[2019] JMSC Civ 118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2014HCV03760

BETWEEN	**KERRY-ANN BARNABY-STODDART**	**CLAIMANT**
AND	**RENVILLE BARKER**	**1ST DEFENDANT**
AND	**ERIC WILLIAMS**	**2ND DEFENDANT**

Mrs. Deandra Grant-Wright instructed by K. Churchill Neita & Co. for the Claimant/Respondent.
Mr. Matthew Ricketts instructed by Samuda & Johnson for the 2nd Defendant/Applicant.

Heard: January 10, 2019.

Civil procedure – Application to set aside default judgment pursuant to rule 13.2 of the Civil Procedure Rules.

Civil procedure – Whether rule 6.8 applies to the claim form – Whether it would be appropriate to dispense with the service of the claim form.

MASTER N. HART-HINES

[1] On January 10, 2019 I heard an application to set aside a default judgment pursuant to rule 13.2 of the Civil Procedure Rules (hereinafter "CPR") and I gave my decision on that date. I now indicate my reasons in writing.

Background and Chronology

[2] By way of a claim form filed on July 30, 2014, the respondent claimed against the applicant, damages for negligence arising out of a motor vehicle accident. I believe that it will be useful to set out the chronology of the events:

i. On June 27, 2012, the aforementioned motor vehicle accident occurred along the Bucknor main road, in the parish of St. James.

ii. On July 30, 2014 the claim form and particulars of claim were filed.

iii. On October 17, 2014, an affidavit of service was filed. The affiant Ruel Elliott stated that he was a police officer who acted as Process Server, and that he knew the 2nd defendant for over twenty years. The affiant said that he served the claim form and particulars of claim on the 2nd defendant on August 15, 2014 at about 5:30pm, after he called the 2nd defendant to the Cambridge Police Station in St. James, and he complied. He further said that the 2nd defendant accepted the claim form and particulars of claim along with the Notice to the defendant and Acknowledgement of service form and the Prescribed Notes to the defendant.

iv. On November 4, 2014, a Request for Default Judgment was filed on the basis that the 2nd defendant failed to file an acknowledgement of service.

v. Judgment in Default of an acknowledgement of service was entered in Binder 763 Folio 358 with effect from November 4, 2014.

vi. On May 7, 2015, an affidavit of service was filed. The affiant Ruel Elliott stated that he served the 2nd defendant with the Judgment in Default of Acknowledgement of Service on March 20, 2015 at 8:30am at Tank Road, Cambridge in St. James.

vii. On February 11, 2016 a Notice of Assessment of Damages was issued by the Registry, indicating that the hearing of the Assessment of Damages was fixed for October 20, 2016.

viii. On October 7, 2016, an affidavit of service was filed. The affiant Fay Rogers stated that she served the 2nd defendant with the Listing Questionnaire on October 6, 2016 by posting same by registered mail to his address in Cambridge in St. James.

ix. On October 20, 2016 the matter was fixed for Assessment of Damages and the claimant was awarded general damages in the sum of $1,600,000 with interest at the rate of 3% from August 15, 2014 to October 20, 2016, and special damages in the sum of $27,000 with interest at the rate of 3% from June 27, 2012 to October 20, 2016, plus $40,000 costs.

x. On January 19, 2017, the application to set aside a default judgment pursuant to rule 13.2 of the CPR was filed. No affidavit in support was filed at that time.

xi. On June 27, 2018, the claim became statute barred.

xii. On September 28, 2018, the affidavit of Eric Williams was filed in support of the application and the applicant stated that he was never served with the claim form or amended claim form, the particulars of claim, or any other document in respect of this matter. He further said that he only became aware that the matter

was before the court on or about March 20, 2015 when he was served with the Judgment in Default of Acknowledgement of Service. No explanation is offered for his delay between March 20, 2015 and January 19, 2017 in filing the application to set aside a default judgment, or for his further delay between January 19, 2017 and September 28, 2018 in filing the affidavit in support of the application.

