JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 53/89

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.

BETWEEN	DR. C. W. THOMPSON	APPELLANT
A N D	ADMINISTRATOR GENERAL FOR JAMAICA (Administrator for Estate Carol Morrison dec'd)	RESPONDENT

Emil George, Q.C. and Richard Ashenheim for Appellant

Gordon Robinson for Respondent

March 5, 6 & April 5, 1990

CAMPBELL, J.A.

This is an appeal from an order of Orr J., dated 22nd June, 1989 refusing to set aside an order for renewal of a writ made on an ex parte application by Ellis J., on 7th November, 1988.

A writ claiming damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act against the University Hospital Board of Management and the appellant inter alia was issued by the respondent on November 23, 1987. The damages claimed were in respect of the death on November 23, 1986 at the University Hospital, Mona in the parish of St. Andrew of one Carol Morrison allegedly as a result of the "negligent attention, treatment, care and/or diagnosis of her by the appellant who was a servant or agent of the University Hospital."

The writ, it was feared, would not be able to be served on the appellant within the twelve months prescribed for service by section 30 of the Judicature (Civil Procedure Code) Law. Inasmuch as it also provides for renewal of writs and is similar in wording to the old Order 8 rule 1 of the Rules of the Supreme Court U.K. on whose judicial interpretation reliance is placed by the appellant, it is set out hereunder:

> "30 - 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 the 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 writ of summons be renewed for six months from the date of such renewal inclusive and so from time to time during the currency of the renewed writ ..... and a writ of summons so renewed shall remain in force and be available to prevent the operation of any Law whereby the time for commencement of the action may be limited and for all other purposes, from the date of the filing of the original writ of summons."

An ex parte application for renewal of the Writ was made during its currency on October 25, 1988 before Ellis J., and the order for renewal of the writ was made on November 7, 1988 also within the currency of the original writ. The renewal was for a period of six months commencing from November 23, 1988.

The renewed writ was served on the appellant on November 23, 1988 and on December 29, 1988 she entered a conditional appearance. By summons dated January 4, 1989 she applied to have the order for renewal of the writ set aside. The basis on which she sought to have the renewal order set aside was that:

> "The Order made on 7th November, 1988 for renewal of the Writ of Summons deprived her of the benefit of the one year limitation period applicable as a servant of the University Hospital Board of Management, which is a 'public authority' as defined in the Public Authorities (Protection) Act."

No other ground was stated in the summons before Orr J., on which the setting aside of the order for renewal was sought.

The University Hospital, Mona was held to be a public authority by this court in Mildred Millen v. The University Hospital of the West Indies Board of Management S.C.C.A. 43/1984 (unreported) dated March 21, 1986. It follows therefore that both the hospital and its servants and employees come within the protection of section 2 of the Public Authorities Protection Act which reads as follows:

> 2 (1) Where any action, prosecution or other proceeding, is commenced against any person for an act done in pursuance or execution, or intended execution, of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect:
>
> (a) the action, prosecution or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within one year next after the ceasing thereof."

The summons to set aside the order of renewal was dismissed and an appeal is taken from the dismissal.

Before us, Mr. George has submitted as he did before Orr J., that Ellis J., should not have granted the order for renewal of the writ as the application therefor had been made after the expiration of the limitation period provided by the Public Authorities (Protection) Act. Nor should an order for renewal be made after the lapse of the said limitation period because a defence under the Act had accrued and the appellant ought not to be deprived of her defence. In the alternative, if the judge had a discretion whether or not to grant the renewal in such circumstances the discretion ought to be exercised only for good reason which good reason would arise only in exceptional circumstances. In the present case, he submitted, no good reason existed or no good reason was put before Ellis J., to justify depriving the appellant of her defence under the aforesaid Public Authorities (Protection) Act.

He relied in support of his submission on a number of cases among which the locus classicus is Battersby and Another v. Anglo American Oil Company Limited and Others (1945) 1 K.B. 23. In that case the application for renewal of the writ was made after the currency of the writ for service had expired. The order for renewal could only be made by first invoking Order 64 rule 7 to enlarge the currency of the original writ to cover the gap between its actual expiry date and the date when the order for renewal was made. The effect would be that the writ would be deemed to be current and the renewal thereby deemed to have been ordered during the writ's currency as prescribed by Order 8 rule 1 which, as earlier stated, is similar to section 30 of our Judicature (Civil Procedure Code) Law. But during the period when the writ had

lapsed, and before its revival by recourse to Order 64 rule 7, time under the limitation Act would have resumed its march against the plaintiff in favour of the defendant and the defence of "statute-barred" had become accrued at the time the judge was considering exercising his discretion to renew the writ. It was in such circumstances **that** Lord Goddard for the Court of Appeal posed the question for which an answer was required. The question he posed was -

> "Whether there was a discretion in the court to enlarge the time for renewal under Order 64 rule 7."

