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[2017] JMCC COMM.06

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00094

BETWEEN	CEDRIC LANYON HARPER	CLAIMANT
AND	DAVID LEE	DEFENDANT

IN CHAMBERS

Mr. Jerome Spencer and Ms. Vanessa Young instructed by Patterson, Mair, Hamilton for the Defendant.

Mrs. Shirley Richards for the Claimant.

Heard: 20<sup>th</sup> and 24<sup>th</sup> February 2017

Civil Procedure – Effect of failure to file application to pay by instalment form (form 6) with claim form in accordance with CPR 8.16(1)(e) - Whether this is a defect which may be cured – Whether re-serving claim form with application to pay by instalment is a method by which defect may be cured - Whether such re-service of claim form must be within 12 months life of the claim form - Whether an extension of time within which to serve claim form may be made more than 12 months after the claim form was issued

LAING, J

The Applications

[1] The Defendant by Notice of Application has applied for the following orders:

1. *A declaration that the court declines to exercise its jurisdiction to try this claim.*

2. *The Claimant's Claim Form and Particulars of Claim filed on May 29, 2015 be struck out.*
3. *Alternatively, judgment be entered for the Defendant....."*

[2] The Claimant in turn has applied for the following orders:

1. *... A declaration that the Claim herein is not invalidated by the Claimant's failure to serve the Claim Form and Particulars of Claim dated May 29, 2015 with the form of Application to Pay by Instalments, Form 6, as required by Civil Procedure Rule 8.16.*
2. *Permission be granted to serve the form of Application to pay by Instalments, form 6, on the Defendant's Attorney-at-law within 14 days from the date of this order.*
3. *The Defendant is to file the Defence, Form 5, within 42 days from the date of service of the form of Application to Pay by Instalments, Form 6, in accordance with paragraph 2.*
4. *Further and/or in the alternative Summary Judgment be entered against the Defendant....*

[3] By claim form and particulars of claim filed on 29<sup>th</sup> May 2015, the Claimant has brought a claim against the Defendant for recovery of debt, arising from a debt repayment guarantee purportedly executed by the Defendant.

[4] The **Civil Procedure Rules 2002** ("CPR"), rule 8.16(1)(e) requires that if the claim is for money and the defendant is an individual, when a claim form is served on such a defendant it must be accompanied by an application to pay by instalments (form 6). It is common ground between the parties that an application to pay by instalments (form 6) was not served together with the claim form as required by the CPR.

[5] Mr. Jerome Spencer for the Claimant made it clear from the outset that he was not submitting that the claim form was a nullity. Counsel referred the Court to the case of **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2** and in particular to paragraph 37 of the Judgment where Morrison JA (as he then was) made the following statement:

*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 accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes J and this court found in **Vendryis**, 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 step to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule.*

- [6] Mr. Spencer submitted that in order to cure the irregular service the Claimant is required to re-serve the claim form accompanied by the requisite documents prescribed by CPR 8.16, however the Claimant is now unable to do so because the twelve month time-period for serving the claim form as provided for by CPR 12.14(1) has expired. Counsel further submitted that whereas CPR 8.15(1) allows a claimant to apply for an order extending the period within which the claim form may be served, CPR 8.15(3) (a) provides that such an application must be made within the 12 month period specified by CPR 8.14. The Claimant not having made such an application during the currency of the claim form, Counsel submitted that any application for extension would be barred.
- [7] Mrs Richards, on behalf of the Claimant argued that the non service of the application to pay by instalments (form 6) was a procedural irregularity which could now be cured by the service of that document. Counsel submitted that the service of the application to pay by instalments form by itself, without also serving the claim form, would be sufficient to cure the irregularity. However, counsel went further to submit in the alternative, that if the dicta of Morrison JA as to the method of the cure was to be employed, then the re-serving of the claim form that the learned Judge prescribed did not have to be done within the 12 months

life of the claim form (or any further period allowed by an order of the Court pursuant to CPR 8.15, extending the period within which the claim form may be served).

[8] Counsel's submission, framed differently, is that a distinction has to be drawn between the claim form and the other documents that are required to be served together with it pursuant to CPR 8.16(1). Counsel argued that the claim form itself was served within 12 months in accordance with CPR 8.14. It was acknowledged that Morrison JA stated in **B & J Equipment Rental** that the claim form should be re-served along with the appropriate documents, however counsel submitted that this statement should not be extended or so construed to mean that the re-serving had to be done within 12 months in order to satisfy CPR 8.14. I understood counsel to be saying that the claim form, although it would now be invalid for the purpose of an initial service on the Defendant, is nevertheless perfectly valid for the purpose of a re-service, since the objective of the re-service is simply the attaching of the application to pay by instalments (form 6) which was excluded at the time of the initial service.

[9] In **B & J Equipment** and in **Dorothy Vendrys v Richard Keane and Karlene Keane [2011] JMCA Civ 15** the Court was concerned with an application to set aside a default judgment to which specific rules apply. In the **B & J Equipment** judgment it was made clear that after having filed an acknowledgment of service, the failure of the appellant to take the additional step of raising the matter of the non compliance with CPR 8.16(1) as a preliminary issue by way of a challenge to the Court's jurisdiction under CPR 9.6, amounted to a waiver of the irregularity and the appellant thereby submitted unconditionally to the jurisdiction of the Court. In this case it is of significance that the Defendant has adopted the correct procedure of asking the Court to decline to exercise its jurisdiction to try this claim and consequently there is no issue which falls for the Court to decide relating to voluntary submission to the Court's jurisdiction and the effect of such a submission.

