2016. That application was, 'heard on paper' and pursuant to an order of this court, for same to be done, the parties

had filed written submissions, in support of and in opposition to, that application, respectively. This court has read and carefully considered same, as well as the authorities referred to, in those submissions and provided, along with same.

[21] In that application, the defendant has sought the following reliefs, among others which need not be specifically referred to, for present purposes.

i. 'A Declaration by this Honourable Court that it will not exercise its jurisdiction to try this claim, and

ii. Discharge the order for service out of the jurisdiction made on the 5th day of May 2016.'

[22] The claimant has set out several grounds in support of that application and one of those grounds has been specified as being that, 'the claimant does not have a reasonable prospect of success as all rights and title to the land as she may have had been extinguished pursuant to **section 3, 4 (a), 16 and 30 of the Limitation of Actions Act, 1881**.' For reasons already given, that ground cannot properly be addressed by this court, at this time, in the context of the defendant's application, which is presently under consideration.

[23] It will, to my mind, suffice to state for present purposes, that the defendant has put forward as grounds for the said application, the contention that the claimant committed several breaches of the rules of court, in having commenced this claim and having obtained this court order for substituted service out of the jurisdiction, of the claim documents, upon the defendant.

[24] Our rules of court ('**CPR'**) specify at **rules 9.6**, the procedure for disputing the court's jurisdiction to try a claim. It is important, for present purposes, to specify the provisions of **rule 9.6 (1) to (5) of the CPR**, as those provisions are directly applicable to this matter, at this time. Those provisions reads as follows:

'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.

9.6 (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.

9.6 (3) An application under this rules must be made within the period for filing a defence.

9.6 (4) An application under this rule must be supported by evidence on affidavit.

9.6 (5) A defendant who 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.'

[25] The defendant's acknowledgement's of service was filed, according to my calculation, 15 clear days after service of claim form and other claim documents on the defendant, via registered post which the defendant deponed to having received, on August 2, 2016. That acknowledgement of service was filed on August 18, 2016.

[26] The period of time for filing an acknowledgement of service, in circumstances wherein the defendant was served with the claim form and accompanying claim documents, is not 14 days after service of the claim form. **Rule 9.3 (2)** read along with **rule 9.3 (1) of the CPR**, makes that clear. Instead, it is **Part 7 of the CPR**, that one must have regard to, in circumstances wherein, a claim form has been served on a defendant, overseas. In particular, it is **rule 7.5 (5)** and **(6)** which must be carefully considered, in that context.

[27] Whilst the court order which permitted substituted service of the claim form and other claim documents, on the defendant, overseas, could have specified a date by which the defendant's acknowledgement of service and defence, should have

been filed, said order apparently did not do so. Whilst I have not seen a perfected order on file, arising from the claimant's application for substituted service and service overseas, there are minutes on file, which this court has taken judicial notice of. Those minutes of proceedings which were held before this court, on May 5, 2016, as regards the claimant's application for permission to serve claim form outside of the jurisdiction, do not reflect that any such order was made, albeit that **rule 7.5 (6) of the CPR** permits this court to specify the periods of time for the defendant to file an acknowledge of service and a defence, in a context wherein, that defence has been served with the claim form and accompanying claim documents, overseas.

[28] With that apparently not having been done by the Judge who made the relevant order, it means that **rule 7.5 (5) of the CPR** is applicable. That rule prescribes, among other things, that it is, 'the general rule that an acknowledgment of service, must be filed, after service of a claim form on a defendant, in the United States of America ('USA'), within 28 days and that the defence must be filed, within 56 days of service of the claim form.

[29] To my mind, 'the general rule,' as set out immediately above, must always apply unless a Judge of this court has, as could have been done, ordered otherwise. Having not ordered otherwise in this case, the general rule, must apply. I am therefore, also, of the view that the defendant has filed his acknowledgement of service, within the legally prescribed time.

[30] In respect of this claim at this time, the defendant is seeking a Declaration that this court does not have jurisdiction to try this claim. This therefore brings into sharp focus, our rules of court which address how it is that a party who is disputing the court's jurisdiction to try the claim, is to go about the pursuit of that dispute.

