[2020] JMSC Civ 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2016HCV04917

BETWEEN	**ANNETTE MCLEAN**	**CLAIMANT**
AND	**PRINCESS EDMONDSON**	**1ST DEFENDANT**
AND	**CONSTANTINE MILLS**	**2ND DEFENDANT**

Mr. Jovan Bowes instructed by Archer, Cummings & Company for the Claimant/Applicant.

Heard February 12 and 19, 2020.

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 and whether there are compelling reasons for granting more than two six-month extensions – Rule 8.15(2) and 8.15(6) of the Civil Procedure Rules.

MASTER N. HART-HINES

[1] The genesis of the claim is a motor vehicle accident which occurred along the Salem main road in the parish of St. Ann on August 6, 2012. It is alleged by the Claimant/Applicant that he was injured when a vehicle licensed PF5390 was negligently operated by the 2nd Defendant and collided with him. The vehicle is owned by the 1st Defendant. The claim form and the particulars of claim were filed on November 17, 2016, seeking damages in respect of the injuries sustained.

THE APPLICATION

[2] By Ex parte Notice Application ("the application") filed on November 14, 2017, the Applicant 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 Insurance Company of the West Indies Limited ("ICWI"), the insurer for a vehicle owned by the 1st Defendant at the time of the accident, or via publication of the Notice of Proceedings in a popular newspaper.

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

1. The Applicant took all reasonable steps to effect service on the Defendants.
2. The districts in which the Defendants reside ("Adelphi" and "Lilliput", St. James) are big districts and the addresses are very general in nature, thus making it very difficult to effect personal service on them.
3. The 1st Defendant is insured by ICWI and the claim form and other documents are likely to come to the 1st Defendant's attention if served on ICWI. The publication of Notice of Proceedings in a popular newspaper will cause the claim form to come to the attention of the 2nd Defendant.
4. The Applicant cannot afford other methods of service.

[4] The application was supported by an affidavit sworn by Giovanni Gardener, Attorney-at-Law at Archer, Cummings and Company, filed on November 14, 2017. The affidavit stated that on or about November 29, 2016, the Applicant's Attorneys retained the services of a Bailiff of the St. James Parish Court to serve the claim form and other accompanying documents on the Defendants. Mr. Gardener stated that he was informed by the Court Bailiff that he made several attempts to serve the documents personally on the Defendants but that he was unable to do so as he could not locate them as the districts are large and the addresses were general in nature. Mr. Gardener averred that the claim form and other documents are likely to come to the attention of the 1st Defendant and the 2nd Defendant if they were served on ICWI, and if the Notice of Proceedings was published in a popular newspaper. Permission is therefore sought to dispense

with personal service of the claim form on the Defendants and to serve the claim form and accompanying documents on ICWI and by publication in a newspaper.

BACKGROUND

[5] The claim form expired on November 17, 2017. The claim became statute barred on August 6, 2018. As aforesaid, the application was filed on November 14, 2017. The Civil Registry first fixed this application for hearing on May 8, 2019, nearly eighteen (18) months after the application was filed.

[6] On May 8, 2019, the application was listed for hearing before a Master in Chambers and the hearing was adjourned to May 15, 2019 on the basis that the file was not located. On May 15, 2019, the hearing was adjourned to May 16, 2019 on the basis that counsel arrived late. On May 16, 2019, the hearing was adjourned to May 22, 2019 for counsel to advise himself. On May 22, 2019, the hearing was adjourned for a date to be fixed by the Registrar but no reason is indicated in the Record of Proceedings for this Order. On February 12, 2020 the application was first listed before me. The hearing was adjourned to February 19, 2020 to allow counsel to file a supplemental affidavit in support of the application.

THE ISSUES

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

1. Has the Applicant demonstrated that she had taken all reasonable steps to locate the Defendants and to serve the claim form?
2. Could multiple extensions be granted in respect of one application?
3. Is there a compelling reason to grant five six-month extensions to extend the validity of the claim form from November 17, 2017 to May 17, 2020?
4. Would it be appropriate to grant the application after the claim is time-barred, if this would deprive the Defendants of a limitation defence?

