



[2019] JMSC Civ 267

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2018HCV04885**

<b>BETWEEN</b>	<b>HORNEIL VAUGHAN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ALMOND GREEN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>IVY BELLVETT</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>KERRY BROMFIELD</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>ERROL DUNCAN</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**IN CHAMBERS**

Ms Tabia Hawkins instructed by Everton J. Dewar & Co. for the Applicant/Claimant

Heard: December 16, 2019

**Civil Procedure – Application to extend the validity of the Claim Form and for service by substituted method – Insufficiency of evidence of the Process Server – Whether the Claim Form can be extended from the date of the hearing of the application – Civil Procedure Rules 2002 (CPR), rules 8.14(1)8.15; 8.15(4)(a)(i) and (ii)(b)**

**MASTER P MASON**

**Background**

[1] On or about December 15, 2012 the Claimant was travelling as a passenger in a motor vehicle registered PF 8367 and driven by the 1<sup>st</sup> Defendant and owned by

the 2<sup>nd</sup> Defendant along Labyrinth main road in the parish of St. Mary. The Claimant alleges that the 1<sup>st</sup> Defendant, the Servant and or Agent of the 2<sup>nd</sup> Defendant drove so negligently that the motor vehicle registered PF 8367 collided with the motor car registered 5694 FY driven by the 3<sup>rd</sup> Defendant and owned by the 4<sup>th</sup> Defendant. The Applicant/Claimant filed a Claim Form and Particulars of Claim on December 11, 2018 three (3) days shy of the expiration of the limitation period on the cause of action. The Claimant Horneil Vaughan is seeking damages and costs as a result of the serious injuries he sustained in the motor vehicle accident.

**[2]** The limitation period on tortious matters such as personal injury cases, is six (6) years. The Applicant/Claimant having realized that the Claim Form would expire within ten days on June 19, 2019 filed a Notice of Application for Court Orders with Supporting Affidavit on May 31, 2019. The Notice of Application for Court Orders is seeking the following orders:-

1. That personal service of the Claim Form and Particulars of Claim with other supporting documents on the 2<sup>nd</sup> and 4<sup>th</sup> Defendants be dispensed with.
2. That permission be granted to the Applicant/Claimant to serve the Claim Form and Particulars of Claim with the other supporting documents on Advantage General Insurance Co. Ltd. Of 4 – 6 Trafalgar Road, Kingston 5 in the parish of Saint Andrew who are the insurers of the 2<sup>nd</sup> Defendant's motor vehicle registered PF 8367 and Insurance Company of the West Indies Limited of 2 St. Lucia Avenue, Kingston 5 who are the insurers of the 4<sup>th</sup> Defendant's motor vehicle 5694 FY.
3. That the validity of the Claim Form and Particulars of claim filed on December 11, 2018 be extended for a period of six (6) months from the date of this application.
4. That the costs of this Application and Order be costs in the Claim.

5. Such further and or other relief this Honourable Court deems fit.

[3] The Notice of Application came up for hearing on December 16, 2019. At the hearing the application to extend the validity of the Claim Form was refused. Consequently, there was no need for the Court to consider the Application for substituted service on the 2<sup>nd</sup> and 4<sup>th</sup> Defendants.

[4] It is noted that if there are good reasons for not effecting service of the Claim Form during its period of validity an extension may be granted, but, the Affidavit evidence must be credible and must satisfy the requirements of rule 8.15 of the Civil Procedure Rules, 2002 (CPR). Therefore, if the Affidavit evidence fails to satisfy the requirements of rule 8.15 of the CPR, it is likely that the Claim Form will not be extended.

### **Issues**

[5] The issues to be determined by the Court are:

- i. Whether the Applicant/Claimant has complied with rule 8.15 of the CPR
- ii. Whether at this stage the Claim Form can be extended.

### **Law and Analysis**

[6] Rule 8.15 Extension of time for serving Claim Form.

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 in 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.

**Whether the Applicant/Claimant has complied with rule 8.15 of the CPR**

[7] In her Affidavit in Support of the Notice of Application filed on May 31, 2019 Miss Tabia Hawkins asserted that subsequent to the commencement of this Claim, the Claim Form and Particulars of Claim and other supporting documents were delivered to Mr Suraje Nesbeth, the Process Server on or about December 11, 2018 for him to serve on the Defendants. At paragraphs 6, 7 and 8 of her Affidavit Miss Hawkins states the following as it relates to the efforts of the process server.