The Application

[3] The application indicated that the following orders were sought:

1. *The time limited for the filing of the Acknowledgement of Service and Defence herein be extended by a period of fourteen (14) days from the date of this Order;*
2. *Alternatively, the Interlocutory Judgment in Default of a Defence entered herein against the Applicant and all subsequent proceedings be set aside on the ground that the Applicant has never been served with the Claim herein or alternatively on the ground that the 2nd defendant has a real prospect of successfully defending this claim;*
3. *The Applicant be granted relief from any sanctions imposed by the Civil Procedure Rules for failing to file an Acknowledgement of Service of Claim Form and Defence within the prescribed time;*
4. *There be such further relief as this Honourable Court may see fit;*
5. *The costs of this application to be the Claimant's to be taxed if not agreed.*

The Hearing on January 10, 2019

[4] On January 10, 2019 the attorneys-at-law for the applicant and the respondent Mr. Ricketts and Mrs. Grant-Wright respectively, were present. However, the respondent's attorney-at-law indicated that the process server refused to travel from St. James to Kingston for the purpose of giving evidence about the service of the claim form and accompanying documents. In the circumstances, Mrs. Grant-Wright indicated that she could not resist the application to set aside the default judgment entered on November 4, 2014.

[5] I gave consideration to the usual practice in such applications pursuant to rule 13.2, for the evidence of the process server and the applicant to be tested in cross-examination. I had regard to the dictum in ***Denry Cummings v Heart Institute of the Caribbean Limited*** [2017] JMCA Civ 34, where Sinclair-Haynes JA said at paragraph 58 "*cross-examination is usually desirable in*

cases where there are disputed facts and was certainly necessary … to ferret out the truth in light of the appellant's denial that he was personally served". In the circumstances, I formed the opinion that in the absence of sworn testimony by the process server, greater weight would be placed on the sworn testimony of the applicant than the affidavit evidence of the process server, and it was likely that the alleged service of the claim form would be found irregular. I determined that the default judgment should be set aside *ex debito justitiae*. I therefore granted the order sought at paragraphs 2 and 3 of the application.

[6] I then went on to consider whether the matter ought to end with the setting aside of the default judgment. As indicated above, the claim became statute barred on June 27, 2018 and the claim form could not be re-served. However, I formed the opinion that re-service of the claim form might not be required since one purpose of service is to give a defendant notice of the proceedings against him, and since the 2nd defendant/applicant had given consideration to the claim form and particulars of claim when preparing his application and draft defence, and would have understood the nature of the claim against him. Further, I gave consideration to the fact that the applicant admitted at paragraph 9 of his affidavit filed on September 28, 2018, that he received the "Interlocutory Judgment in Default of Acknowledgement of Service" on or about March 20, 2015, nearly two years before the application was filed (on January 19, 2017), and some three and a half years before his affidavit in support of the application was filed. No explanation was given by the applicant for this lengthy delay in filing the application between March 20, 2015 and January 19, 2017. During this nearly two-year period of delay, the claim became statute barred.

[7] I indicated to both counsel that I was minded to dispense with service of the claim form pursuant to rule 6.8, and to direct the applicant to file his defence within fourteen (14) days of the hearing date. Further, I indicated to both counsel that the parties would be referred to mediation and a Case Management Conference date fixed. In accordance with rule 26.2, I gave the parties an opportunity to make representations in relation to the orders proposed. Counsel Mr. Ricketts indicated that he did not believe that the service of the claim form could be dispensed with altogether and that, even if it could be dispensed with,

it was first necessary that the respondent/claimant make a written application for service to be dispensed with. Mrs. Grant-Wright indicated that she was making an oral application for service of the claim form to be dispensed with. The oral application was granted. My reasons for so doing are set out below at paragraphs 14, 17, 18 and 19.

The Law on dispensing with service of a document

[8] In coming to my decision I gave consideration to several cases. The Court of Appeal decision in ***B & J Equipment Rental Limited v Nanco*** [2013] JMCA Civ 2 makes clear that the claim form itself is not a nullity by virtue of the irregular service, but a failure to comply with rule 8.16(1), would result in a default judgment being set aside *ex debito justitiae*. At paragraph 37, Morrison JA (as he then was) indicated that where the service of the claim form was irregular because of a failure to comply with rule 8.16(1), it would be appropriate to re-serve the claim form with the correct information and requisite documents and fully comply with the relevant Rules. This guidance was endorsed by Phillips JA in ***Rohan Smith v Elroy Hector Pessoa and another*** [2014] JMCA App 25, who added that the reasoning in ***B & J Equipment*** was equally applicable to the failure to observe rule 8.16(2), so that the reference number could be inserted on the claim form and particulars and "*the documents be re-served in accordance with that rule*".

