



[2022] JMSC Civ 113

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

**CIVIL DIVISION**

**CLAIM NO 2015 HCV 04408**

<b>BETWEEN</b>	<b>ORAL WILLIAMS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DIAMOND PAINTS MFG COMPANY LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Ms Tamika Jordan and Ms Toni Ann Farquaharson instructed by Barbara Barnaby Attorney-at-law for the Claimant/Applicant

Mr Jerome Spencer and Mr Gilroy English instructed by Gilroy English & Co Attorneys-at-law for the Defendant/Respondent.

Heard: June 20, 2022 and July 13, 2022

***Validity of Claim Form - Whether Amended claim form takes life from the claim form – when service is irregular does that bring the matter to an end – does failure to serve Form Defence with claim form nullify the claim – CPR 8.16***

**JUSTICE T MOTT TULLOCH-REID**

**Background**

1. On March 3, 2020 the Defendant applied to set aside a default judgment entered against it in favour of the Claimant. The ground on which the application was made is that the conditions for entry of Default Judgment had not been satisfied at the time the request for same was made pursuant to Civil Procedure Rule (“CPR”)

13.2. CPR 13.3, that the Defendant had a real prospect of successfully defending the claim, was put forward as an alternative ground.

2. The application was heard on July 15 and 23, 2020 and judgment delivered on August 4, 2020. The Default Judgment was set aside on the basis that it was irregular and had to be set aside as of right. Although the Claim Form and the Particulars were served by facsimile, I found that the service was irregular, because the form defence which was to be attached to the Claim Form did not form a part of the service package as is required by CPR 8.16. No additional orders were made.
3. That order having been made, the Registrar, on November 30, 2022 scheduled a Case Management Conference. The Claimant filed an application for court orders on March 10, 2022 with Affidavit of Barbara Barnaby in Support. In the application, the Claimant sought the following orders:

*“1. The Further Amended Claim Form filed on the 28<sup>th</sup> day of January 2019 be permitted to stand.*

*2. The Defendant shall file a Defence within fourteen (14) days of the date of the Order.*

*3. The matter shall proceed to mediation and the parties must attend within ninety (90) days of the date of the Order....”*

4. The application has several bases. The ground that is most relevant to the application is ground 4 which states that based on the orders that I made in relation to the Defendant’s application to set aside default judgment,

*“... the Claimant seeks directions for further action to be taken in his claim given that no Orders were made at the hearing of the application to set aside default judgment on August 4, 2020 in this regard.”*

5. Ms Barnaby in her affidavit in support of the application indicates that since the default judgment was set aside, consequential orders need to be made for the progress of the matter. At paragraph 6 of her affidavit she indicates that the default judgment was set aside as of right on the basis that the form defence was not served. She goes on to say that since the default judgment was not set aside on the basis of any issues pertaining to service, and the defendant had received sufficient notice of these proceedings, the Further Amended Claim Form filed on January 28, 2019 should be permitted to stand. Ms Barnaby's evidence is that the claim became statute barred as at October 26, 2015 and as such the initiating documents cannot be re-served. Service of the Claim Form and Particulars of Claim should be dispensed with in the interest of justice particularly in light of the fact, that I had previously found that they had been served.

#### **Submissions on behalf of the Claimant**

6. Ms Jordan relies on the written submissions prepared by Ms Barnaby included in the Bundle of Submissions filed on May 13, 2022. Ms Barnaby argues at paragraph 15 of the submissions that having concluded in my reasons that the default judgment should be set aside as of right, I gave no further reasoning to state or suggest that the claim was dismissed. She submits that the claim is therefore not dismissed and the matter should proceed to case management conference. She states that without the express statement of the Court that the claim is dismissed the Defendant has no basis to argue that the claim is dismissed. She relies on the case of **Vendryes v Keane and anor [2011] JMCA Civ 15** to support her submission that a claim is not dismissed on the setting aside of a default judgment.
7. Paragraph 18 of the written submissions quotes from paragraph 29 of the judgment of Harris JA in the **Vendryes case** which reads as follows:

*“he had an obligation to have taken into account the non-service of the respondents’ amended pleadings. The appellant’s right to defend would*

*only arise after service. Consequently, subsequent to the service of these pleadings, the appellant would, then and only then, be required to file a defence. She may do so within 42 days after the date of service as prescribed by rule 10.3(1) of the CPR”.*

Paragraph 19 of the written submissions goes on to say that after the setting aside of the default judgment, the court should consider the issue of service of the pleadings and then order the filing of a defence by the Defendant.

