THE EASTERNCARIBBEANSUPREMECOURT
INTHEHIGHCOURTOF JUSTICE
STCHRISTOPHERANDNEVIS
NEVIS CIRCUIT
(CIVIL)
AD2012

CLAIM NO:NEVHCV2010/0153

BETWEEN:

KENNETH WILLIAMS

Claimant/Applicant

and

LESLIE CHANG

1st Defendant/Respondent

SURREY PAVING AND AGGREGATE CO. LTD

2nd Defendant/Respondent

Appearances:
Mr. Jerry Webb for Claimant/Applicant

2012: October 8, 10

DECISION

[1] **WALLACE, J.:** This in an application by the Claimant for an extension of time within which to serve the Claim Form out of the Jurisdiction. The request was that the application at bar be heard on paper without a hearing. The Court considered that this was not an appropriate case for the application to be disposed of without a hearing pursuant to CPR 11.14 and as such directed that it be listed for hearing.

Facts Relevant to the Application

[2] These are gleaned from the application itself, the Applicant's affidavit in support both filed on the 30th July, 2012 and the other documents on the court file including the Claim Form, the Statement of Claim and the Order for Service Out of the Jurisdiction dated 29th day of March 2011.

[3] On the 8th October 2010 the Claimant filed a Claim Form endorsed with a Statement of Claim for payment of $7,858,500.00 due to him by the Defendants with respect to certain agreements made between 18th and 20th April 2003. The Defendants being outside the jurisdiction of this court, the Claimant filed an application on 17th December 2010 for an order granting permission to serve out of the jurisdiction.

[4] For some reason, which was not apparent from the Court file and which was not alluded to in any affidavit before me, the Application was not heard until the 29th March 2011 when the Order was granted as prayed. What is also curious is that the Claimant filed a subsequent application on the February 18th, 2011 in the very same terms and asking for the same order as the December 2010. I am satisfied however that the Order made on the 29th March 2011 related to the prior Application of December 2010.

[5] On the 30th July 2012 the Claimant filed an Application for extending the validity of the Claim Form and the Statement of Claim. This Application is supported by an Affidavit sworn by the Claimant. Essentially, he states:-

1. "I am the Claimant/Applicant in this matter, applying for leave to renew for six months the Claim Form annexed hereto...

2. It was issued on the 10th day of December 2010 and His Lordship the Honourable Mr. Justice Redhead by Order dated 29th day of March 2011 permitted it to be served on the Defendants in Jamaica West Indies.

3. I had informed this instant Solicitor that I would instruct him of my Jamaican contact who would there affect such service.

4. He also advised me that I should produce at this initial stage the Witness Statements since in the event of my losing, the costs against me would be phenomenal, having regard to the amount of the claim.

5. Although the Statements were prepared it took a long time finding the Witnesses to obtain their signatures because they were highly placed Government officials....

6. While they were in my possession they were lost (irretrievably so) and could not be found, after my car-cleaner had mistakenly thrown them away with other papers.

7. During this unhappy state of affairs I had been imprisoned and had never once been in communication with the instant Solicitor or my family, having been allotted only a limited amount of telephone calls which I used exhaustively in obtaining Bail. (I was subsequently informed on release that this instant Solicitor had been enquiring about my whereabouts.)

8. On release from Prison I went overseas from where I still am. From there on the 22nd day of June 2012 I contacted this instant solicitor, asked him to reproduce the Witness Statements and gave him the Process-Server's address.

9. I also understand that this matter was listed for the Master's Court on 2nd day of July 2012 but I verily believe that this instant Solicitor's absence was due, (he having checked with the Registry Staff) to his not having received the date-of-hearing notice thereof.

10. The Defendants are still in business and the 2nd Defendant is still highly thriving and profitable business and going concern with branches or subsidiaries in the Caribbean and even here on Nevis. Dismissal would deprive me of my suit by reason of the Limitation Act. Dismissal would also take away the revenue receivable by this country which will come from my success and benefit the defendants alone."

Counsel's Submissions

[6] During the hearing Learned Counsel relied on **Kelly v Arawak Motors Ltd. And Others**[1]. This was a case which involved an application made to the High Court to set aside a default judgment on the grounds that it was issued without leave contrary to Order 6 rule 6(1) of the former Rules, and it had been served more than a year after its issue without any extension of validity by the court, contrary to Order 6 rule 7(1). Counsel specifically referred to paragraphs e to g on page 167 of the judgment in support of the application at bar. Satrohan Singh JA(Ag), as he then was, cited with approval the principles enunciated by the House of Lords in **Kleinwort Benson Ltd v Barbrak Ltd**[2], and in **Waddon v Whitecroft-Scovill**[3] Ltd. He concluded that the court in determining whether or not to exercise its discretion to extend the validity of the writ (the predecessor to the "claim form" under CPR 2000), should have regard, not only to difficulty of serving the writ but also the balance of hardship between the parties.