*“6. That she was reliably informed by Mr Nesbeth that on December 12 and 13, 2018 and January 17, 2019 he attempted to locate and serve the 2<sup>nd</sup> and 4<sup>th</sup> Defendants at the addresses provided that being 118 Spring Valley and C-Shell in the parish of St. Ann were futile.*

*“7. That Mr Nesbeth attempted to but was unable to obtain any information concerning any information concerning any alternative addresses for the Defendant from the police.*

*“8. That despite attempts, he was unable to have the 2<sup>nd</sup> and 4<sup>th</sup> Defendants served.*

- [8]** The affiant admits in her Affidavit that the relevant limitation period had already expired at the time of the filing of her Affidavit on May 31, 2019. It is to be noted that the cause of action is negligence arising out of a vehicular accident which took place on or about December 15, 2012. The relevant limitation period in a negligence matter is six (6) years. The limitation period therefore, had expired on December 14, 2018.
- [9]** Mr Nesbeth in his Affidavit, filed on May 31, 2019, indicates that he was misinformed that the 2<sup>nd</sup> Defendant could be located at Lot 118 Spring Valley in the parish of St. Mary. He later found out that the address is located in the parish of St. Mary. He then visited the area on December 13, 2018 to locate the 2<sup>nd</sup> Defendant.
- [10]** On January 17, 2019, Mr Nesbeth visited a complex called Chissans Condo and C-Shells Villas at 134 Main Street Ocho Rios with a view to locating the 4<sup>th</sup> Defendant. He was directed by a security guard to the receptionist who informed him that it was against their policy to disclose information about their guests.
- [11]** It is noted that the Process Server, Mr Nesbeth, visited each location once, in his efforts to locate the Defendants. I also observe that no details are given as to the time he spent in each locale. In his evidence I find that the information he gathered concerning the whereabouts of the Defendants came across as rehearsed. His evidence is insufficient in that regard. I am of the view that the Process Server, in a bid to be more comprehensive in his search could have made another attempt and expanded his search in the areas with a view to gathering more information regarding the Defendants' whereabouts.
- [12]** Furthermore, the Affidavits are devoid of any information which suggest that the Defendants are deliberately avoiding service or that there is some other compelling reason why the Process Server failed to serve the Defendants. It is the duty of the Court to evaluate the evidence as it relates to the whereabouts of the Defendants, and if found wanting, it is highly likely that the validity of the

Claim Form will not be extended. Consequently, I find that the Applicant/Claimant has not taken all reasonable steps to serve the Claim Form on the Defendants. (See rule 8.15(4) (a) (i) and (ii) of the CPR).

- [13] It is noted that the Applicant/Claimant's attorney-at-law waited until the last moment before filing the Claim Form and the Notice of Application to Extend the Validity of the Claim Form. The Claim Form was filed on December 11, 2018 three (3) days before the expiration of the relevant limitation period. The Notice of Application to Extend the Life of the Claim Form was filed on May 31, 2019, a couple of days before the expiration of the validity of the Claim Form.
- [14] The cases of **Vinos v Marks & Spencer PLC** [2001] 3 AllER 784 from the United Kingdom Court of Appeal and **Raymond Price. v. Egbert H Taylor & Company Limited** 13M5/007/A, Claim No. AYM127, a judgment delivered on 16<sup>th</sup> June, 2016, from the Birmingham County Court in the United States of America, support the principle that litigants who wait until the last minute to take action will not be treated with the generosity of the Court. Consequently, it was not a prudent decision by the Applicant/Claimant to be inordinate in filing his application to extend the life of the Claim Form because when the application came before the Court for hearing on December 19, 2019 the Claim Form had already expired and the limitation period of the cause of action had also expired.
- [15] To my mind, the Claimant is under the misconception that the Claim Form can be extended "from the date of the hearing of the Application" as contained in Order No. 3 of the Notice of Application. That misconception was clarified by the Court of Appeal.
- [16] In the case of **Cover v Perrin** [2017] JMSC Civ 71, Justice Lindo (Ag.)(as she then was), on July 13, 2015 ordered that "permission be granted for the Claim Form, filed herein on the 12<sup>th</sup> day of June 2015 be renewed for a period of six (6) months from the date hereof." The learned Judge, after making the Order, realized that the Order made to extend the life of the Claim Form from the date

hereof was of no effect due to the defective nature of the Notice of Application as it was badly drafted. She recognised that she had the jurisdiction to correct the defective wording of the application as it was a purely technical, procedural breach, committed by the Claimant's attorney. Lindo J, went on to correct the order made as follows: "That the Claim Form is extended for a period of six (6) months from the 12<sup>th</sup> day of June 2012." Lindo J was of the view that at the time the Notice of Application was filed, the Claim Form was still valid and proceeded to extend the life of the Claim Form.

