



[2019] JMSC Civ 216

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2007 HCV 03323

BETWEEN WINDELL SIMMS CLAIMANT

**AND THE ADMINISTRATOR GENERAL 1ST DEFENDANT
FOR JAMAICA (Representative of the
Estate of Milton Morgan, Deceased)**

AND EARL SAUNDERS 2ND DEFENDANT

AND ISOLYN SAUNDERS 3RD DEFENDANT

AND WALTHAM WILSON 4TH DEFENDANT

AND WALTON WILSON 5TH DEFENDANT

**BETWEEN THE ADMINISTRATOR GENERAL ANCILLARY
FOR JAMAICA (Representative of the CLAIMANT
Estate of Milton Morgan, Deceased)**

**AND EARL SAUNDERS ANCILLARY
DEFENDANT**

IN OPEN COURT

Mr Maurice Smith and Miss Kathy Smith instructed by SmithLaw for the Claimant

**Mr Garth McBean Q.C. and Miss Dian C. Johnson instructed by Garth McBean
and Company for the 2nd Defendant/Ancillary Defendant**

Heard: November 4, 5 and 6, 2019

Civil Procedure – Claim form not served on the 2nd defendant prior to the expiration of its validity – Whether the claimant can properly proceed on that claim form against the 2nd defendant – Whether the 2nd defendant waived the service of the claim form by his participation in the proceedings – Whether the action is now statute barred – Whether the claimant can properly proceed against the ancillary defendant on the ancillary claim form – Limitation of Actions Act, 1881, section 46, Limitation Act, 21 Ja. I, c. 16, section 3, Civil Procedure Rules, 2002, rules 5.1, 8.14(1), 8.15(1), 8.15(3)(a)(i) and (ii), 18.1, 18.7 and 18.10

A. NEMBARD, J

INTRODUCTION

- [1] By way of a Claim Form, filed on 16 August 2007, the Claimant, Windell Simms, seeks damages arising from a motor vehicular accident that allegedly took place on 22 August 2001, along the Nelson Mandela Highway, in the parish of St. Catherine.
- [2] Neither the Claim Form nor the Particulars of Claim was served on the 2nd Defendant/Ancillary Defendant, Earl Saunders.
- [3] On 3 November 2008, the 1st Defendant/Ancillary Claimant, the Administrator General for Jamaica, in her capacity as representative of the Estate of Milton Morgan, deceased, filed an Ancillary Claim Form against Mr Saunders, seeking an indemnity and/or contribution from him, should she be found liable on the Claim.
- [4] Mr Saunders contends that the Ancillary Claim Form was served on his father and that the Ancillary Particulars of Claim, the Claim Form, filed on 16 August 2007 and the Particulars of Claim, also filed on 16 August 2007, were never served on him. He contends that the Claim Form and Particulars of Claim were sent to his Attorneys-at-Law, by the Attorneys-at-Law for the Administrator General for Jamaica, on 15 December 2008, on the request of the former. There

is no evidence before the Court that the Claim Form and Particulars of Claim, each filed on 16 August 2007, were ever served on Mr Saunders.

- [5] An Acknowledgement of Service (in respect of the Ancillary Claim Form, dated and filed on 3 November 2008) and the Defence of Ancillary Defendant Earl Saunders, were filed on 10 December 2008 and 5 January 2009, respectively, on behalf of Mr Saunders.
- [6] The matter was subsequently discontinued against the 3rd Defendant, Isolyn Saunders, the 4th Defendant, Waltham Wilson and the 5th Defendant, Walton Wilson.
- [7] On 4 November 2019, the Court was advised by learned Counsel Mr Maurice Smith, who appears for Mr Simms, that, the matter, as between Mr Simms and the Administrator General for Jamaica, as the representative of the Estate of Milton Morgan, deceased, has been settled in terms endorsed on Counsel's brief.
- [8] It is in those circumstances that the Court was invited to determine whether Mr Simms can properly proceed against Mr Saunders on the Claim Form, filed on 16 August 2007 and on the Ancillary Claim Form, dated and filed on 3 November 2008.