- [10] The failure to comply with CPR 8.16(1) is therefore an irregularity which does not have to be cured in all instances and can be waived by the Defendant. Implicit in the court's ruling is a finding that compliance with CPR 8.16(1) is not a necessary precondition to a default judgment in cases in which an acknowledgment of service has been filed. However, I have not been able to locate any applicable legal authority which suggests that the requirement is one which can be dispensed with and that the Court is able to use its general case management powers in managing the case and furthering the overriding objective, to cure a failure to comply with CPR 8.16(1).
- [11] The objective of CPR 8.16 is obvious especially when considered in the context of the lay litigant being served with a claim. It provides for invaluable guidance. The acknowledgment of service form and the defence template which is provided pursuant to the rule will be of limited value to the litigant who retains counsel immediately. However, the only practical way of ensuring that all litigants have the benefit of these documents, whether ultimately they will be of value to them or not, is to make the service mandatory for all persons. In my view the elimination of the need to retrospectively assess whether a litigant was prejudiced or not by the non-provision of these documents explains the mandatory manner in which the requirement is framed, that the claim form "must be accompanied..." by the relevant documents.
- [12] The application to pay by instalments (form 6) will only be potentially relevant to defendants against whom a claim for money is made and for that reason this form 6 is only required to be served in cases where the claim is for money. In the instant case the Defendant has indicated in his acknowledgment of service that he does not admit the claim or any part thereof. He has not expressed any intention of making an application to the Court to pay by instalments. It is therefore patently clear that he has not been prejudiced in any way by the failure of the Claimant to serve the application to pay by instalments (form 6) on him. In these circumstances, it seems to be a wholly artificial and non productive exercise to require the Claimant to serve a form 6 on the Defendant, (which the

Defendant has no intention of utilizing), in order for the claim to be allowed to proceed.

[13] If ever a state of affairs deserved the Court's exercise of its discretion to waive an irregularity or use its case management powers to cure a defect, then, in my opinion, these circumstances would qualify. In my respectful view, the failure to serve an application to pay by instalments (form 6) in a case such as this, ought to be given the weight it deserves when all the surrounding facts are taken into account. Unfortunately my views are not supported by precedent or any clear legal authority. Interestingly, in the United Kingdom, pursuant to the provisions of their CPR 6.16(1) the Court may dispense with service of the claim form if there are exceptional circumstances and the example is given of the case of **Home Office v Dorgan [2002] 1 WLR 3174** where the English Court of Appeal upheld a decision of a Judge where the court's discretion was exercised to cure service deemed out of time by dispensing with service. In that case there was service by fax of the claim form and particulars of claim by the claimant's solicitor and the deadline was missed by three minutes.

[14] What the Court of Appeal in **B & J Equipment** clearly indicated is that where there is a failure to comply with CPR 8.16, the Claimant should "*re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule*". There is no authority which supports Counsel for the Defendant's submission that the Defendant could simply serve the acknowledgement of service (form 6) by itself. **B & J Equipment** certainly does not go that far. Had the Court of Appeal been of the view that this was a sufficient cure then I am inclined to think that the Court would have so indicated.

**Does the claim form have to be re-served within 12 months?**

[15] The appropriate rule of the CPR which deals with the time within which a claim form may be served is CPR 8.14(1) which provides as follows:

*8.14 (1) The general rule is that a claim form must be served within 12 months after the date when the claim was issued or the claim form ceases to be valid.*

I am of the view that the claim form must be re-served within 12 months of the date the claim form was issued (or in applicable circumstances, within any period for service as extended by the Court). If the purpose of the re-service is to cure the initial defective service, by doing correctly what ought to have been done in the first place, it seems illogical that one could rectify the initial defect by re-serving a claim form which was invalid at the time of the re-service pursuant to CPR 8.14 (because it had not been [properly] served within 12 months).

- [16] The service of the claim form sets in motion a procedural regime with a timetable for compliance by filing a defence *et cetera*. If there is a re-service of the claim form, the time for filing the defence must run from the date of the corrective re-service. It cannot be that the Defendant would be required to respond to a claim form that has ceased to be valid. Permitting the claim form to be re-served after 12 months without an order extending time for service would be tantamount to allowing the Claimant to cure an irregularity by employing another irregularity.

#### **Can the time for serving the claim form be now extended**

- [17] CPR 8.15(3) provides that an application under CPR 8.15 for an order extending the period within which the claim form may be served must be made within the 12 month period for serving the claim form as specified by CPR 8.14 or within the period of any subsequent extension permitted by the court. In the case under consideration there is no jurisdiction for the court to grant an extension since the initial 12 month period provided for under CPR 8.14(1) has expired without an application having been made. The position in this jurisdiction is unlike that which exists in England where their CPR 7.6(3) provides for an application to extend time to be made after the end of the applicable period (which at four months is considerably shorter than the twelve months specified in our rules).

**[18]** For the reasons expressed herein, the claim cannot properly proceed and Court makes the following orders;

1. The Court declares that it declines to exercise its jurisdiction to try this claim.
2. The service of the Claim Form and Particulars of Claim dated May 29, 2015 is set aside as being irregular.
3. The orders sought on the Claimant's Notice of Application filed on 5<sup>th</sup> January 2017 are refused.
4. Costs of the Claim to include costs of the applications herein are awarded to the Defendant to be taxed if not agreed.