[2019] JMSC Civ 119

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 02551

BETWEEN	**IZETH ROBERTS**	**CLAIMANT**
AND	**DEVON HARMON**	**1ST DEFENDANT**
AND	**CONWAY ROBINSON**	**2ND DEFENDANT**

IN CHAMBERS

Ms Jacqueline Cummings instructed by Archer Cummings & Co, Attorneys-at-law for the Claimant

Heard: June 6, 2019 and June 12, 2019

Civil Procedure – Application to extend the validity of the Claim and for service by a specified method – CPR Part 8

MASTER T. MOTT TULLOCH-REID (AG)

[1] The Claimant has made a without notice application for a further extension of the validity of a claim form which was filed on May 12, 2015 and for the said claim form and particulars of claim, which was also filed on May 12, 2015 to be served on the Defendants by way of publication of Notice of Proceedings in the Daily Gleaner or Observer. This application for the further extension of the claim form's validity was filed on October 18, 2017.

[2] I must give a background to the case as it impacts on my decision. This is a negligence claim. The cause of action arose on November 15, 2010. The

statute of limitation on tort matters is six years and as such, the limitation period on the cause of action would have expired on November 14, 2016. The Claimant however stopped time from running on the cause of action when he filed his claim form on May 12, 2015.

[3] In 2015, the claim form had a life of 12 months and so would have expired on May 11, 2016. The Claimant seemed to have had difficulty serving the defendants and so he applied prior to life of the claim form expiring for an extension of the claim form's validity. This first application was filed on May 6, 2016 – just 5 days prior to the expiration of the claim form's validity. The application was heard on April 20, 2017 when the claim form would have ceased to be valid, the limitation period of the negligence claim would have expired and the remedy available to the Claimant would have been barred. On April 20, 2017, Master Harris, extended the validity of the claim form from April 20, 2017 for 6 months. That would have caused the claim form to have expired on October 19, 2017.

[4] On October 18, 2017, one day prior to the expiration of the validity of the claim form, the Claimant applied for a further extension of the validity of the claim form. The hearing of that application was however not scheduled to take place until June 6, 2019, almost two years later. The Claimant is of the view that I should, in keeping with the overriding objective, allow the extension as the application was made at the time when the claim form was valid and it was through no fault of his why the Court did not set a date for the hearing of the application when the claim form was still valid.

[5] First I would say, it was not likely that the Court would have been able to hear the application on October 18, 2017 which was the last day on which the application could have been brought. Had the Court heard the application on October 18, 2017, and the application been successful, then the claim form would have expired on April 19, 2018. I believe that a Court could at any time during the period October

18, 2017 to April 19, 2018 hear the application but that the Court could only grant the extension, in any event, up to April 19, 2018 as the Court can only extend the validity of a claim form when it is alive. Once the claim form ceases to be valid, that is the end of the matter.

[6] I base my reasoning as set out in paragraph 5 above on Parts 8.14 and 8.15 of the Civil Procedure Rules ("CPR"). Part 8.14(1) of the CPR provides that

> *"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".*

Part 8.15(1) of the CPR provides that

> *"The claimant may apply for an order extending the period within which the claim form may be served."*

Part 8.15(3) of the CPR provides that

> *"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.*

Part 8.15(6) provides that there shall be no more than two extensions of the validity of the claim form unless the Court is satisfied that the defendant is deliberately avoiding service or there is some other compelling reason for so doing.

[7] The language as set out in Parts 8.14 and 8.15 of the CPR is very clear and as such an ordinary and literal interpretation of the rules can be applied. The application to extend the life of the claim form must be made when the claim form is valid. A claim form is valid only for the period in which it can be served and it can be served within 6 months after issue or during the time for which time for service has been extended. The extensions to the validity of the claim form can only be for two 6-month periods unless the defendant is shown to be deliberately evading service or for some other compelling reason. Each 6-month extension must be on its own application.

[8] The Claimant has not put forward any evidence in this application to suggest that the Defendants are deliberately evading service or that there is any compelling reason to grant more than two extensions. The basis on which the further extension is being sought is simply that the Claimant has not been able to serve the claim form and particulars of claim by publishing a Notice of Proceedings in the newspaper because the Formal Order of Master Harris has not been perfected from as far back as 2017 and so the Notice of Proceedings has not been settled by the Registrar.

[9] I am of the view that for the Claimant's application to succeed, he must have applied to the court for the further extension when the claim form was still valid. He succeeds on this point. The validity of the claim form can only be extended while the claim form can still be served (i.e. it is still alive). The Claimant cannot succeed on this point. I cannot extend the validity of the claim form, from the date of the hearing – that is not what the rule provides. I must extend during the period the claim form is valid. If I were to extend the validity, of the claim form, I would have to extend from October 18, 2017 to April 18, 2018, from April 18, 2018 to October 19, 2018, from October 18, 2018 to April 19, 2019 and from April 18, 2019 to October 19, 2019. That would be a total of five subsequent extensions and a total of 6 extensions (including Master Harris' extension) in circumstances where the CPR allows for two extensions except in exceptional circumstances. Further, for me to be able to make orders allowing the several further extensions, the Claimant would have had to have an application before the Court with respect to each of the subsequent 6-month extensions. The subsequent extensions could not be made on the sole application, which was filed on October 18, 2017.