THE LAW AND ANALYSIS

[8] 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 months after the date when the claim was issued or the claim form ceases to be valid.*
>
> *"**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. …*
>
> ***(6) No more than two extensions may be allowed unless the court is satisfied that –***
> *(a) the defendant is deliberately avoiding service; or*
> *(b) there is **some other compelling reason** for so doing. (My emphasis)*

Has the Applicant taken "all reasonable steps" to serve the Defendants?

[9] The Court is required to consider whether the Applicant had demonstrated that she had taken "all reasonable steps" to locate the Defendants and to serve the claim form on them, 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. The test of whether the Applicant has taken all reasonable steps in compliance with Rule 8.15(4)(a) of the CPR is an objective one, having regard to the circumstances. The corresponding English rule (CPR 7.6) is slightly different from the Jamaican provision, but the condition in the English CPR 7.6(3)(b) is a similar test to our CPR rule 8.15(4)(a) in that it refers to the need for an Applicant to take "*all reasonable steps*" to serve a defendant. I am therefore persuaded to apply the

English cases considering CPR 7.6(3)(b). In ***Drury v British Broadcasting Corporation and another*** [2007] EWCA Civ 497 Smith LJ stated this:

> *"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)*

[10] The reason proffered by the Applicant for the failure to serve the claim form, is that the Court Bailiff experienced difficulties in serving the claim form because the districts of Adelphi and Lilliput are large and the Defendants' addresses in those districts were vague or general in nature. I should indicate that it is more appropriate for the Court Bailiff or Process Server to swear to an affidavit in respect of attempts made to serve the claim form, than for counsel to do so. There is no affidavit sworn by the Court Bailiff, Mr. Daniel Robinson to indicate the dates and times of his visits to the communities and the results of his enquiries. I cannot therefore be satisfied based on the evidence before me, that reasonable attempts were made to serve the claim form.

Could multiple extensions be granted in respect of one application?

[11] 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.

[12] The initial application to extend the life of the claim form must be filed while the claim form still has life. 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 the initial application to extend the life of the claim form has not been heard and the six-

month period sought (in the initial application) will soon 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. Our CPR does not give an Applicant permission to retrospectively apply for an extension after the time for service of a claim form has elapsed (unlike the English CPR 7.6(3)). Consequently, an application for a first extension must be filed within the life of the claim form, and, an application for a further extension must be filed within the six-month period in which the first extension is likely to be granted (rule 8.15(3)).

[13] It seems 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 permit the Court to 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.

Is there are a compelling reason to grant five six-month extensions?

[14] By the time the application came to be heard by me, more than two years had elapsed since the claim form expired. Five six-month extensions would be required in order for the claim form to be valid for the purpose of service, after the hearing date on February 12, 2020. Rule 8.15(6) provides that only two six month extensions are permissible unless there is some other "*compelling reason*" for so doing. Although I adjourned the first hearing to allow counsel to file a supplemental affidavit in support of the application, no further affidavits were filed. There is no affidavit indicating a compelling reason to permit the Court to grant more than two six-month extensions.

[15] I must state that I do not find that the delay by the Civil Registry in fixing the hearing date would amount to a compelling reason for extending the validity of the claim form by more than two years. Attorneys should be mindful of the Court's resources and the fact that many files and applications are filed daily. Having regard to the fact that the Applicant's Attorneys knew when the claim would become time-barred and knew when the claim form would expire, the onus would be on them to seek to have the application heard much earlier. Rule 1.3 of the CPR provides that the parties have a duty to help the Court to further the overriding objective of dealing with cases justly and expeditiously. It is the duty of Applicant's Attorneys to prosecute the claim and this includes writing to the Registrar of the Supreme Court to request that the application is fixed for hearing at the earliest possible date, before the claim form expired or within the six-month period of the extension sought.

Would it be appropriate to grant the application after the claim is time-barred?

