



[2019] JMSC Civ 261

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2018HCV03966**

BETWEEN BERISFORD WATSON CLAIMANT
AND JUDITH BROWN DEFENDANT

Ms. Liane Chung instructed by Nigel Jones and Company for the Applicant/Claimant.

Heard November 4, 2019.

Civil procedure – Application to extend the validity of the claim form and application for an order for service by a specified method – Whether multiple extensions might be granted on hearing one application to extend the validity of the claim form – Rule 8.15(2) of the Civil Procedure Rules.

MASTER N. HART-HINES

[1] On November 4, 2019 I heard an application to extend the validity of the claim form, pursuant to Rule 8.15 of the Civil Procedure Rules (hereinafter “CPR”) and an application to permit service by a specified method, pursuant to Rule 5.14 of the CPR. I gave my decision on that date and I promised to put my reasons in writing. I now do so.

BACKGROUND

[2] The genesis of the claim was a motor accident which occurred on August 28, 2013, along the AGR Byfield Highway in the parish of St. Ann. It is alleged by the Applicant/Claimant that his vehicle bearing registration 4040FY was

damaged as a result of a collision with vehicle bearing registration 5710GE which was negligently operated by Defendant. The claim form and the particulars of claim were filed on October 10, 2018, seeking damages in respect of the cost of repair of the vehicle and transportation expenses.

[3] By Ex parte Notice Application (hereinafter “the application”) filed on April 9, 2019, the Applicant/Claimant applied for an order extending the validity of the claim form. The application also sought an order dispensing with personal service and permitting service on Advantage General Insurance Company Limited (“AGIC”), the insurer for a vehicle owned by the Defendant at the time of the accident.

[4] The grounds of the application can be summarised as follows:

1. The Claimant took all reasonable steps to effect service on the Defendant without any success.
2. The Defendant is insured by AGIC and the claim form and other documents are likely to come to the Defendant’s attention if served on AGIC. Further, by virtue of its rights of subrogation, AGIC may take conduct of the proceedings.
3. It is expedient and in the interests of justice to grant the application.

[5] The application was supported by an affidavit sworn by Cindikay Graham, Legal Assistant at Nigel Jones and Company, filed on April 9, 2019. The affidavit stated that on or about November 15, 2018 the Claimant gave instructions to a Process Server, Loren Sortie, to serve the claim form and other accompanying documents on the Defendant. The Defendant was not located at her last known address in St. Ann. Though there is no affidavit sworn by the Process Server, Ms. Graham stated that she has been informed that further attempts were made to serve the documents on:

1. On January 14, 2019 at 6:30am;
2. On January 23, 2019 at 8:30am;
3. On February 8, 2019 at 7:00am;
4. On March 12, 2019 at 5:45pm; and
5. On March 19, 2019 at 3:59pm.

[6] Ms. Graham stated that the Claimant took all reasonable steps to trace the Defendant and effect service within the prescribed period but the attempts to locate the Defendant were unsuccessful. In the circumstances, permission is sought to serve the claim form and accompanying documents on AGIC. It is said that the Defendant's motor vehicle was insured at the time of the accident by AGIC and that Notice of Proceedings were served on AGIC on October 12, 2018, and the insurance company accepted same. It is believed that service on AGIC would cause the claim form to come to the Defendant's attention.

[7] The claim form expired on April 10, 2019. The claim became statute barred on August 28, 2019. As aforesaid, the application was filed on April 9, 2019. The Civil Registry first fixed this application for hearing by on November 4, 2019, seven months after the application was filed.

THE ISSUES

[8] The issues in this case are as follows:

1. Has the Applicant demonstrated that he had taken all reasonable steps to trace the Defendant and to serve the claim form on her?
2. Could two six month extensions be granted in respect of a single application to extend the validity of the claim form?

[9] A third issue is always a factor to consider when a claim has become time-barred, and it is whether it is appropriate to grant an order extending the validity of the claim form if this would deprive the Defendant of a limitation defence. Though decision in this case turns on the second issue identified above, brief mention will be made of this third issue as well.

THE LAW AND ANALYSIS

[10] For the purpose of this application, the relevant portions of Rules 8.14 and 8.15 of the CPR provide as follows:

"8.14 (1) The general rule is that a claim form must be served within 6 months¹ after the date when the claim was issued or the claim form ceases to be valid.

¹ Pursuant to the **Civil Procedure Rules Amendment Rules 2018**, the life of the claim form was reduced from 12 months to 6 months effective January 15, 2018.

“8.15 (1) The claimant may apply for an order extending the period within which the claim form may be served.