8. Ms Barnaby argues at paragraph 22 of the written submissions that since I was satisfied that the pleadings had been served by fax, the issue of service is not in dispute. The Court was therefore authorised to employ case management powers, and the claim is now at the stage where I should order that a defence be filed.
9. In her oral submissions, Ms Jordan argued that setting aside in the absence of an attached document does not invalidate the claim and that setting aside for the absence of a document is different from setting aside for service. The claim, she argues, was still valid when the default judgment was set aside because the issue was not non-service but because the defendant had not received the form defence. Ms Jordan further submitted that the Court of Appeal has ruled that if there is no service and the statute of limitation and validity of the claim have expired, the claim falls by the way. That would go to the substance of the claim. However, when a document is not served with the claim form, the issue becomes a procedural one and therefore does not invalidate the original claim form.
10. Ms Jordan has also made submissions with respect to the re-service of the Claim Form in October 2016. I need not relook on that issue as I already commented on the “re-service” of the Claim Form, in my August 4, 2020 decision.
11. Ms Jordan has asked me to consider the following cases in coming to my decision:

- a. **Marsha Salmon v Neville Scott [2019] JMSC Civ 18**

- b. **Kerry-Ann Barnaby-Stoddart v Renville Barker [2019] JMCA Civ 118**
- c. **Dorothy Vendryes v Richard Keane and anor [2011] JMCA Civ 15; and**
- d. **Rohan Smith v Elroy Pessoa and anor [2014] JMCA App 25**

I have considered all the cases relied on in coming to my decision.

### **Submissions on behalf of the Defendant**

12. Mr Spencer submitted that the attempt by Ms Jordan to draw a distinction between the failure to serve Claim Form and Particulars of Claim on the one hand, and the failure to file the said documents without complying with Part 8.16 of the CPR on the other hand is of no significance for the purposes of setting aside the default judgment. He argues that the **Vendryes**, **Nanco** and **Pessoa** decisions make it clear that the default judgment must be set aside if the claim form is served without the supporting documents required by CPR 8.16. While **Vendryes** said service without the supporting documents made the claim itself a nullity, **Nanco** and **Pessoa** have clearly articulated that the failing in question was an irregularity. He said in this case in which service was irregular, the irregularity could only be cured with a re-service of the Claim Form, Particulars of Claim and all the supporting documents. That is what Morrison JA said at paragraph 37 of the **Nanco decision** and this was reiterated by Phillips JA at paragraphs 31-32 of **Pessoa**.

13. He further submitted that when I made my decision in August 2020, there was no need for me, to order a defence to be filed by a certain time, as service was irregular and the documents had to be re-served and re-service would have to be done during the time that the Claim Form would have to be served pursuant to the CPR. That did not happen. The only recourse is for the Claimant to bring a new claim and he cannot do this now as the limitation period has passed.

### **Further Submissions of Ms Jordan**

14. Ms Jordan has also asked me to dispense with service. I would not be doing that at this time especially since I have already ruled that there was service. She relied

on the **Barnaby-Stoddart case** to support her submissions. I do not believe that the case is helpful. In that case the claim form was not served at all and the Court, in what was described as “the exceptional circumstances” in that case, exercised its discretion and dispensed with service. I do not have to make that decision now. In 2020, I had already ruled that there was service by fax.

### **The case law**

15. I will begin my analysis of the issues with a review of the **Vendryes case** on which both the Claimant’s and the Defendant’s attorneys-at-law rely. In that case the Claim Form and Particulars of Claim were served on the Defendant. They were however served without the Prescribed Notes to the Defendant, Form Acknowledgement of Service and Form Defence. Notwithstanding this shortcoming, a default judgment was entered against the Defendant. The Defendant applied to set aside the Default Judgment on the basis that the judgment was wrongly entered due to the Claimants failure to comply with CPR 8.16 which is mandatory in nature. Harrison JA in agreeing with the decision of Sykes J (Ag) as he then was to set aside the default judgment had this to say at paragraph 12 of the judgment

*“Rule 8.16(1) expressly specifies that at the time of service the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word “must” as used in the context of the rule is absolute. It places on a claimant a strict and unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2 the default judgment must be set aside.”*