- [17] The Defendant appealed on the grounds that the Court had no jurisdiction to try the Respondents' claim as the Claim Form had expired and that the Order made on July 13, 2015 purporting to extend the life of the Claim Form be set aside. Pusey J (Ag.) stated at paragraph 42 that:

*"It was clear that the words "from the date hereof" In the application meant just that (from the date the application was made), and not the date of the hearing of the application, which would have been at the time when the Claim was invalid, and the Order would have been sanctioning service of an invalid Claim."*

- [18] The Court of Appeal in **Perrin v Cover** [2019] JMCA Civ 28, dismissed the appeal and varied the Order made by Lindo J to read as follows:

*"That the Claim Form filed on the 12<sup>th</sup> June, 2014 is renewed for a period of six months from the 3<sup>rd</sup> June 2015 the date of the application to extend the Claim Form to the 3<sup>rd</sup> December 2015."*

The Court of Appeal agreed that Lindo J had the jurisdiction to correct the error in the Order of July 13, 2015 as it falls within the category of errors that the Court can correct to give effect to its true intentions. Both the case at bar and the Perrin v Cover case were filed before the expiration of the Claims. However, in the Perrin case the application was filed on June 3, 2015 and heard a month after the expiration of the Claim on July 13, 2015. There is a distinction in the case at bar, in that, by the time the Notice of Application came up for hearing on December 16, 2019, the Claim Form had expired for over seven (7) months. The Applicant did not file another application for a further six (6) month extension. I

am of the view that if the Claim Form was extended the Defendants in the instant case would be prejudiced as they would be deprived of a statutory defence due to the long delay in filing the Claim Form by the Claimant. It is my view, that the case of Perrin v Cover is distinguishable to the case at bar.

### **Whether at this stage the Claim Form can be extended**

- [19] The language of rules 8.14(1) and 8.15 of the CPR is clear and unambiguous. Incorporating 'must' in the rule means that compliance is mandatory. The Claim Form in the instant case should have been served on the 2<sup>nd</sup> and 4<sup>th</sup> Defendants within the six month period as provided in rule 8.14 (1) of the CPR, or, during the time within which it can be extended by the Court as provided in rule 8.15(1)(3)(a)(i) (ii) of the CPR.
- [20] Having filed the Notice of Application to extend the life of the Claim Form so late but before the Claim Form had expired, coupled with the delay in locating the Defendants, have all contributed to the dilemma of the expiration of the Claim Form. I am of the view that some amount of blame ought to be placed at the feet of the Claimant's attorney-at-law for being tardy in moving the matter along. There is no evidence to indicate that the Applicant/Claimant's attorney-at-law made regular checks with the registry to ascertain the status of the matter as to when it would be placed before a judge in a timely manner or that he sought the intervention of the Registrar of the Supreme Court. It is important that timelines are met. Neuberger LJ held in the English case of **Kuengehia v International Hospitals Group Limited** 2006EWCA Civ 21 [33] that "the time limits in the CPR, especially with regard to service of the Claim Form where the limitation leave expired, are to be strictly observed and extensions and other dispensations are to be sparingly accorded especially when applied for after time has expired."
- [21] The Applicant/Claimant contends that the reason advanced for an extension of the validity of the Claim Form, instead of dismissal of the Claim Form is that it would deprive him of his cause of action as the limitation period had expired and



he would not be able to refile the Claim. He further contends that he will be prejudiced if he has to discontinue the proceedings. On the other side of the coin, however, if the Claim Form is extended, the Defendants would be denied the defence of limitation and who, at this time are entitled to assume that the matter is no longer justiciable, as they would be prejudiced. The case of **Battersby v Anglo-America Oil Company Limited** [1945] KB 23 supports this position. At such a crossroad, I believe that the odds go against the Claimant/Applicant, as it is his duty to serve the Defendants with the initiating process.

[22] The Eastern Caribbean Court of Appeal case of **Marty Steinberg et al v Swisstor & Company et al** Civil Appeal 2011/012 (British Virgin Island) unreported, dealt directly with the issue of extension of time within which to serve a Claim Form and the effect of the Limitation Act Cap 43 of the British Virgin Islands, on the exercise of the court's discretion. The court was of the opinion that a defendant had a right to be sued by means of a Claim Form issued within the statutory period of limitation and served within the period of its validity. Once the Respondents could show, as they have, that they might be deprived of a defence of limitation of time for service of the Claim Form, if the Claim Form was extended it was enough for the extension to have been set aside. The statutory limitation period should not be made elastic at the whim or sloppiness of a litigant. Public interest requires that the Claimant adhere strictly to the time limits for service or else provide a good reason for the dispensation.

[23] In the case at bar, the Applicant/Claimant has not acted in a timely manner in having the initiating process filed and served on the Defendants. He has failed to provide the Court with credible and satisfactory evidence that there is good reason to extend the life of the Claim Form. As such, I am of the view that he is not entitled to the Court exercising its discretion in extending the validity of the Claim Form after the Claim Form died and the limitation period has expired.

**Conclusion**

[24] Based on the aforementioned, I am of the view that the Claim Form cannot be extended

**Orders:**

[25] Notice of Application filed on May 31, 2019 is refused.