[7]] Learned Counsel also submitted that the Court should have regard to Rule 26.1(2)(k) of CPR where it is provides that *"Except where these rules provide otherwise, the Court may-...extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.."*

[8] Further, Learned Counsel urged the Court to take into account the fact that the order to serve out of the jurisdiction, which was made on the 29th of March 2011, was not drawn up by the court in compliance with CPR 42.5 (1). This led to a number of mistakes with finalizing the draft order and that resulted in delay in Counsel for the Applicant/Claimant being aware of it, and being able to act on it expeditiously. This fact, he submitted, adversely affected the Applicant/Claimant

[1] 1992) 43 WIR 165
[2] [1987] 2 All ER 289
[3] [1988] 1 All ER 966 at page 1000

and should be considered by the Court in determining whether the Applicant has a good reason for not effecting service during the period of the validity of the claim.

Relevant CPR rules

[9] CPR 8.12 provides (1) that a claim form that is to be served within the jurisdiction must be served within six (6) months of the filing of a claim, and (2) a claim form that is to be served outside the jurisdiction must be served within twelve (12) months, provided however that where a claim form is to be served outside the jurisdiction, permission must be obtained from the court, pursuant to CPR 7.

[10] CPR 8.13 governs applications for an extension of time for serving a claim form. This provides, so far as is relevant to this case:

> "(1) The claimant may apply for an order extending the period within which a claim form may be served.
>
> (2) The period by which the time for serving a 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 a claim form specified by rule 8.12; 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 under paragraph (1) only if it is satisfied that –
>
> (a) the claimant has taken all reasonable steps to –
>
> (i) trace the defendant; and
> (ii) serve the claim form;
>
> but has been unable to do so; or
>
> (b) there is some other special reason for extending the period...."

[11] CPR 26.1 (2) (k) states:

> "26.1 (2) Except where these rules provide otherwise, the court may...
>
> (k)extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;"

[13] CPR 42.5 (1) provided:

> "Every judgment or order must be drawn by the court, unless –
> (a) a party with the permission of the court agrees to draft it;
> (b) it is a consent order under rule 42.7
> (c) the court directs a party to draft it; or
> (d) the court dispenses with the need to do so."

Issues

[14] The central issues for consideration in this matter are:-

(1) whether any of the reasons proffered by the Applicant/Claimantsatisfy the requirements under Rule 8.13 of the CPR.

(2) whether the Court should have regard to the Applicant/Claimant's claim that his suit may be statute barred under the Limitation Act if extension is not granted.

(3) whether the failure by the Court to draw up the order granting permission to serve out amounts to a "special reason" within the meaning of Rule 8.13 of CPR.

(4) Whether the Court should exercise its general discretionary power under CPR 26.1 (2) (k) and grant an extension of the period within which the claim may be served, notwithstanding that the power to extend time for service of the claim form is circumscribed by Rule 8.13 of the CPR.

Legal Principles

[15] CPR 8.12(1) provides a general rule that the claim form must be served within six (6) months. If permission is given for it to be served out of the jurisdiction, then by CPR 8.12(2) the period for service is extended to twelve (12) months.The need for placing these time limits on service of the claim form is dictated by the need for finality to litigation and by the existence of limitation periods. The period allowed for service seeks to ensure that the uncertainty of litigation is not unreasonably extended. These rules also reflect the recognition that the objective of limitation rules would be thwarted if, having issued proceedings, claimants could indefinitely put off service and thereby keep their claim alive infinitely into the future[4].

[16] The court is however empowered to extend that period in situations where it has proved difficult to carry out service within the time limits established by the CPR. This discretionary power is however circumscribed by Rule CPR 8.13 and applications for extension of the period for service are thereby subjected to a stricter regime. As a general rule, an application to extend the time for service **must** be made within the period for serving the claim form or extension of that period granted by the Court (see CPR 8.13(3). Further, the court may grant an extension only in the following situations:-

(i) the Claimant has taken all reasonable steps to trace the Defendants and serve the claim form but has been unable to do so; or

(ii) there is some other special reason for extending the period.

The adoption of these conditions reflects the importance that the CPR attaches to enforcing compliance with time limits for serving the claim form. As Dyson LJ put it, it "*should clearly be understood ... that where there is no reason, or only a very weak reason, for not serving the claim form in time, the court is most unlikely to*

[4] Zuckerman on Civil Procedure: Principles of Procedure 2nd edn (2006) at paras. 4.34 and 4.134

grant an extension of time"[5]. This approach has been reiterated by Neuberger LJ who held in the English case **Kuenyehia** v. **International Hospitals Group Ltd**[6] "*the time limits in the CPR, especially with regard to service of the claim form where the limitation have expired, are to be* ***strictly observed****, and extensions and other dispensations are to be sparingly accorded, especially when applied for after time has expired".*

[17] The question whether the claimant has taken all reasonable steps to serve the claim form must be judged by reference to the entire period for service. Accordingly, a claimant who sits back for the most of the period and springs into action only close to the end of the service period would not normally be considered to have taken all reasonable steps, even if what he has done at the last moment was in itself reasonable. Much will depend on the reasonableness of periods of inactivity as well on as the active steps taken[7].