16. At the hearing of the matter, having set aside the default judgment, Sykes J (Ag) then held a Case Management Conference and heard arguments for summary judgment to be entered. The Court of Appeal did not agree with that course of action. At paragraph 27 of the Judgment, Harrison JA said

*“The claim form upon which the learned judge proceeded lacked validity, in that it was not in compliance with rule 8.16(1). It would have been a nullity and ought not to have been acted upon. The averments in the amended claim form and particulars of claim related back to the date of the filing of the original claim...”*

17. In the **Pessoa case** the application to set aside a default judgment was successfully made by the Defendants and the Acknowledgment of Service and Defence filed, allowed to stand as being filed in time. In that case Phillips JA at paragraph 31 of her judgment referred to Morrison JA in the case of **B & J Equipment v Nanco** who in commenting on the **Vendryes case** had this to say:

*“[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 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... 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. 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 same claim form accompanied by the requisite documents and by that means fully comply with the rule...”*

Justice Morrison also commented that Justice Harrison’s statement that the claim form in the **Vendryes case** was a nullity, was *obiter*.

## Analysis

18. CPR 13.6 provides that

*“When judgment is set aside under rule 13.3 the court must treat the hearing as a case management conference unless it is not possible to deal with the matter justly at that time.”*

I raise this point here because Ms Barnaby has suggested that subsequent to my setting aside the default judgment I ought to have held a Case Management Conference to give directions as to how the matter was to proceed. I am only duty bound to do that if the default judgment was set aside where the defendant showed he had a real prospect of success. That was not the basis on which the default judgment was set aside. The default judgment was set aside as of right because service was irregular because a mandated document was missing from the bundle of initiating documents served. The default judgment was set aside pursuant to CPR 13.2. There is no requirement for a case management conference to be held in circumstances where the default judgment was set aside as of right.

19. In the usual course of things, what is required when the Court finds that the Claim Form along with all the other documents required pursuant to CPR 8.16(1) to be served with it, have not been served, is for the Claimant to re-serve it **IF** the claim form continues to be valid. If the validity of the claim form has expired and the limitation period is still current, the claimant may file a new claim form and serve it. This was not the case before me. In the case before me there was service of the original documents but the service was irregular. The form defence was not attached. What is required in circumstances such as these, is for the Claimant to file amended documents to include the missing documents and serve the Defendant with the amended documents. Technically there would be no “re-serving” of the initiating documents as they were already served.



20. In my opinion the procedure that must be followed where service was done but was irregular because the form defence was not attached to the claim form as is required by CPR 8.16 is:

- a. The claimant must file an amended claim form to which the form defence should be attached. That action is necessary because the claimant could not simply attach the form defence to the already filed claim form and serve it. The Registry would have to be apprised of the fact that a claim form which has all the CPR 8.16 documents attached to it has been filed. The only way to achieve this, would be to file an amended claim form. The amended claim form with the form defence attached would then become a part of the court's file.
- b. Having filed the amended claim form with the form defence attached, the claimant would then be required to serve it on the Defendant.

21. The amended claim form would have to be treated in much the same way as any other amendment to the claim form is treated. The only difference here being that the amendment is as to form, not to substance. It is in essence an amendment to correct a procedural irregularity. Since it is to correct a procedural irregularity, I do not believe that Part 19 of the CPR which deals with amendments to the claim would apply. It is amendments as to substance that are strictly affected by Part 19, as those amendments go to the basis of the claim. Amendments to correct procedural errors do not.

22. Like every other amended claim form, the amended document gets its life from the original document. In this case, I already held there was service by fax. Since irregularity of service does not nullify the claim form, the claim form continued to exist and be valid. It is from that valid document that the amended claim form gets its life. And it is on that basis that service of the amended document will be allowed. But what of the limitation you may ask? Again I will emphasise that this

is an amendment to correct an irregularity as to form and not substance. The amendment would not affect the claim itself. If the Claimant wishes to make any amendment to the substance of his claim, he must seek the permission of the court if the limitation has already passed. In this case, it has.

23. Having made my order to set aside the default judgment, it was for the Claimant to take the steps it deemed fit to bring the matter to the Defendant's attention properly. If it failed to do so, the Defendant had no duty to take steps. If the Defendant has not been properly served, there would be no need for him to file a defence. There would be no need to have a case management conference because there would be no live issues before the Court that it would need to deal with and/or sort out in anticipation of a trial.

