



[2021] JMSC Civ. 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV03509

BETWEEN	JULIETTE WRIGHT	CLAIMANT
AND	ALFRED PALMER	1ST DEFENDANT
AND	JASON SALMON	2ND DEFENDANT

IN CHAMBERS

Mrs. Winsome Marsh Attorney-at-Law for the Claimant/Applicant

Heard: January 7, 2021, February 11 & 18, 2021

Civil Procedure – Claim form filed shortly before the expiration of the limitation period - Application to extend the time to serve a claim form filed within the life of the claim amended application filed after the claim had expired- Whether the application can be granted where the defence of limitation has accrued.

MASTER S. ORR (Ag)

BACKGROUND TO THE APPLICATION

- [1]** This application brings into question the principles to be applied by the court in the exercise of its discretion to extend the validity of an unserved claim form in a case where the limitation period for the claim has expired.
- [2]** CPR 8.14 provides that a claim form must be served within six months from the date of issue or it ceases to be valid. CPR 8.15 permits the court to extend the time to serve the claim form.

- [3] CPR 8.15 (3) and (4) are specific. An applicant must apply to extend the period to serve the claim form before the claim expires or before any extension given by the court expires. The court can make an order for the extension of the validity of the claim form only where the claimant is able to satisfy the court that all reasonable steps have been made to trace the Defendant and all reasonable steps have been taken to serve the claim form, without success. There is also provision for some other special reason for extending the claim form.
- [4] Juliette Wright's claim is for damages for negligence arising from a motor vehicle accident on December 3, 2013. She was a passenger in the 1st Defendant's public passenger motor vehicle driven by the 2nd Defendant.
- [5] Her claim was filed on August 29, 2019 shortly before limitation expired on December 2, 2019. Her application to extend the time to serve the claim form was filed on February 25, 2020 during the life of the claim. This application sought an order *"That the validity of the claim be extended for a period of six months from the date hereof."*
- [6] An amended application was filed on August 3, 2020, after the claim had expired and also after the limitation period had expired. This amended application sought an order that *"The validity of the claim form be extended for a period of six months from February 28, 2020 and further extended for a further period of six months from August 28, 2020."*
- [7] In her submissions counsel explained that the amended application was made to ensure that at the hearing of the application, the court would grant the order to take effect at time before the original claim form expired and, secondly, to seek a further extension as the extension initially sought would in all likelihood have expired before the application was heard.
- [8] Both orders sought a further order for substituted service on the 1st Defendant by way of service on his insurer.

- [9] The application was supported by an affidavit from counsel and also an affidavit from the Bailiff for the parish St. Mary. He outlined that he made five visits to the 1st Defendant's home in September and October 2019 and January 2020. He further stated that on each occasion no one was present. On one such visit, he spoke with the 1st Defendant's neighbour who is also his cousin and he learnt that the 1st Defendant was overseas. He went on to say that he has known the 1st Defendant for 10 years and therefore wished to make a further attempt to serve him with the claim.
- [10] The amended application was heard on January 7, 2021 at which time both the claim and the limitation period would have expired. In the circumstances I asked counsel to consider whether the application was affected by the Limitation of Actions Act.

THE SUBMISSIONS

- [11] Mrs. Marsh was of the view that the act did not in any way affect the application and pointed out that another Master had granted an order on a similar application. Notwithstanding, I invited her to provide me with any authorities on the effect of the limitation period on applications to extend the time to serve the claim/to extend the validity of a claim after the limitation period had expired.
- [12] The application was therefore adjourned to February 11, 2021 but unfortunately I did not receive Mrs. Marsh's submissions until shortly before the application was to be heard and it was therefore further adjourned to February 18, 2021.
- [13] Mrs. Marsh filed submissions wherein she relied on ***Glasford Perrin v Donald Cover***, SCCA 77/2017 (unreported) which she submitted permitted a Claimant to extend the time to serve the Defendant which had the effect of extending a claim form when at the time the order was made the limitation period had already expired.

- [14] Counsel also submitted that the unanimous decision of that court is binding on the issue as to whether the court could extend the validity of the claim beyond the limitation period once the Applicant had satisfied the requirements of CPR8.15
- [15] Of particular importance to this case she said was the fact that Pusey, JA (Ag) as he then was at paragraphs [9] and [10] of his judgment highlighted that :

“... there was no dispute that the claim form was valid at the time of the application since it was made “during the currency of the claim”. Further, that the application could properly be heard after the 12 month’s lifetime of the claim form had expired, once it had been made before the expiration of the claim form.”

“The learned Judge (Lindo, J (Ag)) was of the view that to allow the respondent to benefit from a statute of limitations defence in these circumstances did not advance the overriding objective of the Civil Procedure Rules 2002”

- [16] She said to make the point clear beyond peradventure, Pusey, JA (Ag) found that the submission that the Defendant would be prejudiced and deprived of the benefit of the statutory defence, where the Claimant had filed the claim shortly before the limitation period expired and failed to act carefully in proceeding with his claim, did not find favour with either courts.