[31] The defendant has not, by having filed an acknowledgement of service, lost his right to dispute this court's jurisdiction, to try this claim. **Rule 9.5 of the CPR** specifically so states.

[32] As was earlier stated and is now reiterated, it is to be noted that the defendant has not yet filed a defence and that is why, also in the application of his, which is now under consideration by this court, he has also, in the alternative, applied for an order of this court, that the defendant file a defence, or an affidavit in response, within 42 days of the date of this court's order.

[33] As such, it is my understanding that in the affidavit evidence which has been filed by the defendant, to date, the defendant was placing before this court, affidavit evidence in support of his application for court orders, which was filed on October 25, 2016, albeit that such affidavit evidence seemed to have been formulated and expressed in a manner which was more akin to a defence, rather than as affidavit evidence, in support of the defendant's said application.

[34] What then is the procedure to be followed, by a party who is disputing the court's jurisdiction to try a claim? **Rule 9.6 of the CPR** specifies that procedure.

[35] **Rule 9.6 (2) of the CPR** prescribes that a defendant who, as the defendant in this claim, has done, applies to this court, for a declaration that this court, does not have jurisdiction to try a claim, must first file an acknowledgement of service. The defendant has also done that and done so, within the legally prescribed time.

[36] **Rule 9.6 (3) of the CPR** goes further than that. That rule prescribes that, '*An application under this rule must be made within the period for filing, a defence.*' That application being referred to, in that rule of court, is of course, an application disputing this court's jurisdiction to try a claim.

[37] Furthermore, **rule 9.6 (5) of the CPR** prescribes that a defendant who files an acknowledgement of service and does not make an application under this rule within the period for filing a defence, is treated as having accepted that this court has jurisdiction to try the claim.

[38] The next question which therefore arises and which is now of significant importance, is whether the defendant filed his application which is now under

consideration, within the time period for filing a defence, as per the general rule for same, which was earlier specified in these reasons. It is to be recalled that said period is, for the purposes of this claim, which was served on the defendant, in the United States of America, 56 days.

[39] By my calculation, since the defendant's relevant application, was filed on October 25, 2016 and the claim form was served on the defendant, on August 2, 2016 by means of registered post, addressed to the defendant's address in the United States of America, in accordance with this court's order which allowed for same to have been done, at first glance, it seems that the defendant's relevant application was not filed within the requisite time period of 56 days.

[40] That is though, not legally so. It is not legally so, because, our rules of court, as amended, provide that during the long vacation, the time prescribed for filing and serving any statement of case other than the claim form, or the particulars of claim contained in or served with the claim form, does not run. **Rule 3.5 (1) of the CPR**, now specifically so provides.

[41] Accordingly, the time for the filing and service of a defence, does not begin to run between August 1 and September 15, of any year. Time for the filing and service of same, beings to run, from as of September 16 onwards. Since the defendant's acknowledgement of service shows that the defendant received the claimant's claim form, on August 2, 2016, the time for the filing and service of his defence, did not begin to run, until September 16, 2016.

[42] That means therefore, that the defendant's present application, was filed and served within time, since same was filed and served within 56 days, of September 16, 2016. As such, the defendant's application challenging this court's jurisdiction to try this claim, needed to have been filed and served within 56 days, counting from as of September 16, 2016, which was, what was done, by the defendant.

[43] Since it is this court's conclusion that the defendant's application, challenging this court's jurisdiction to try this claim, can properly be proceeded with, this court must now go on to consider the grounds put forward by the defendant, in his application, as constituting the basis for his application that this court should declare that it does not have jurisdiction to try this claim.