24. In **Stoddart**, the claim form was not served. It would require service. In the case before me, as was the case in **Nanco**, the claim form was served but served without the accompanying documents. It had to be served with the form defence attached to it in order to regularise the service. I agree with Mr Spencer that service of the claim form with the defence form attached has to be done during the validity of the claim form. Is the claim form in this case still valid? **Nanco** has made it clear that irregular service does not invalidate the claim form. When the claim form was filed in September 2015, time stopped running as it relates to the limitation period. Time started to run for service. In 2015, the claim form had to be served within 12 months of it being filed. When the claim form was served by fax in September 2016, time stopped running as to the validity of the claim form. This means that the claim form filed on September 2015 and served in September 2016, remains valid.

25. I do not agree with Mr Spencer that a new claim has to be filed. The September 2015 claim form remains valid. Service is to bring the content of the initiating documents to the attention of the Defendant. This was done. The attached forms per Rule 8.16 are to alert the Defendant as to the steps he is required to take and

provide him with the documents which would allow him to take them. The Defendant knew what case it had to meet since September 2015. It just did not receive the form defence. The Defendant has not been penalised for failing to file a defence, nor could it be since service on it has not yet been regularised. In the circumstances, it would not be required to file a defence and so the Claimant could not take any steps against it. All that can be done at this stage is for the Claimant to file an amended claim form with all the Part 8.16 accompanying documents attached to it and serve that document on the Defendant to regularise service. He has not done so, but has now by way of application asked the Court for directions on how to proceed. I will provide the necessary directions in my decision, which in my view, the Claimant's attorneys-at-law ought to have known.

**Should the Further Amended Claim Form filed on January 28, 2019 be allowed to stand?**

26. The Claimant has asked the Court to permit the Further Amended Claim Form filed on January 28, 2019 to stand. I cannot allow that. It still does not have the Form Defence attached to it. The Claimant attempted 3 times to prepare the claim form. There is the Claim Form filed on September 16, 2015 which does not have the Form Defence attached to it, there is the Amended Claim Form filed on June 1, 2018 which does not have the Form Defence attached to it and there is the Further Amended Claim Form filed on January 28, 2019 which also does not have the Form Defence attached to it.

27. This is the difficulty I have with this case. The Claimant has been delinquent with respect to his approach to this case from the beginning. The cause of action arose in October 2009, the Claim Form was not filed until September 2015 just one month before the limitation period would have expired and it was filed without complying with the mandatory requirements of CPR 8.16. When I made my order in August 2020, the Claimant's failed to take any steps with respect to correcting the irregularity in the service. If the Registrar had not set a CMC date and prompted them into action, the application for directions would probably not have been made.

The application was made approximately two years from the date of my 2020 decision. The only thing that saved this claim is the fact that the Defendant took no steps to have the claim struck out for want of prosecution. I do not believe that it is the responsibility of the Judge who hears the matter in cases where service is irregular to give directions to the Claimant as to how it should proceed without an oral or written application for those directions to be made. If the Court gives those directions without an application being made by, in this case the Claimant, in my opinion, it denies the Defendant from taking any step which it wishes to take in defending the claim, when the Claimant fails within a reasonable time, to do what the CPR or common sense would require him to do.

### **Decision**

- a. The Claimant's attorneys-at-law are to file a 2<sup>nd</sup> Further Amended Claim Form with the Prescribed Notes to Defendant, Form Acknowledgement of Service and Form Defence attached to it and serve it on the Defendant's attorneys-at-law on or before July 22, 2022, failing which his statement of case will be struck out.
- b. The Defendant's attorneys-at-law are to file and serve a Defence to the Claimant's claim on or before October 10, 2022.
- c. The parties are to attend mediation on or before January 13, 2023. If any party fails to participate in the mediation process, that party's statement of case will be struck out.
- d. Should mediation be unsuccessful the parties are to attend Case Management Conference on March 15, 2023 at 11:00am for half hour by videoconference. The Claimant and a representative from the Defendant company are to be present at the Case Management Conference along with their attorneys-at-law failing which the absent party's statement of case will be struck out.
- e. The Further Amended Claim Form filed on January 28, 2019 is not allowed to stand.

- f. The Claimant is to pay the Defendant costs in the application, which costs are to be taxed, if not agreed. The Registrar is to tax costs on October 11, 2022 @ 2:30pm for one hour.
- g. The Claimant's attorney-at-law is to file and serve the Formal Order.