[9] In the instant case, the applicant denied receiving the claim form and the said claim form is now invalid for the purpose of service as no order was made extending its validity (see rules 8.14 and 8.15), and the claim is statute barred. I therefore gave consideration to rule 6.8(1) which provides that the court "*may dispense with service of a document if it is appropriate to do so*". I also gave consideration to the English Court of Appeal decision of ***Anderton v Clwyd County Council (No. 2)*** [2002] EWCA Civ 933 which considered the English rule 6.9, which was similarly worded as our rule 6.8. I was mindful however that rule 6.8 falls under Part 6, which deals with service of "*other documents*", and that there is no similar provision in Part 5, which deals with service of the claim form. I have noted that in the English CPR, no distinction was made between

the service of the claim form and the service of other documents, as the provisions in respect of service generally were contained in one part, Part 6. I will address this issue at paragraph 15.

[10] In England it is settled law that a court may dispense with the service of the claim form in exceptional cases. Prior to the 2008 amendment of the English CPR, the power to dispense with service of a document was contained rule 6.9, which provided that the court "*may dispense with service of a document*". In ***Anderton***, the English Court of Appeal considered five joined appeals concerning the service of the claim form at the end of the limitation period, where in four of the cases, service was effected within the life of the claim form but was deemed late by virtue of the calculation of the deemed day of service. The court held *inter alia* that the court's power in rule 6.9 to dispense with service of "a document" applied to a "claim form", and that a court could make such an order prospectively or retrospectively, but only in "exceptional" cases, including where the limitation period had expired. What was required in the exercise of its discretion is that the court assesses what is fair in the circumstances, having regard to the balance of prejudice between the parties.

[11] In considering the ***Anderton*** case, I was mindful of the guidance given by Morrison P in ***B & J Equipment*** regarding re-serving the claim form. However, it seems that Morrison P was giving guidance in the usual case where there was nothing to prevent service or re-service and where there were no exceptional circumstances to merit dispensing with service of the claim form and the accompanying documents. Indeed, on the facts of that case, the accident occurred on 9 July 2009 and the Court of Appeal delivered its decision on 15 February 2013, and this meant that the claimant had a further two years to refile and re-serve a claim form before the claim would become statute barred on 9 July 2015. I believe that in an exceptional case such as the instant case, a judge could order that service of the claim form and the accompanying documents be dispensed with, as an alternative to directing re-service. My reasons for saying that this is an exceptional case are indicated in paragraphs 14 and 17 below.

[12] I also considered ***Nelson v Clearsprings*** [2006] EWCA Civ 1252, where Sir Anthony Clarke MR reiterated the position decided in ***Anderton***, and went on to express seemingly extreme views at paragraphs 43, 44, 45, 50 and 51 of the judgment that there may be circumstances in which it will not be appropriate to set aside a default judgment even where the defendant was never served. The learned judge said that the determination of each case depends on its own facts, and a Court has the power to refuse to set aside a default judgment *ex debito justitiae* where a defendant who was not served but who was made aware of the default judgment, subsequently inexcusably delayed in making his application for the default judgment to be set aside. The views expressed in ***Nelson*** were *obiter dicta* and is not the position in this jurisdiction. Our Court of Appeal has clearly stated that where there was irregular service or no service, a default judgment must be set aside *ex debito justitiae*. I therefore did not adopt the approach in ***Nelson*** even though it was clear that the applicant delayed inexplicably by nearly two years before filing his application.

[13] It is accepted that it is usually only upon service of the claim form that the defendant gets notice of the claim. In ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent*** [1915] 1 KB 857, Lord Reading CJ said at page 887 that it is a fundamental principle of English law, that a defendant "*is entitled to effective notice of the proceedings against him*". Likewise, in ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203, Lord Justice Dyson stated at paragraph 54 that "*service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on the formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted…. The third is to enable the court to control the litigation process*". Notwithstanding this guidance, it was accepted in ***Anderton*** that there is power to dispense with the service of the claim form in an exceptional case.