(2) The period by which the time for serving the claim form is extended *may not be longer than 6 months on any one application.*

(3) An application under paragraph (1)

(a) must be made within the period

(i) for serving the claim form specified by rule 8.14; or

(ii) of any subsequent extension permitted by the court, and

(b) may be made without notice but must be supported by evidence on affidavit.”

(4) The court may make an order for extension of validity of the claim form only if it is satisfied that

(a) the claimant has taken all reasonable steps

(i) to trace the defendant; and

(ii) to serve the claim form, but has been unable to do so; or

(b) there is *some other special reason* for extending the period. (My emphasis)

Has the Claimant taken “all reasonable steps” to serve the Defendant?

[11] The Court was required to consider whether the Applicant had demonstrated that he had taken “all reasonable steps” to trace the Defendant and to serve the claim form on him, as stipulated by CPR Rule 8.15(4)(a). In determining whether the Applicant has satisfied the test in the rule, the Court must consider the nature and number of attempts made at service, and the reason proffered for the failure to serve the claim form within the six-month period specified by that rule.

[12] The test of whether the Claimant or those instructed by him have taken all reasonable steps in compliance with Rule 8.15(4)(a) of the CPR is an objective one, having regard to the circumstances. In ***Drury v British Broadcasting Corporation and another*** [2007] EWCA Civ 497 Smith LJ considered what was required of a claimant and stated this at paragraph 37:

*“37. ... It seems to me that the right approach is to consider what steps were taken in the four-month period and then to ask whether, in the circumstances, those steps were all that it was reasonable for the claimant to have taken. **The test must...be objective**; the test is not whether the claimant believed that what he had done was reasonable. **Rather it is whether what the claimant had done was objectively reasonable, given the circumstances that prevailed...**” (My emphasis)*

[13] The reason proffered by the Claimant for the failure to serve the claim form, is that he experienced difficulties in serving the claim form. I am satisfied,

based on the evidence before me, that reasonable attempts were made to serve the claim form. However, the Court would expect to see more detail in relation to the names of other residents spoken to and any other enquiries made. An affidavit from the Process Server indicating the attempts made to serve the claim form on the Defendant is therefore what is required. Nonetheless, in this instance I am content to accept the evidence of Ms. Graham that all reasonable attempts were made to serve the claim form. However, this is but one consideration for the Court under CPR Rule 8.15.

Could two six month extensions be granted in respect of one application?

[14] The Court must also be satisfied that the application to extend the time for compliance with CPR Rule 8.14 was filed within the period specified for service of the claim form, that is to say, the application to extend the time for service of the claim form must be filed

1. within the six month life of the claim form, or,
2. where a six month extension of time was previously permitted by the court, an application for a subsequent extension must be filed within that six month period of extension previously granted by the court.

[15] Rule 8.15(2) of the CPR permits one six-month extension to be made in respect of any one application. This means that where an application has been made to extend the life of the claim form, but the application has not yet been heard, and it is apparent to the Applicant that the claim form or the additional six month period sought is about to expire, a second application must be filed for a further extension. The affidavit in respect of the second application ought to set out what transpired since the date of filing the first application. This could include a brief statement that the Applicant was awaiting a date for the hearing of the application. This is what was required in the instant case. While this might seem onerous, it seems to be what is required as our CPR goes not give an applicant permission to apply for an extension after the time for service of a claim form has elapsed (unlike the English CPR 7.6(3)).

[16] It seems to me that the drafters of our CPR were concerned to end an era of

delay in litigation, and thought it prudent not to give the Court jurisdiction to retrospectively extend the time for service of a claim form, unless (1) the claim form is extant at the date of the hearing of the application or (2) there is an existing application that can renew the claim form by six months, up to and including the hearing date. Once the claim form has expired and there is no pending application to extend it in compliance with Rule 8.15(3), it cannot be resuscitated or resurrected.

- [17] In the instant case, only one application was filed seeking one six month extension. However, by the time the application came to be heard, more than six months had elapsed since the claim form expired. A second application would have been required in order to grant a further extension of the validity of the claim form up to the date of the hearing and beyond that date.

The overriding objective and prejudice to the Defendant

- [18] Finally, the Court must also be guided by the overriding objective and dispense justice to both parties. This means that in considering the application for an extension, the Court must be mindful of a defendant's right to rely on a limitation defence. I must also assess the balance of prejudice between the parties.

- [19] By way of observation, even if there been two applications filed in the instant case, it would not have been appropriate to grant an order extending the validity of the claim form beyond the date of the expiration of the limitation period, unless there was an exceptional reason to do so. Such an order would have deprived the Defendant of a limitation defence. Even if the extension of the time for serving a claim form is just outside the limitation period, it would deprive the defendant of his limitation defence. This defence should not be circumvented except in exceptional circumstances. In ***Bayat and others v Cecil and others*** [2011] EWCA Civ 135 at paragraphs 54 and 55, Stanley Burnton LJ said:

"54. ... in the law of limitation, a miss is as good as a mile. ... The primary question is whether, if an extension of time is granted, the defendant will or may be deprived of a limitation defence."