He answered the question thus at p. 29 -

> "As we have just said there is a consistent line of authority that the court will not extend the time in such cases so as to deprive the defendant of the benefit of the statute (meaning the statute of Limitation)."

And at p. 31 - 32 he said:

> "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."

The Court proceeded to lay down general principles governing renewal of writs which would be applicable even when the application for renewal was made within twelve months of the date of the writ, which was unnecessary having regard to the facts of that case.

The Court per Lord Goddard said at p. 32:

> "We conclude by saying that, even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as indeed, is laid down in the order. The best reason, of course would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others ..... it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal, his application may very possibly come before a master or judge other than the one who made the order and who will not necessarily know the grounds on which the discretion was exercised."

In Heavens v. Road and Rail Wagons Ltd (1965) 2 All E.R. 409 in which the expression "exceptional circumstances" was introduced by Megaw J., the application for renewal was again made after the period of validity of the writ had expired. The defence under the Limitation Act had accrued during the period when the writ had lapsed. It was held that the discretion to renew ought not to have been exercised and the order of renewal was set aside.

Baker v. Bowketts Cakes Ltd (1966) 1 W.L.R. 861 was another case on which Mr. George relied. The application to renew the writ which was issued on May 28, 1964 was made to a District Registrar on May 24, 1965 which was during the currency of the writ. However, the District Registrar adjourned

it and later referred it to a judge who heard the application ex parte and renewed the writ on August 16, 1965. This, as can be seen, was done after the currency of the writ had expired. A conditional appearance was entered by the defendant who thereafter applied to have the renewed writ and service set aside. The application came before the same judge who in setting aside the renewal reasoned that as the writ had expired at the date when he had renewed it, sufficient reason had to be shown to justify depriving the defendant of his accruing defence. An appeal from his decision was taken to the Court of Appeal which upheld his decision. In doing so the court adverted to the principle enunciated in the case of Battersby v. Anglo-American Oil Co Ltd and Heavens v. Road and Rail Wagons Ltd (supra) which was expressly approved and by inference applied. Lord Denning at p. 866 said:

> "In particular, when the Limitation Act, 1939, has run or is running in favour of a defendant, as here, the plaintiff who desires a further extension must show sufficient reason for an extension."

It will be seen that the Battersby case (supra) on which Mr. George relied, turned wholly on how the judge should exercise his discretion to enlarge time under Order 64 r 1 to accommodate a lapsed writ as a condition precedent to his exercising his discretion to renew a writ within the ambit of Order 8 r 1 (similar to our section 30 of the Judicature (Civil Procedure Code) Law. The other cases were decided under the new rule which operates in the Supreme Court in England since 1962 which by its express terms permit an application for "extension" of a writ to be made either during or after the expiry of the writ. The new rule under R.S.C., Order 6, r 8 (2) provides as follows:

> "Where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at anyone time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for an extension (of time) is made to the court before that day or such later day (if any) as the court may allow."

The issue in these latter cases was whether notwithstanding the change in the rule which now obviates the need for the appellant to invite the judge to invoke his powers of enlarging time, (Order 64 r 1) the judge should still apply the principle established under the old rule which governed the renewal of writs where the application therefor was made after the twelve month life of the writ had expired. The cases establish that the accepted principle still applies, namely, that where an application to extend the validity of a writ is made after its expiry date, it ought not to be granted where to do so would be to deprive a defendant of an accrued defence under a statute of Limitation. If the defence had not yet accrued but had recommenced its march to accrual as in the case of Baker (supra) as a result of the writ having lapsed, an extension ought not to be granted except for good reasons.

Mr. Gordon Robinson submitted correctly in my view that the cases relied on by Mr. George were not helpful because they established a principle which was only applicable to applications for renewal of a writ after it had lapsed. Further, in none of the cases was the excuse for non-service attributed to failure to do so notwithstanding reasonable efforts to serve.