[14] It was my opinion that the power in rule 6.8 could be utilised to dispense with the service of the claim form in the instant case, as the circumstances were exceptional. The applicant had notification of the default judgment from March

20, 2015 but seemed to deliberately delay the filing of his affidavit in support of this application for three and half years, and after the claim had become statute barred. In making an order pursuant to my power under rule 6.8, I was seeking to ensure that justice was done between the parties. I am guided by dictum in ***Baptiste v Supersad*** (1967) 12 WIR 140 where Wooding CJ said at page 144:

> "***the law is not a game*** *nor is the Court an arena.* ***It is … the function and duty of a judge to see that justice is done as far as may be according to the merits***" (emphasis added).

Analysis

[15] It is my opinion that the power in rule 6.8 extends to the claim form, for the following reasons:

1. It seems that Parts 5, 6, 7, and 8 should be read conjunctively, thus making rule 6.8 applicable to the claim form. The rules that relate to the service of the claim form are not confined to just Part 5, but instead, are also contained in Part 6, Part 7, and Part 8, and in particular, in rule 6.6, rule 8.2 and rules 8.13 through to 8.16. It seems therefore, that the rules on service of the claim form and the powers of the court contained in Parts 5, 6, 7 and 8 are to be read conjunctively, and that includes the power in rule 6.8(1) to dispense with the service of a document.

2. A "literal" interpretation of the word "*document*" in rule 6.8(1) and of the word "*may*" in rule 8.13 would mean that the claim form is a document with which service may be dispensed with, in an appropriate case. It seems significant that the drafters of the CPR elected to use the word "*may*" rather than "*must*" in rule 8.13, which provides: *"**Service of the claim form** 8.13 After the claim form has been issued it may be served on the defendant in accordance with Part 5 (service of claim form) or Part 7 (service out of the jurisdiction)."* The "literal rule" approach of statutory construction means that a Court must apply the literal meaning of the exact words of a statute or rule. However, if giving the word its natural and ordinary meaning might result in "*some absurdity, or some repugnance or inconsistency with the rest of the*

instrument"[1], then the court may apply the "golden rule" approach and substitute another word or meaning in place of the word used. It is my opinion that by using the words "*may be served…*" in rule 8.13, the drafters of the CPR envisioned that there might be instances where service of the claim form may, alternatively, be dispensed with altogether. In my opinion, interpreting the word "*may*" in rule 8.13 literally as a permissive rather than a mandatory word, would not lead to any inconsistency with the approach to service of the claim form in Part 5, since the guidance in ***Anderton*** is that the power to dispense with the service of the claim form is to be used only in exceptional circumstances.

3. Further, using the "literal rule" approach to interpret the word "document" in rule 6.8(1) as including the claim form, would be in keeping with rule 1.2 that the court *"must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these Rules".*

4. Finally, a review of rules 52.3, 52.4(a), 53.5(3) and 53.10(3) reveals that the court is vested with a similar power to dispense with the service of a judgment summons, a committal order, a confiscation order and an application for committal for contempt, if it is "*just to do so*". If the drafters of the CPR felt that the court should have the power to dispense with service of draconian orders such as committal and confiscation orders, it does not seem farfetched that it was also their intent that the court should have the power to dispense with the service of the claim form, in an appropriate case.

[16] As indicated in ***Anderton***, the power of the court to exercise its discretion under rule 6.8 is to be used sparingly, and only in an "*exceptional case*". It is my opinion that this was an "*exceptional case*" which merited the court's exercise of its discretion.

<u>Would this be an exceptional case in which to dispense with service?</u>

[17] I have identified three factors which would make this an exceptional case in

[1] Per Lord Wensleydale in ***Grey v Pearson*** (1857) 10 ER 1216 at page 1234.

which to make an order dispensing with the service of the claim form. These are:

1. The respondent's attorneys-at-law acted relatively promptly in filing the claim within two years of the accident, in filing the Request for Default Judgment, and in responding to a requisition issued by the Registry. The respondent's attorneys-at-law could not be blamed for the claim becoming statute-barred. The respondent's attorneys-at-law also ensured that the applicant was served with the Interlocutory Judgment in Default on March 20, 2015 and with the Listing Questionnaire in early October 2016.