ISSUES

- [9] The following issues arise for the Court's determination: -
- (1) Can the Claimant, Windell Simms, properly proceed with the Claim Form, filed on 16 August 2007, against the 2nd Defendant, Earl Saunders?
 - (2) Can the Claimant, Windell Simms, properly proceed against the Ancillary Defendant, Earl Saunders, on the Ancillary Claim Form, dated and filed on 3 November 2008?
- [10] Flowing from the first issue identified above, the following sub-issues arise: -

- I. Was the Claim Form, filed on 16 August 2007, served on Mr Saunders?
- II. Was the Claim Form, filed on 16 August 2007, served on Mr Saunders, prior to the expiration of its validity?
- III. If the Claim Form, filed on 16 August 2007, was not in fact served on Mr Saunders, prior to the expiration of its validity, or, any at all, what is the effect of that non-service?
- IV. Has Mr Saunders waived the service of the Claim Form, filed on 16 August 2007, by virtue of his 'active participation' in the proceedings?

THE LAW

Service of a Claim Form

- [11] Rule 5.1 of the Civil Procedure Rules, 2002 ("CPR") provides that the general rule is that a claim form must be served personally on each defendant. The defendant must be served with a copy of the claim form sealed by the court in accordance with rule 3.9 (sealing of documents issued by court).

Validity of a Claim Form

- [12] Rule 8.14(1) of the CPR reads as follows: -

"(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."

- [13] This provision was amended by the **Supreme Court (Civil Procedure Rules) (Amendment) [(No. 2)], 2018**. By virtue of that amendment, rule 8.14 of the CPR was amended by deleting the words "12 months" wherever they appear and substituting therefor the words "6 months".

Extension of time within which to serve a Claim Form

- [14]** Rule 8.15 of the CPR allows a claimant to apply for an Order extending the period within which the claim form may be served. Such an application must however be made within the period for serving the claim form as specified by rule 8.14 or of any subsequent extension permitted by the court. (See – Rules 8.15(1), 8.15(3)(a)(i) and (ii) of the CPR).

The nature of an Ancillary Claim

- [15]** An ancillary claim is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes:
- (a) a counterclaim by a defendant against the claimant or against the claimant and some other person;
 - (b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and
 - (c) a claim by an ancillary defendant against any other person, whether or not already a party.

(See – Rule 18.1 of the CPR).

- [16]** One of the major areas in which ancillary proceedings are appropriate is that of contribution and indemnity. For example, where a defendant alleges that, should he be found liable to the claimant in the action, another person is to indemnify him (that is, to pay the whole amount of the damages awarded to the claimant), the defendant should use the ancillary proceedings procedure to bring into the action the person whom he claims is bound to indemnify him.
- [17]** Similarly, where a defendant claims not a full indemnity but a contribution from a third party, he should utilize ancillary proceedings.

[18] Another type of ancillary claim is where a defendant wishes to have a question or an issue, arising out of the claimant's claim, resolved, not only as between claimant and defendant but also as between both of them and a third party.

[19] The advantages of an ancillary claim are:

- (a) speedier determination of the claim or issue against the third party;
- (b) avoidance of the costs of a second hearing; and
- (c) avoidance of the risk of conflicting decisions from different judges on essentially similar issues.

[20] The CPR provides that an ancillary claim is to be treated as if it were a separate action in that:

- (a) the ancillary defendant (the third party) may counterclaim against the defendant; he may also bring in a fourth party, called a 'secondary ancillary defendant';
- (b) the claimant in the main action cannot obtain judgment against the ancillary defendant, nor can the ancillary defendant counterclaim against the claimant; and
- (c) ancillary proceedings may continue even after the main action has been settled, dismissed or struck out.

(See – Rule 18.7 of the CPR).