[44] Although there were seven (7) such grounds posited, one (1) of those grounds has already been addressed, that being that the claimant's claim, *'does not have a reasonable prospect of success as all rights and title to the land as she may have had have been extinguished pursuant to sections 3, 4 (a), 16 and 30 of the Limitation of Actions Acts, 1881.'*

[45] Of the other grounds, it is sufficient to state that only one of those, merit any consideration, in so far as the defendant's challenge to this court's jurisdiction to try this claim, is concerned. That ground is that, *'the documents served on the defendant did not include an acknowledgement of service of claim form, form of defence or copy of the formal order granting leave for service out of the jurisdiction as required by the* ***CPR 8.16 (1) (a), (b) and (d****).'*

[46] In addressing that ground, it must firstly be stated that **rule 8.16** does not, at all, address the requirement that a copy of this court's order granting leave for service out of the jurisdiction, ought to have been served on the defendant. Additionally, even **Part 7** of our rules of court, which specifically sets out the rules of court which are applicable to service of court process, out of jurisdiction, does not require that order to be served.

[47] It is also important to note that it does not appear as though there exists any formal order which could have been served on the defendant. After having carefully reviewed each document on this court's file for this matter, at present, both on paper and electronically recorded, no such formal order has been found to exist. There is not even a draft order, on file, or electronically recorded. That of course though, does not mean that the order was not made, or that the order is not as

effective as it would have been, if there existed a formal order. An order of a court is to be treated as valid, once made, unless and/or until same is set aside by another court of equal or higher jurisdiction. See: **Isaacs v Robertson** – [1985] AC 97.

[48] **Rule 42.6 of the CPR** though, does provide that:

> *'Unless the court otherwise directs the party filing a draft judgment or order in accordance with **rule 42.5** must serve the judgment or order an (a) every other party to the claim in which the judgment or order is made; and (b) any other person on whom the court orders it to be served.'*

[49] Although that rule of court has been framed in mandatory terms, this does not automatically mean that it is to be interpreted and/or applied, in a mandatory way. The manner of interpretation of a statutory provision, must always be carefully considered, based on the context and specific nature of that relevant provision. See: **AG v Prince Ernest Augustus of Hanover** – [1957] AC 436, on that point.

[50] I am not of the view that the failure to have served the order of this court, which had permitted service of the claim form, etc., on the defendant, out of Jamaica ('the jurisdiction'), renders the service of the claim form, on the defendant, a nullity. I am not of that view because, it is my view instead, that **rule 42.6 of the CPR**, even though expressed in mandatory terms, ought not to be given a mandatory construction by this court.

[51] As regards the failure, on the claimant's part, to have served the other important documents, such as, for instance, a form of acknowledgement of service, or a form of defence, or the prescribed notes for defendants – all of which are specified in **rule 8.16 (1) of the CPR**, as documents which, 'must' accompany a claim form, whenever a claim form is served on a defendant, it is worthy of note, that the defendant's submissions as regards the legal effect of the claimant's failure to have served any of those documents on the defendant, can perhaps best be described as, 'pithy' in so far as it was limited to stating that it has been held in three (3)

cases, namely: **Joseph Nanco v Anthony Lugg, B & J Equipment Rental Ltd**. – [2012] JMSC Civ 81; and **B & J Equipment Rental Ltd v Joseph Nanco** – [2013] JMCA Civ 2; and **Dorothy Vendryes v Dr. Richard Keane and Karen Keane** – [2011] JMCA Civ 15, that **rule 8.16 of the CPR** is expressed in mandatory terms. I have had to deduce from the defendant's pithy submissions on this point, that it is the defendant's submission that **rule 8.16 of the CPR** ought therefore, always to be applied in a mandatory way, such that, if there has been any failure to comply with that rule of court, that of necessity, being a failure on the part of the claimant, since it is a rule of court which places certain requirements on the claimant only, then it will render the claim, a nullity, or void. It was though, stated in **B & J Equipment Rental Ltd. v Joseph Nanco** *(op. cit.)*, by Morrison, JA, (as he then was), that:

> *'37 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 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 though 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. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non- compliance with **rule 8.16 (1)**, should not be able to take the necessary steps to re-serve the claim form accompanied by the requisite documents and by that means fully comply with the rule.*
>
> *38 Accordingly, given that the validity of the claim form as such was not an issue before the court in **Vendryes**, I can only regard the statements that the claim form served in breach of **rule 8.16 (1)** was a nullity as obiter, and not part of the court's reason for its decision in that case. In my view, there is therefore no basis to conclude in the instant case that the claim form is a nullity*