*“55. It is of course relevant that the effect of a refusal to extend time for service of the claim form will deprive the claimant of what may be a good claim. **But the stronger the claim, the more important is the defendant’s limitation defence, which should not be circumvented by an extension of time for serving a claim form save in exceptional circumstances.**” (My emphasis)*

[20] The requirement in CPR Rule 1.2(a) that the Court ensure that “*the parties are on an equal footing*” essentially means that there should be 'equality of arms'. Each party must have a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage. An order extending the validity of the claim form after the claim is time-barred would place the Defendant at a substantial disadvantage.

[21] The requirement CPR Rule 1.2(d) that the Court ensure that cases are “*dealt with expeditiously and fairly*” essentially means that cases must progress swiftly and time limits stipulated in the CPR must be strictly observed, unless there is good reason to depart from them and it is fair and just to do so. In seeking to deliver justice, there should be equality in treatment, proportionality and procedural fairness in applying the rules of the CPR. The coming into effect of the CPR in Jamaica in January 2003 was expected to herald the end of an era of delay in litigation, through judge-driven case management. It was not the expectation that a Court would sanction delay or assist a tardy litigant. Neither is it expected that the rules of procedure would be used to enlarge, modify or abridge any right conferred on the parties by substantive law. Consequently, if a defendant’s right to be served with proceedings within the statutory period of limitation and the period for the validity of the claim form is regarded as a “fundamental” right², it cannot be abridged without an exceptional reason. Where no exceptional reason has been proffered as a basis on which to extend the validity of the claim form after a claim is time-barred, any such order would not be in keeping with the spirit of the CPR and the overriding objective.

² See *Dagnell and Another v J.L. Freedman & Co. (a firm) and others* [1993] 1 W.L.R. 388, per Lord Browne-Wilkinson at page 396D.

[22] An order granting an extension would cause prejudice to the Defendant by the loss of a statute of limitation defence. In contrast, the prejudice to the Claimant is his inability to seek redress from the Defendant in respect of any injury sustained during the accident. Nonetheless, I am guided by the decision in ***Hashtroodi v Hancock*** [2004] EWCA Civ 652, where Dyson LJ said (at paragraph 21) that the three-year limitation period for personal injury claims in England and the four month time limit within which to serve the claim form were already “*generous*”. He further said that these time limits should not be overlooked when considering an application to further extend the time in which to the claim form. In this country the limitation period is six years, and is more than generous. The balance of prejudice would therefore be in favour of the Defendant and it would not be just to extend the life of the claim form after the expiration of the limitation period.

Delay by the Court Registry in fixing the application for hearing

[23] I am mindful that the delay in the fixing of the application for hearing might be attributable to the Court Registry. However, I do not find that the delay by the Civil Registry in fixing the hearing date would amount to “some other special reason” for extending the period pursuant to Rule 8.15(4)(b) or an exceptional circumstance to allow an extension of the claim form beyond the period of limitation. In my opinion, the Claimant’s Attorneys could have pursued the Court Registry for a hearing date before the claim form expired. Rule 1.3 of the CPR provides that the parties have a duty to help the Court to further the overriding objective of enabling the court to deal with cases justly and expeditiously. As the Claimant’s Attorneys knew when the claim would become statute barred and knew when the claim form would expire, it would be their responsibility to write to the Registrar and to seek to have the application for service by a specified method fixed for hearing before the claim form expired. That aspect of the application cannot now be granted as it is not appropriate to extend the validity of the claim form. This judgment therefore does not address the application pursuant to Rule 5.14 of the CPR which requires the Court to have regard to other considerations.

CONCLUSION

[24] The Applicant satisfied the requirements of CPR Rule 8.15(4)(a) in that all reasonable steps had been made to trace the Defendant and to serve the claim form. However, the claim form could not be extended more than six months to October 10, 2019, unless a second application was filed, and none was filed in this case.

[25] Even if it were possible to extend the validity of the claim form to a date beyond October 10, 2019, it would not be appropriate to do so, as this would deprive the Defendant of his right to a limitation defence which accrued from August 28, 2019.

ORDERS

[26] The application to extend the validity of the claim form is refused.

[27] The validity of the claim form can only be extended by six months in any one application (pursuant to Rule 8.15(2)). The validity of the claim form could only be extended to October 10, 2019. The Court cannot make an order further extending it without a second application being made before the expiration of the claim form or subsequent extension (Rule 8.15(3)).

[28] Leave to appeal granted.