[21] If the defendant is seeking a contribution or indemnity, the ancillary claim is dependent on the main claim in the sense that the defendant is seeking to pass on to a third party the liability to the claimant. If the claim fails, there is no liability to pass on.

[22] Accordingly, in cases of contribution and indemnity, a distinction must be drawn between:

- (a) cases where the claimant's claim is 'settled', the effect of which is that the ancillary proceedings will continue despite the settlement because there will still be a live issue as to whether the third party should contribute to the settlement; and
- (b) cases where the claimant's case is 'dismissed or struck out', the effect of which is that there is nothing left to litigate between the defendant and the third party, other than costs.

[23] Rule 18.10 of the CPR provides as follows: -

“(1) A person on whom an ancillary claim form is served becomes a party to the proceedings if that person is not already a party.

(2) When an ancillary claim form is served on an existing party for the purpose of requiring the court to decide a question against that party in a further capacity, that party also becomes a party in the further capacity specified in the claim form.”

The relevant limitation period

[24] Section 46 of the Limitation of Actions Act, 1881 provides that the United Kingdom Statute 21 James I Cap.16 has been recognized and 'is now esteemed, used, accepted and received as one of the statutes of this Island'. (See also – **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2010] JMCA Civ 7).

[25] The relevant limitation period for actions in negligence is six (6) years from the date on which the cause of action accrued. (See – Section 3 of the **Limitation Act**, 21 James I Cap. 16, **Letang v Cooper** [1964] 2 All E.R. 929 and **Lance Melbourne v Christina Wan** (1985), 22 J.L.R. 131).

- [26] Stuart Sime, the learned author of the text **A Practical Approach to Civil Procedure**, 13th edition, stated as follows, at paragraphs 7.01-7.03: -

*“Expiry of a limitation period provides a defendant with a complete defence to a claim. Lord Griffiths in **Donovan v Gwentys Ltd** [1990] 1 WLR 472 said, ‘the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal’. If a claim is brought a long time after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk.*

Limitation is a procedural defence. ...

Normally, the only consequence of the expiry of a limitation period is that the defendant acquires a technical defence to the claim. The claimant still has a cause of action, but one that cannot be enforced. ...”

ANALYSIS

Can the Claimant, Windell Simms, properly proceed with the Claim Form, filed on 16 August 2007, against the 2nd Defendant, Earl Saunders?

- [27] One of the issues for the Court’s determination is whether, in the circumstances of the instant case, Mr Simms can properly proceed with the Claim Form, filed on 16 August 2007, against Mr Saunders.
- [28] Mr Smith conceded that there is no evidence before the Court that the Claim Form, filed on 16 August 2007, was served on Mr Saunders, prior to the expiration of its validity, or, any at all. He submitted however, that, Mr Saunders is prohibited from raising the issue of non-service of the Claim Form at this juncture, in light of his ‘active participation’ in the proceedings to date.

- [29] In that regard, Mr Smith relied on the authorities of **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2, **The Gniezno** [1968] P. 418 (1967) and **Warshaw and Others v Drew** (1990) 38 WIR 221.
- [30] In **B & J Equipment Rental Limited v Joseph Nanco** (supra), arising out of an accident at the workplace, in which the respondent received severe personal injuries, his Attorneys-at-Law served the appellant with a claim form by registered post. Accompanying the claim form were particulars of claim and a form of acknowledgement of service. However, a defence and the prescribed notes for defendants, required to be served with a claim form by rule 8.16(1)(b) and (c) of the CPR, were not served.
- [31] On 30 July 2009, Attorneys-at-Law acting for the appellant filed an acknowledgement of service, indicating that the claim form and particulars of claim were received by the appellant on 16 July 2009 and that it intended to defend the claim.
- [32] On 17 November 2009, no defence having been filed by the appellant, the respondent obtained judgment in default of defence against the appellant.
- [33] On 10 August 2010, an order for interim payment of Six Million Dollars (\$6,000,000.00) was made in the respondent's favour and an assessment of damages hearing was fixed for 27 October 2010. The appellant was again represented by counsel at the assessment and on 12 November 2010, damages were assessed and final judgment entered.
- [34] On 23 November 2010, a copy of the final judgment was sent by registered post to the appellant and served on its Attorneys-at-Law. On 20 January 2011, an order for seizure and sale was made and on 25 January 2011, the bailiff for the Corporate Area executed that order on the appellant.
- [35] By notice of application filed on 15 February 2011, the appellant sought an order setting aside the judgment in default and this application was in due course