*because it was not served with all the documents required to accompany it by **rule 8.16 (1)**.'*

[52] In that said case, the Court of Appeal not only concluded, in affirming a judgment of this court, which had been rendered by McDonald-Bishop, J (as she then was), that the failure to serve the documents which ought to accompany a claim form, as specified in **rule 8.16 (1) of the CPR**, is not such as to render the claim a nullity, but rather, renders same an irregularity and thus, the failure of the claimant to comply with same, can be waived by a defendant, thereby rendering such failure, inconsequential, as far as the validity of the claim, is concerned. Also, see paragraphs 24 to 28 of this court's judgment, in that regard.

[53] Indeed, Phillips JA, speaking on behalf of the Court of Appeal in **Rohan Smith v Elroy Hector Pessoa and another** – [2014] JMCA App 25, stated that, *'the breach of **rule 8.16 (2)** produced the result that the service would have been irregular and as such, did not render the originating documents invalid.'* Of course, **rule 8.16 (2)**, just as **rule 8.16 (1)**, has been expressed in mandatory terms and thus, I do not understand the effect of failure to comply with **rule 8.16 (1)** to be such as to render the claim, a nullity, whereas, the effect of failure to comply with **rule 8.16 (2),** to be such as to result in there being a procedural irregularity, as being a logical argument that could be made by anyone. Thankfully though, no such argument has been proferred to this court, by the defendant herein.

[54] Of course too, it was because the Court of Appeal concluded that **rules 11.15** and **11.16 (3) of the CPR**, although also expressed in mandatory terms, will not render as a nullity, that which was done prior to any failure to comply with either of those rules of court – which set out certain requirements to be met by a party who has obtained an order, on an application which was made without notice to another party, affected by that order, that said court, denied the procedural appeal, in the case: **BUPA Insurance Limited, t/a BUPA Global and Roger Hunter** – [2017] JMCA Civ 3.

[55] Thus, as was stated at first instance, by McDonald-Bishop, J (as she then was) in **Joseph Nanco v Anthony Lugg and B & J Equipment Rental Ltd**. *(op. cit.)* and reiterated by McDonald-Bishop JA in delivering her leading judgment in the **BUPA Insurance Ltd**. case *(op. cit.)*: *'**Rule 26.9 (2**) then provides, among other things, that failure to comply with a rule does not invalidate any step taken in the proceedings, '**unless the court so orders**.' It means that the effect on the proceedings of the claimant's failure to comply with **rule 8.16 (1)** does not, without more, invalidate the proceedings. **Whether it should do so is, ultimately, a question for the court to determine in the circumstances of the case**.'*

[56] Of course, the Court of Appeal upheld the first instance judgment of McDonald-Bishop, J (as she then was) in the judgment which it rendered in the case: **B & J Equipment Rental Ltd. v Joseph Nanco** (*op. cit.)*, which I have already made reference to. The same view was echoed by Brooks, JA, in the case: **AL-TEC Inc. Ltd. and James Hogan and Renee Lattibudaire and Attorney General of Jamaica** – [2019] JMCA Civ 9, esp. at paragraph 13. The view that I have quoted, immediately above, is one which, for my part, I must state that I entirely agree with.

[57] I am of the view that **rule 26.9 of the CPR** is applicable to the matter at hand. That rule specifies that:

> *'(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 direction or court order.*
>
> *(2) An error of procedure or failure to comply with rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
>
> *(3) Where there has been an error of procedure or failure to comply with 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.'*

[58] I am of the view that not only is **rule 26.9 of the CPR** applicable to the present matter, but also, that this court ought now to make an order to put matters right, as the service of the claim form on the defendant, should not be deemed invalid. Same should not be deemed invalid, because it is apparent that the defendant has been caused no injustice whatsoever, as a consequence of the failure on the part of the claimant to have served him with what are known as the documents which typically accompany a claim form, when that claim form is properly served.