ANALYSIS

- [17] The short facts of that case are that in this court the Claimant commenced a claim for damages for negligence on June 12, 2014. Limitation expired on June 30, 2014, the circumstances giving rise to the cause of action having arose on July 1, 2008.
- [18] At that time a claim form had a life of twelve months and thus the time to serve the claim form would have expired on June 11, 2015. The Claimant’s ex-parte application to extend the time to serve the claim form was filed on June 3, 2015.
- [19] Lindo, J (Ag) as she then was heard the application on July 13, 2015 and made an order extending the validity of the claim for six months from the date that the application was heard. She also made orders for the claim to be served by way of substituted service/an alternative method of service.

[20] There was therefore an unexplained gap between June 11, 2015 when the claim expired and July 13, 2015 the effective date of the renewal.

[21] The Defendant took issue with this gap and after being served with the claim form, he filed a conditional Acknowledgment of Service to challenge the jurisdiction of the court. He subsequently filed a notice of application seeking several declarations. Lindo, J (Ag) who heard the application outlined the orders sought at paragraph [4] of her judgment:

(i) *A declaration that the claim form having expired on June 12, 2015 and not having been extended/renewed by an order taking effect on or before June 12, 2015, the court had no jurisdiction to hear the claim,*

(ii) *That the order of the Supreme Court on July 13, 2015 be set aside as being void and of no effect as it is purported to take effect when the claim form has already expired and that the claim form filed on June 12, 2014 stand struck out as its twelve month lifetime expired on June 12, 2015 and was not renewed on or prior to that date*

[22] At paragraph [5] she summarized the submissions by the parties as follows:

“... the essence of the submissions by the applicant is that the express wording of the order made by the court on July 13, 2015 could not validly extend the claim form which had already expired on June 12, 2015 while the claimant is contending that the court made an order which validly extended the lifetime of the claim form”

[23] The issue of any effect of the Statute of Limitations on the claimant's application was dealt with briefly as a likely prejudice that the Defendant would endure where the application was to stand. There is no indication that the court was asked to consider any detailed submissions on this issue.

[24] At the Court of Appeal the central issue for the court was the ability of a judge to correct an error in an order to give effect to the intention of the court. Indeed Pusey, JA (Ag) as he then was traced several decisions on this subject in his judgment. He addressed the issue of the effect of the limitation period in two short

paragraphs [49] and [50]. On this issue he simply stated that the Appellant's submissions on the statutory defence did not find favour in either court.

- [25] In his analysis, he did not consider the several cases which dealt with the issue of the court's power to renew a claim where at the time the order was to be made the claim itself had expired as also the limitation period for the claim, which is the issue before me.
- [26] I accept that I am bound by the decisions of the Court of Appeal, but I do not agree that the decision in **Glassford Perrin (supra)** can be used as an authority to enable a Claimant to extend the time to serve her claim form after both the claim form and the limitation period have expired. To do so would be to extend the limitation period using the provisions of the CPR particularly where our courts have rarely treated it as just to deprive a Defendant of a statutory defence.
- [27] If I am wrong in this regard, in **Tikal Limited & Wayne Chen v Everley Walker** [2020] JMCA Civ 33 that court considered the effect of the Statute of Limitations on CPR 19.4 which makes provision for a party to be added after the end of a limitation period.
- [28] Morrison, P said that CPR 19.4 by its clear terms presupposed an existing power to add or substitute a party to an action already in train after the expiry of the relevant limitation period. He echoed the sentiments of Sykes, J (as he then was in **Peter Salmon v Master Blend Foods Limited** (unreported) CL 1991/S 163 October 26, 2007,and Simmonds, J (as she then was) in **Shawna Williams v Garry Gilzene**, (unreported) 2009 HCV5631 May 3, 2003 and the earlier decision by Edwards, J (as she then was) in **Shawn Baker v O'Brian**. [2002] JMSC Civ 72. He made the point that there is no provision which supports the judicial extension of limitation periods prescribed by legislation. In particular reference to CPR 19.4 he said at paragraph [24]:

“ It is jurisprudential commonplace that subsidiary legislation is entirely derivative of primary legislation and as such, cannot override it”

[29] I accept that I am bound by the decisions of the Court of Appeal, but I do not agree that the decision in **Glassford Perrin (supra)** can be used as an authority to enable a Claimant to extend the time to serve her claim form after both the claim form and the limitation period have expired. To do so would be to extend the limitation period using the provisions of the CPR particularly where our courts have rarely treated it as just to deprive a Defendant of a statutory defence.

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[32] In **Battersby & Others v Anglo American Oil Company Limited** [1945] KB 23 the court considered the ability of the lower court to extend the validity of a writ where the application was made after the writ had expired. The Claimant relied on Or.64, r.7 (which permitted the court to extend time generally) as the authority for the court to extend the validity of the claim although the claim had already expired when the application was made.