heard and refused by the order of McDonald-Bishop, J (as she then was) made on 2 July 2011.

[36] The appeal filed in the matter raised important issues as to (i) the effect of (a) a failure to comply with rule 8.16(1) of the CPR and (b) the filing of an acknowledgement of service; and (ii) whether the conditions for setting aside judgment in default laid down in Part 13 of the CPR were satisfied.

[37] At first instance, McDonald-Bishop, J considered firstly, whether the judgment was irregular, as a result of the failure of the respondent to serve the documents required by rule 8.16(1) of the CPR to be served along with the claim form. Considering this failure to have been ‘an irregularity in service’, which could be waived, the learned judge concluded that the irregularity had been waived by the appellant in this case, by acknowledging service, indicating its intention to defend and actively participating in other aspects of the proceedings, without any application disputing jurisdiction under rule 9.6 of the CPR.

[38] In arriving at this conclusion, she distinguished the decision of the Court of Appeal in **Dorothy Vendryes v Richard Keane and Karene Keane** [2011] JMCA Civ 15, where it had been decided that a failure to comply with rule 8.16(1) of the CPR was fatal to judgment entered in default of acknowledgment of service.

[39] Rule 8.16(1) of the CPR, so far as it is relevant for present purposes, reads as follows: -

“When a claim form is served on a defendant, it must be accompanied by

–

(a) *a form of acknowledgement of service (form 3 or 4);*

(b) *a form of defence (form 5);*

(c) *the prescribed notes for defendants (form 1A or 2A);”*

- [40] In **Vendryes**, the respondents brought a claim against the appellant for specific performance of a contract for the sale of land and damages for its breach. The appellant was served with the claim form and particulars of claim but the prescribed notes for defendants (form 1A), the form of acknowledgement of service (form 3) and the form of defence (form 5) were not served on her.
- [41] On 18 October 2007, the appellant having failed to file an acknowledgment of service, the respondents filed a request for judgment in default of acknowledgement of service. On 29 October 2007, the respondents filed an amended claim form and particulars of claim but these were never served on the appellant. On 26 November 2007, the appellant was served with a copy of the judgment in default of acknowledgement of service.
- [42] The appellant applied for an order setting aside the judgment on the ground that it was wrongly entered, due to the respondents' failure to comply with rule 8.16(1) of the CPR. Sykes, J (as he then was) concluded that rule 8.16(1) of the CPR imported a mandatory requirement to serve the documents referred to in it and, that not having been done, the judgment was irregularly entered and therefore had to be set aside.
- [43] On appeal, the Court of Appeal agreed with Sykes, J, in relation to the proper interpretation to be applied to rule 8.16(1) of the CPR, in the following words: -
- “Rule 8.16(1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word ‘must’, as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside. The learned judge was correct in so doing.”*
- [44] Morrison, JA (as he then was), in **B & J Equipment Rental Limited v Joseph Nanco** (supra), stated that, if the authorities predating the CPR held to be the

case that non-service of a writ could be waived by the defendant's entry of an appearance, it should follow, subject to rule 9.6 of the CPR, that, the filing of an acknowledgement of service, which must be taken as meaning what it says, would necessarily have the same effect. Brandon, J (as he then was) observed in **The Gniezno** (supra), at page 428, that the essential point is "that the requirements in the rules relating to service are requirements made for the benefit of the defendant, and that because of that, if the defendant wishes to waive any of those requirements, he can do so". Thus, he considered, a defendant was in principle entitled to waive the requirement of service, not only during the currency of a writ but also after it expired, it already having been established by the Court of Appeal in **Sheldon v Brown Bayley's Steelworks** [1953] 2 All E.R. 894, that, "a writ which has expired is not a nullity; **it is only invalid for the purpose of service by the plaintiff on the defendant**". **[Emphasis added]**

(See also – **Warshaw and Others v Drew** (supra)).