[59] Those typical accompanying documents are specifically designed to ensure that any defendant, whether represented by counsel or not, is sufficiently made aware of that which needs to be known, in order to properly be able to adequately respond to the claim.

[60] In this matter, the defendant has adequately responded to this claim. He has filed his acknowledgement of service, within time. He (the defendant), I have no doubt, fully understands the nature of this claim. As such, the service of those other documents as specified by **rule 8.16 of the CPR**, on him, would and could have assisted him no further then he has already been competently assisted by the attorneys who have always been on record, for him.

[61] In the circumstances, the defendant's application challenging this court's jurisdiction to try this claim, will be denied. As regards the application for an order defendant's discharging the order for service out of the jurisdiction, made on May 5, 2016, it is important to recognize that **rule 7.7 of the CPR** sets out the circumstances in which this court can properly set aside service of a claim form, out of the jurisdiction – which is what earlier occurred, with respect to this claim. It is therefore helpful to set out that rule of court, in its entirety. It reads as follows:

> *'7.7 (1) Any person on whom a claim form has been served out of the jurisdiction under **rule 7.3** may apply to set aside service of the claim form.*
>
> *(2) The court may set aside service under this rule where –*

a) *service out of jurisdiction is not permitted by the rules;*

b) *the case is not a proper one for the court's jurisdiction; or*

c) *the claimant does not have a reasonable prospect of success in the claim.*

(3) *This rule does not limit the courts power to make an order under* ***rule 9.6*** *(procedure for disputing the court's jurisdiction).'*

[62] Having already disposed of the issue as to whether this court has jurisdiction to try this claim, that aspect need be considered no further.

[63] The defendant has not, at all, contended as a ground for his application which is now under consideration, that service out of this jurisdiction, of the claim form, on the defendant, is not permitted by, 'the rules' – which is of course, a reference to the rules of court. It was entirely appropriate and understandable, for the defendant not to have so contended, since any such contention would have been entirely unmeritorious.

[64] That is so, to put it simply, because **rule 7.3 (1)** read along with **rule 7.3 (6) of the CPR,** permits service of a claim form out of the jurisdiction, with the permission of this court, in circumstances wherein the claim, as is the case here, has, as the subject – matter of its proceedings, land located within this jurisdiction – Jamaica.

[65] The defendant has contended that the claimant does not have a reasonable prospect of success in this claim, as the claim is statute-barred, pursuant to **sections 3, 4 (a), 16 & 30 of the Limitation of Actions Act**, **1881**.

[66] That though, is not a proper ground upon which it can be contended that the claimant does not have a reasonable cause of action. Thus, in the **Ronex** case *(op. cit.)*, at page 968, Stephenson LJ, reportedly stated: *'There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say*

that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out his claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred…' That quoted passage was referred to, with approval, by Brooks JA, in a Court of Appeal Judgment, in the case: **Bertram Carr and Vonn's Motor and Company Ltd.** – [2015] JMCA App 4.

[67] In the circumstances, the defendant's application for court orders which was filed on October 25, 2016, must and will be denied in its entirety, save and except that the orders applied for, in the event that this court denies the defendant's application, will be made, albeit with a slight variation as to the number of days for the defence to be filed, following upon this order. That variation is made, because the defendant was served at an address, in the United States of America and is made in accordance with **rule 7.5 (5) of the CPR**.

[68] It is ordered that:

i. The defendant's application for court orders which was filed on October 25, 2016, is denied.

ii. The defendant shall file a document which shall be headed: 'Affidavit in response to claim/defence' and which shall constitute the defendant's defence to this claim, within 56 days of this order.

iii. This matter shall proceed to mediation, provided that the defendant has filed a defence in accordance with order no. (ii) above.

iv. The costs of the defendant's said application for court orders, are awarded to the claimant with such costs to be taxed, if not sooner agreed.

v. The claimant shall file and serve this order.

……
Hon. Kirk Anderson, J.