The cases above-mentioned have indeed established no principle applicable to the renewal of a writ where both the application and the order for renewal have been effected during the currency of the writ. True enough the observation of Lord Goddard in Battersby (supra) did refer to the need for the judge to exercise caution in exercising jurisdiction under the rule (Order 8 r 1) and that this applied, even when application was made within twelve months of the date of issue of the writ. He correctly emphasized that:

> "In every case care should be taken to see that the renewal will not prejudice any right of defence then existing." (emphasis mine)

and he went on to say -

> "..... and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order." (Order 8 r 1) (emphasis mine)

In Kleinwort Benson Ltd v. Barbrak Ltd (1987) 2 All E.R. 289 the House of Lords unanimously, per Lord Brandon, classified into three categories the cases in which, on an application for extension of the validity of a writ (renewal of a writ), questions of limitation of action may arise, albeit the writ had been issued before the relevant period of limitation had expired. These categories he identified as:

1. Cases where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired.

2. Cases where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired.

3. Cases where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired.

Lord Brandon for a unanimous House then said at p. 294 -

> "In both category (1) cases and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and, if he does so the defendant will not be able to rely on a defence of limitation. In category (1) cases but not category (2) cases it is also possible for the plaintiff before the original writ ceases to be valid to issue a fresh writ which will remain valid for a further 12 months. In neither category (1) cases nor category (2) cases, therefore, can it properly be said that at the time when the application for extension is made, a defendant who has not been served has an accrued right of limitation. In category (3) cases, however, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In category (3) cases, therefore, it can properly be said that, at the time when the application for extension is made, a defendant on whom the writ has not been served has an accrued right of limitation." (underlining mine)

The instant case is obviously a category (2) case and when the above-stated principle is applied thereto it becomes abundantly clear that the only ground on which it is sought to impeach the refusal of Orr J., to set aside the order for renewal of the writ made by Ellis J., cannot be supported. Neither at the time of the issue of the writ nor at the date of renewal was there an accrued right of limitation. If the renewal had been refused it is possible that the appellant could still have been served with the original writ before its expiry and no defence under the Act could be raised.

No ground was stated for argument before Orr J., that Ellis J., had erred in accepting the affidavit of Jeffrey Mordecai to which was exhibited the letter of Beresford Richards the process server as satisfying him that reasonable efforts had been made to serve the appellant. Thus no submission could be advanced, nor was any advanced before us that Orr J., should have set aside the order for renewal on this basis. In this connection Lord Brandon in Kleinwort Benson Ltd (supra) at p. 299 said:

> "The old rule in force before 1962, then Order 8 rule 1 expressly made the exercise by the court of its power to renew a writ conditional on the court being satisfied either that reasonable efforts to serve the writ had been made or that there was some other good reason for renewal."

In conclusion when the application for renewal came before Ellis J., he could not properly consider any prejudice to the appellant based on any accrual of a defence under the Public Authorities Protection Act as the defence had not then accrued. He considered the affidavit in relation to the ground on which renewal was sought. He was satisfied that the ground was substantiated and he ordered the renewal of the writ. Before, Orr J., a ground was advanced for setting aside the order for renewal which is not well founded in law. The same ground is advanced before us and for the same reason cannot succeed.

Subsequent to the hearing of submissions, Mr. Emil George brought to our attention the unreported case of C.A. 49/77 Muir v. Morris dated 18th June 1979 which is clearly not in his favour. Speaking on behalf of my brothers, we are grateful to learned counsel. That was a case where the period of limitation had already run its course and to allow a renewal, would deprive the defendant of the protection of

the defence under the statute of limitation. The court therefore set aside the order of renewal which had been made. This case is therefore consistent with what I have said before.

It is unnecessary for me to express any fully considered opinion on the submission of Mr. Gordon Robinson that Orr J., would in any case have had no jurisdiction to set aside the ex parte Order of Ellis J. Suffice it to say that the cases referred to in this judgment do show a jurisdiction exercised by a master to set aside an order for renewal made ex parte by another master or a judge and if no such express provision exists in our Judicature (Civil Procedure Code) Law it may well be that consideration could be given to invoking section 686 thereof.

For the reasons given herein I would dismiss the appeal.

CAREY, J.A.

For the reasons stated by Campbell, J.A., I entirely agree that the appeal should be dismissed with costs to the respondent. I have one reservation. With respect to a judge of co-ordinate jurisdiction setting aside ex parte orders of their brethren, I considered a similar point in C.A. 10/89 Vehicles and Supplies Limited & Another v. The Minister of Foreign Affairs, Trade and Industry dated June 16, 1989.

WRIGHT, J.A.

I agree with the reasoning and conclusion of Campbell J.A. and have nothing which I can usefully add.