- [45]** Brooks, J (as he then was), in **Keith Anthony Silvera v Owen A. McFadden et aux**, observed that the procedural history of that case was unusual, in that, the validity of the writ of summons and statement of claim filed (on 24 August 2001) under the Judicature (Civil Procedure Code) Act ("the CPC") had already expired (on 24 August 2002) by the time the CPR came into effect. No step was taken in the matter until 22 March 2005, when an application was filed seeking an extension of time to apply to renew the writ and for the renewal of the writ. On 16 November 2005, the learned Master duly made an order accordingly and the writ was renewed for six months and additional time allowed for service, which was effected on 30 November 2005. On 14 December 2005, an acknowledgement of service was filed by one of the defendants and on 27 April 2009, that defendant applied for a declaration that the writ had been automatically struck out, pursuant to rule 73.3(8) of the CPR.

- [46] Brooks, J considered, on the authority of **Sheldon v Brown Bayley's Steelworks** (supra), that, the writ, although expired, was not a nullity and therefore constituted 'old proceedings' for the purposes of transition to the CPR.
- [47] Brooks, J accepted that an expired writ under the old rules was not a nullity; indeed, this was the cornerstone of his reasoning in the case. It was a commonplace of civil procedure that such a writ, even after expiry, could in a proper case be renewed.
- [48] In **Vendryes**, as in **B & J Equipment Rental Limited v Joseph Nanco** (supra), no question arose as to the validity of the claim form itself and the only matter for consideration was the legal effect of the respondent's failure to serve all the documents required by rule 8.16(1) of the CPR to be served with the claim form. It was this that Harris, J.A. stated "clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside".
- [49] In **B & J Equipment Rental Limited v Joseph Nanco** (supra) Morrison, JA stated as follows: -

"...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 the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular...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 steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule.

...there is therefore no basis to conclude in the instant case that the claim form is a nullity because it was not served with all the documents required to accompany it by rule 8.16(1)."

- [50] This Court is of the view that the authority of **B & J Equipment Rental Limited v Joseph Nanco** (supra) is properly to be distinguished from the instant case. In **B & J Equipment Rental Limited v Joseph Nanco** (supra) the claim form and particulars of claim had been duly served on the appellant, prior to the expiration of the validity of the claim form. The documents that had not been served were the accompanying documents that are required to be served along with the claim form, pursuant to rule 8.16(1) of the CPR.
- [51] In the instant case, there is no evidence before the Court that the Claim Form, filed on 16 August 2007, was ever served on Mr Saunders and prior to the expiration of its validity.
- [52] Rule 8.14(1) of the CPR expressly states that the general rule is that a claim form must be served within 12 months of the date when the claim was issued or the claim form ceases to be valid.
- [53] Rule 8.15 of the CPR permits a claimant to apply for an order to extend the period within which a claim form may be served. That must however be done within the period for serving the claim form as specified by rule 8.14 of the CPR, or, within the period of any subsequent extension permitted by the Court. (See- Rule 8.15(1), 8.15(3)(a)(i) and (ii) of the CPR.) One cannot help but to observe the mandatory language used in rule 8.15(3)(a) of the CPR.
- [54] This Court is of the view that the language of the rules (rules 5.1, 8.14(1) and 8.15(3)(a) of the CPR) is plain and precise. The word 'must', as used in the context of the rules, is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rules as mandated offends the rules.