[16] Even if compelling reasons were put forward to extend the validity of the claim form from November 17, 2017 to May 17, 2020, I would also have to consider the fact that the claim became statute barred on August 6, 2018. In deciding whether or not to exercise my discretion under CPR rule 8.15, I must assess what is fair in all the circumstances, having regard to the overriding objective as set out in rule 1.1. In my opinion, this process involves the Court giving consideration to the Defendants' right to rely on a limitation defence.

[17] For the purpose of this application, the relevant portions of rule 1.1 provide:

> *"1.1(1) These Rules are a new procedural code with* ***the overriding objective of enabling the Court to deal with cases justly****.*
>
> *(2) Dealing justly with a case includes –*
> *(a) ensuring, so far as is practicable,* ***that the parties are on an equal footing*** *and are not prejudiced by their financial position; …*
> *(d)* ***ensuring that it is dealt with expeditiously and fairly*** *…" (My emphasis)*

[18] The requirement that the Court ensure that "*the parties are on an equal footing"* means that each party must have a reasonable opportunity to present his case

under conditions which do not place him at a substantial disadvantage. In this case, it is my opinion that an order extending the validity of the claim form after the claim is time-barred would place the Defendants at a disadvantage.

[19] The requirement in CPR rule 1.1(2)(d) that the Court ensure that cases are "*dealt with expeditiously and fairly"* 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 ***Aktas v Adepta*** [2010] EWCA Civ 1170, Rix LJ said at paragraph 91 that a claimant is to adhere strictly to the time limit for serving the claim form and the Court is to strictly regulate the period granted for service of the claim form.

[20] Although the Defendants were not present at the hearing of the application, the Court should consider their rights. The purpose of the Limitation of Actions Act is to protect defendants from stale claims. According to Halsbury's Laws of England, 4th Edition (Volume 28 at paragraph 805) there are three reasons for the enactment of statutes of limitation:

> *"1. A plaintiff with a valid cause of action should pursue it with reasonable diligence.*
> *2. By the time a stale claim is litigated, a defendant might have lost evidence necessary to disprove the claim.*
> *3. Litigation of a long-dormant claim may result in more cruelty than justice."*

[21] Section 46 of our Limitation of Actions Act 1881 ("the Act") provides that the United Kingdom Statute 21 James I, Cap. 16, (Statute of Limitation 1623) has been incorporated into the Laws of Jamaica. Section 46 of the Act therefore provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action was accrued. Unlike the English Limitation Act (as amended in 1980), our Act does not give the Court the power to extend the limitation period. The CPR is not to be used to enlarge, modify or abridge any right conferred on the parties by substantive law. An extension beyond the life of the claim form to a date after the limitation period expired, without good reason, would abridge the Defendants' right to rely on a limitation defence. In ***Hashtroodi v Hancock*** [2004] EWCA Civ 652, Dyson LJ

said at paragraph 18 that in such circumstances, the claimant is effectively asking the Court "*to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed*".

[22] The prejudice to the Applicant/Claimant is his inability to seek redress from the Defendants in respect of any injury sustained during the accident. In contrast, any order made to extend the validity of the claim form to May 17, 2020 would deprive the Defendants of a limitation defence. In ***Bayat and others v Cecil and others*** [2011] EWCA Civ 135 at paragraph 55 Stanley Burnton LJ said "…*the defendant's limitation defence, … should not be circumvented by an extension of time for serving a claim form save in exceptional circumstances."* No good reason has been proffered as a basis on which to extend the life of the claim form and there are no exceptional circumstances in this case.

ORDERS

[23] The Court therefore makes the following orders:

1. The application to extend the validity of the claim form is refused. The validity of the claim form cannot be extended from November 17, 2017 to May 17, 2020. This would require five extensions and it is not possible to grant more than one six-month extension in hearing any one application.

2. The claim form became statute barred on August 6, 2018. Even if it were possible to extend the validity of the claim form to May 17, 2020, it would not be appropriate to do so, as this would deprive the Defendants of their right to a limitation defence which accrued from August 6, 2018.

3. Leave to appeal granted.