[10] Counsel for the Claimant submitted that the Court is to further the overriding objective by extending the validity of the claim form and do justice to a claimant who will be deprived of his claim if the validity of the claim form is not extended because the Claimant would be unable to initiate new proceedings as the limitation period would have passed. I agree with Ms Cummings that the Court has a duty to further the overriding objective but the CPR also says that it is the duty of all parties to assist the Court in furthering the overriding objective (CPR 1.3 refers). It is my view

that the Claimant's attorneys-at-law should have attended on the Registrar and indicated that the claim form was about to expire and that a date was urgently needed. An Affidavit of Urgency could have assisted her in her quest of securing a date prior to the expiration of the claim form. Ms Cummings submits on behalf of the Claimant that she made several visits to the Court's registry herself to obtain a date for the hearing of the application filed in October 2017. However, she has presented no evidence on which those submissions can rest. I am very certain, that had she been having difficulty obtaining a date for the hearing of the application and had attended personally on the Registrar - Mrs Walters-Wellington or Ms Anguin, and explained to either of the Registrars what her difficulties were and the impact it would have on the limitation period, they would have given her an early date, which can usually be accommodated on a Master's list. I am not of the view that the Claimant's attorneys-at-law, did all they could do to assist the Court to assist their client.

[11] I also have to take notice of the fact that this extension is being sought at a point in time when the limitation period would have expired. The Court must balance justice to the Claimant and the Defendants in the matter. Should I grant the orders sought by the Claimant, the Defendants would be served with a claim form and particulars of claim almost three years after the limitation period would have expired. This would be to prejudicial to the Defendant.

[12] It is quite an unfortunate state of affairs that the Claimant and his attorneys-at-law have found themselves in but there is really no compelling reason (based on the sole application and evidence before me) for me to go outside of the normal number of extensions in an effort to assist the Claimant. Should I do so, the Defendants' limitation period defence will be affected negatively and they will be prejudiced. This is not a prejudice that can be compensated in costs only. The cases of **Battersby v Anglo-American Oil Co Ltd [1945] KB 23** and **Ricketts v Ewers 2004 SC of Jamaica 216 of 2001** support this view. In the former case, the learned judge, Lord Goddard, held that

> *"the court will not exercise that discretion in favour of renewal, …, if the effect of so doing [would] be to deprive the defendant of the benefit of a limitation which has already occurred."*

[13] Lord Goddard relied on the case of **Doyle v Kaufman 3 QBD 7, 340** in which Cockburn CJ said

> *"The power to enlarge the time given by Or 57 r 6 (now Or 64 r 7) cannot apply to the renewal of a writ when, by virtue of a statute the cause of action is gone."*

Further reliance was placed on the old case of **Hewett v Barr [1891] 1 QB 98, 99** in which Lord Esher explained the general rule of conduct as being that amendments should not be granted where those amendments would have the effect of changing the existing rights of the parties. Lord Esher then went on to say

> *"This being the rule with regard to amendments of pleadings the same principle applies still more strongly to the case where we are asked to allow the renewal of a writ, though by so doing we should deprive the defendant of his existing right to the benefit of the Statute of Limitations."*

[14] I have observed over the years and by reading the case law which emanates from courts in several jurisdictions that that the Court has never thought that it was just to deprive a defendant of a legal defence. A court cannot disregard a statute which is primary legislation in order to engage in activities seemingly permitted by the CPR, which is subsidiary legislation.

[15] I wish to now quote verbatim from Lord Goddard's decision in **Battersby** as I find it to be very instructive

> *"We conclude by saying 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… While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the*

> *ground that there is no good reason for the renewal, his application may very possibly come before a master or judge other than the one who made the order and who will not necessarily know the grounds on which the discretion was exercised."*

While the Claimant's position is to be taken into account, the effect of such an order on the Defendant should not and cannot be ignored.

[16] In **Ricketts v Ewers**, Mrs Sinclair-Haynes J (as she then was) said that

> *"… some consideration must be given to the fact that a defendant, after some reasonable time has passed, must be able to rely on the defence of limitation. The claimant failed to proceed with the matter with any vigour, having waited 6 months to apply… In balancing the scale of hardship and prejudice, I am of the view that the scales must be tipped in favour of the defendant."*

[17] I am of a similar view. On each occasion that the Claimant applied for an extension of the validity of the claim, it was at the 11th hour and just about when the claim form would have expired. More importantly however, the effect of the extension on the defendant would be grossly unfair to him in circumstances where by now he has a reasonable expectation that he will no longer have to answer to a claim because the limitation period has passed. It is my view that in these circumstances the prejudice to the Defendants who have never been served would be greater than the prejudice the Claimant who had 6 years to bring the claim and an additional 1½ years to serve the claim form and the particulars of claim on the Defendants, would experience. Although the operation of the statute of limitations will result in hardship to the Claimant I have no right to disregard it and therefore am compelled to order as follows:

(a) The orders sought in the application for court orders filed on October 18, 2017 are refused.

(b) The Claimant's attorneys-at-law are to prepare, file and serve the Formal Order.

(c) Leave to appeal is granted.