2. The applicant accepts that he was served with the Interlocutory Judgment in Default of Acknowledgement on or about March 20, 2015, but offers no explanation for the nearly two-year delay in his response to that document. The application to set aside the default judgment was filed on January 19, 2017. The applicant's affidavit in support of the application was not filed until September 28, 2018, three months after the claim became statute barred.

3. It seems to me that the delay in the progression of this application was due wholly to the applicant's inertia between March 20, 2015 and September 28, 2018. It is unlikely that the Registry would have listed the application for hearing without an affidavit being filed in support. The Registry therefore cannot be blamed for the delay in the hearing of the application between January 19, 2017 and late 2018. Instead, the delay in the progression of this application is due to the decision of the applicant to seemingly ignore the Interlocutory Judgment in Default for over two years. Had the applicant filed his application and affidavit in support as early as April 2015, the application would have been heard before the claim became statue barred on June 12, 2018. The claimant would then have had an opportunity to refile a claim and serve the defendant, if the court hearing the application deemed that necessary. It is not justice that the applicant should benefit from his dilatory conduct or nonchalance, now that the claim is statute-barred.

Where would the balance of prejudice lie?

[18] In my opinion the applicant would not be prejudiced by an order dispensing with

service of the claim form since he now knows of the nature of the respondent's case by virtue of making this application. The only real prejudice that there would be to the applicant by such an order, would be the loss of a statute of limitation defence. As regards the significance of this, I am guided by dictum in ***Shaun Baker v O'Brian Brown and Angella Scott-Smith***, *(unreported) Supreme Court, Jamaica*, Claim No 2009 HCV 5631, judgment delivered on May 3, 2010, where Edwards J (Ag) (as she then was) considered the issue of prejudice in determining an application for an extension of the time to file a claim under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act and said:

> *"80. …Since any extension of the limitation period is designed to specifically override the statutory defence,* ***what is of paramount importance to the respondents is not the loss of the defence … but the effect it will have on the respondents' ability to defend themselves on the merits of the case****, both as to liability and quantum". (emphasis supplied)*

[19] In this case, the applicant could not reasonably be said to be prejudiced by the order, since he had the opportunity from at least the date of the accident to preserve any documentary evidence, since he was the driver of the vehicle. Alternatively, the applicant had notice of the proceedings from at least March 20, 2015 (when he received notification of the default judgment) and he could have started collecting witness statements from that point. It was always within his power to secure witness statements and to keep in touch with any witnesses who might be able to assist his case. In contrast, the respondent/claimant stands to be severely prejudiced by being denied an opportunity to have her claim heard if the default judgment is set aside, because the claim is now statute barred.

[20] In summary then, I believe that I had the power to dispense with the service of the claim form and so ordered as this seemed to be an appropriate case in which to do so. In such a case, applying rule 6.8 to the claim form will not cause an abuse of the fundamental principle of English law, that a defendant "*is entitled to effective notice of the proceedings against him*" since the applicant would have given consideration to the claim form and understood the nature of the claim at the time he filed his application to set aside the default judgment.

Further, applying ***Anderton***, I was satisfied that this was an exceptional case, and having regard to the balance of prejudice between the parties, I was satisfied that it was fair in the circumstances to exercise my discretion to dispense with service of the claim form.

Disposition

[21] In light of the foregoing, I made the following orders:

1. *The Interlocutory Judgment in Default of a Defence entered against the applicant/2nd defendant and all subsequent proceedings against the applicant are set aside on the ground that the applicant has never been served with claim form.*
2. *The Court dispenses with the requirement that an application to dispense with service of the claim form and particulars of claim must be in writing. The Court now orders that service of the claim form and particulars of claim be dispensed with in the interest of justice.*
3. *The applicant/2nd defendant is permitted to file and serve his Defence within fourteen (14) days hereof.*
4. *The parties are referred to Mediation and must attend by April 30, 2019.*
5. *Case Management Conference hearing is fixed for June 6, 2019 at 10:00a.m. for half hour. The parties are to attend the Case Management Conference.*
6. *No order as to Costs.*
7. *The claimant's Attorneys-at-Law are to prepare, file and serve this order.*