- [33] Goddard, LJ gave a detailed judgment which traced several cases dealing with the court's power to extend the validity of a writ where the application was made after the claim had expired. He emphasized the fact that the court had always refused to allow a Claimant to defeat the defence provided by the Statute of Limitations.
- [34] Although the court in that instance was asked to consider an application where the applicant made his application after the writ had expired, he concluded by saying at page 32 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."

- [35] In ***Dr. C.W.Thompson v Administrator General for Jamaica (Administrator for Estate Carol Morrison, deceased)*** (1990)27 JLR 175 the appellate court considered an order refusing an application to set aside an order renewing a writ after the limitation period under the Public Authorities Protection Act had expired, but before the writ itself expired.
- [36] In dismissing the appeal the court considered the court's decision in ***Battersby*** (supra) but was of the view that Lord Goddard's decision established no principle applicable to the renewal of a writ where both the application and the order for renewal were effected during the currency of the writ. Campbell, J.A. said that:

"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 the 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 his)*

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 his)*

[37] Notwithstanding his decision not to follow the reasoning of the court in **Battersby** (supra) on the basis that the court was asked to consider a case where the application was made after the claim had expired, Campbell, J.A nevertheless relied on Lord Brandon’s decision in **Kleinwort Benson Limited v Barbrak Limited** [1987] 2 All ER 289 which is also a case where the application was made after the writ had expired.

[38] Following Kleinwort (supra) he classified 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.

[39] He classified these cases as follows:

- “ 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 limitation period 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 limitation period has expired.”

[40] He went on the quote from Lord Brandon’s judgment at p. 294 where he said:

“ 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 (2) cases but not category (1) 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 be properly said that at the time when the application for extension of time 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.”

[41] In dismissing the appeal Campbell, JA said:

“Neither at the time of the issue of the writ nor at the date of renewal of the writ made by Ellis, J, 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.”

“In conclusion when the application for renewal came before Ellis, J he could not properly consider any prejudice to the appellant based on an accrual of a defence under the Public Authorities Protection Act as the defence had not accrued.” (my emphasis)

[42] A consideration of the court on any application to extend the time to serve the claim form must therefore be whether the Defendant will suffer any prejudice based on any accrued defence under the Statute of Limitations.

[43] Importantly, Campbell, J.A was not concerned with the time when the application was made, but rather when the order extending the time to serve the claim was to be made by the court. This latter period was the relevant time to consider whether the statutory defence accrued to the Defendant.

[44] In the instant case, at the time the application (both the original and the amended application) was heard on January 7, 2021, the 1st Defendant would have by that time had the benefit of an accrued statutory defence of limitation which arose on December 3, 2019. To therefore, extend the time to serve the claim form under CPR 8.15 would be to deprive him of this statutory defence.

[45] I am cognizant of CPR 11.4 which says that an application is deemed to be made when it is filed in the court. This rule is also subject to the provisions of the Limitation Act. In any event as Campbell, J.A said the relevant consideration for the statutory defence was when the order was being made, not when the application was made.

- [46]** The requirements under CPR 8.15(4) are twofold. In addition to making the application before the claim expired, the Applicant must also provide affidavit evidence that the applicant has taken all reasonable steps to trace and serve the Defendant with the claim form.
- [47]** In the affidavit of Stanley Davis filed on June 17, 2020 he outlines the steps taken to serve the 1st Defendant with the claim. He states that he has known the defendant for some ten years. He also states that he learnt from the 1st Defendant's neighbour that he is overseas. There is no indication that he sought to ascertain the whereabouts of the 1st Defendant from anyone else or to ascertain whether the claim could be served on another person who might be in contact with the 1st Defendant, who was not a stranger to him. This would be necessary to trace and serve the Defendant.
- [48]** It is also to be noted that in addition to the application to extend the time to serve the claim form, Miss Wright seeks an order for an alternative method of service or substituted service. She asks that the 1st Defendant be served by way of service on his insurer, Advantage General Insurance Company Limited.
- [49]** It is noteworthy that CPR 5.13 enables a litigant to serve the Claimant by way of an alternative method of service, which they determine will likely bring the claim to the Defendant's attention.
- [50]** CPR 5.13 (3) and (4) outline the steps that the party using an alternative method of service must take after effecting service.
- [51]** CPR 5.13 therefore, provides all Claimants (save and except where the claim is to be served out of the jurisdiction) with an option to serve the claim within the life of the claim and before the expiration of the limitation period, without having to apply for and await a date for the hearing of their application. It would also remove the necessity to apply for an extension of the prescribed time to serve the claim form.

[52] The rule is therefore of particular assistance to litigants who have not been able to serve the claim form personally on a defendant where limitation will soon run on the claim.

[53] In all the circumstances, I could not find that the Claimant has satisfied the requirement of CPR 8.15 (4).

DISPOSITION

[54] After careful consideration of the applicable cases, the application to extend the time to serve the claim form and to serve the 1st Defendant by an alternative method of service (substituted service) is refused.

[55] Leave to appeal granted.