- [55] It therefore means that the Claim Form, filed on 16 August 2007, would have had to have been served on Mr Saunders by 15 August 2008. There is no evidence before the Court that that Claim Form was served on Mr Saunders within that 12 months' period, or, any at all. There is no evidence before the Court that an extension of the period within which that Claim Form was to be served on Mr Saunders, was ever granted. Indeed, Mr Smith has conceded that he has no proof that the Claim Form, filed on 16 August 2007, was ever served on Mr Saunders. In those circumstances, the validity of the Claim Form, filed on 16 August 2007, would have expired on 15 August 2008. (See – **Cedric Lanyon Harper v David Lee** [2017] JMCC COMM 06 and **Elise Kelly (Mother and Administratrix of the Estate of Daniel Garciano Burgess, Deceased) v Orlando Burgess, Garfield Minott and Robert Nelson**, 2004 HCV 03036, judgment delivered on 22 March 2007).
- [56] The Court accepts the submissions of learned Queen's Counsel, Mr Garth McBean, on behalf of Mr Saunders, and finds that, in all the circumstances of the instant case, it cannot be that Mr Saunders should now be required to respond to a claim form that has ceased to be valid.
- [57] Furthermore, by the time that the Ancillary Claim Form, dated and filed on 3 November 2008, had been served on Mr Saunders, the validity of the Claim Form, filed on 16 August 2007, had already expired. Consequently, the question of his waiver of the requirement for service by his 'active participation' in the proceedings, which is not admitted, does not arise.
- [58] Regrettably, Mr Simms would not now be able to apply for an Order granting an extension of time within which to serve the Claim Form, filed on 16 August 2007, nor would he be able to commence an action de novo, against Mr Saunders, as the relevant limitation period has expired.

Can the Claimant, Windell Simms, properly proceed against the Ancillary Defendant, Earl Saunders, on the Ancillary Claim Form, dated and filed on 3 November 2008?

[59] This Court is of the view that Mr Simms is unable to proceed against Mr Saunders on the Ancillary Claim Form, dated and filed on 3 November 2008. (See – Rule 18.7 of the CPR). On this issue, the Court notes that Mr Smith has conceded.

CONCLUSION

[60] By way of summary, there is no evidence before the Court that the Claim Form, filed on 16 August 2007, was ever served on Mr Saunders, prior to the expiration of its validity, or, any at all.

[61] By the time that the Ancillary Claim Form, dated and filed on 3 November 2008, had been served on Mr Saunders, the validity of the Claim Form, filed on 16 August 2007, had already expired. Consequently, the question of his waiver of the requirement for service by his 'active participation' in the proceedings, which is not admitted, does not arise.

[62] Mr Simms is now unable to apply for an Order granting an extension of the time within which to serve the Claim Form, filed on 16 August 2007, nor is he able to commence an action de novo, against Mr Saunders, as the relevant limitation period has expired.

[63] Mr Simms is also unable to proceed against Mr Saunders on the Ancillary Claim Form, dated and filed on 3 November, 2008.

DISPOSITION

[64] It is hereby ordered that: -

- (1) The matter, as between the Claimant and the 1st Defendant, is settled in terms endorsed on Counsel's brief;

- (2) The validity of the Claim Form, filed on 16 August 2007, is expired and expired on 15 August 2008;
- (3) The Claimant is precluded from proceeding against the 2nd Defendant on the Claim Form, filed on 16 August 2007, for non-service on the 2nd Defendant, prior to the expiration of its validity and prior to the expiration of the relevant limitation period;
- (4) The Claimant is precluded from proceeding against the Ancillary Defendant on the Ancillary Claim Form, dated and filed on 3 November 2008;
- (5) Trial costs, including the costs of November 4-6, 2019, inclusive, are awarded to the 2nd Defendant against the Claimant to be taxed if not sooner agreed;
- (6) The 2nd Defendant/Ancillary Defendant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.