Analysis and Findings

[18] The claim form in this case was issued on 8th October 2010. Therefore, given that permission to serve it out of the jurisdiction was granted (29th March 2011), it became a claim under 8.12(2) and so the period for service expired on 10th October 2011. The application at bar was however filed some 9 months after the expiry of this period and not within the period for serving the claim as mandated by CPR 8.13(a). As I see it, the requirement under CPR 8.13(a) must be strictly complied with since, unlike the UK CPR 7.6(3), does not empower court to grant an extension where permission is sought after the expiry of the period for service of the claim form. Accordingly, the application at bar ought to be dismissed.

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[5] Collier v. Williams [2006] EWCA Civ 20, [133].
[6] [2006] EWCA Civ 21, [33].
[7] Supra at Note 4 at para. 4.139.

[19] In the event that I am wrong I shall now turn to whether the Applicant/Claimant has satisfied the conditions laid down by CPR 8.13(4)(b). The application at bar does not fall within CPR 8.13(4)(a) because the Applicant/Claimant does not allege that he has taken all reasonable steps to trace the Defendant and to serve him with the claim form. Indeed, the evidence adduced establishes that the Applicant/Claimant failed to take any steps at all to serve the claim form within that twelve (12) months window although he had approximately 6 months of validity left after the order to serve out was obtained. He could have attempted service, or at a minimum, applied for an extension of its validity before it expired. This he did not do.

[20] The "special reason(s)" proffered by the Applicant/Claimant for his failure in this regard are set out at paragraphs 5(3) to 5(10) above. I will examine each of these *ad seriatim*.

[21] The Claimant alleged that he was preoccupied with producing Witness Statements in support of his case from high profile Government officials and that this took him some time. The reason he gave in his affidavit for his puzzling actions in this regard was that he needed the Witness Statements since in the event he lost at trial, the costs against him would be phenomenal, having regard to the amount of the claim. Counsel for the Applicant/Claimant, in an effort to assist the Court, explained that he, as Counsel, wanted to be sure about the facts of the case before the documents were served as he, Counsel, needed to check the veracity of the claim. He felt that signed Witness Statements would assist in corroborating those allegations.

[22] In passing, I find this a rather novel way of conducting a matter where one has already issued a Claim Form and Statement of Claim containing certain allegations which the Applicant/Claimant has certified as true. This seems to be putting the "cart before the horse" as parties are expected to verify the facts pleaded in their claim before the claim is filed.

[23] The Claimant further alleges that the Witness Statements that he was waiting on for some time were tossed out by his car-cleaner and lost irretrievably.

[24] I find that the effort to obtain Witness Statements at this premature stage of the proceedings is not a very good reason for the Claimant's failure to serve the claim form within the service period or his delay in making the application at bar for an extension. Indeed, the Claimant is not seeking the Court's assistance to overcome a genuine problem he has encountered in carrying out service but rather he is seeking relief from the consequences of his own neglect. It is noteworthy that the Claimant did not even spring into action and try to effect service after the Witness Statements were lost. He allowed the period for service to pass and now throws himself on the Court's mercy and complains of the hardship he would suffer if his claim is allowed to be dismissed.

[25] The Claimant also testified that he was imprisoned and during the period of his imprisonment he had never once been in communication with his Solicitor on this matter as he was preoccupied with obtaining Bail. It is noteworthy that nowhere in his affidavit, has he deposed the period of incarceration and how that impacted his ability to effect service within the period limited for so doing. It is the Claimant's own evidence that he went overseas after he was released. It would appear that the Claimant simply overlooked or did not attribute any importance to the matter and now seeks relief from the consequences of his own neglect. I find that this ground is not a good reason.

[26] The other reason advanced by the Applicant/Claimant that I think worthy of further consideration is that dismissal would deprive him of his cause of action as the limitation period has expired. It appears that the action has become time-barred during the currency of the unserved claim form and if the matter is dismissed, the Claimant would find himself in some real difficulty in re-filing his Claim. The Applicant/Claimant is by his application asking to disturb a defendant who is by now entitled to assume that the matter is no longer justiciable.

[27] The Eastern Caribbean Court of Appeal in **Marty Steinberg et al v Swisstor & Co. et al**[8] dealt directly with the issue ofextension of time within which to serve a claim form and the effect of the Limitation Act Cap. 43 of the British Virgin Islands[9] 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 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 if time for service of 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 claimants adhere strictly to the time limit for service or else provide a good reason for dispensation*[10]". This decision is binding on this Court and I accordingly find that the expiration of the limitation period does not amount to a "special reason for extending the period". It is noteworthy that the **Kelly v Arawak Motors Ltd. And Others** case relied on by Learned Counsel also enjoins this Court to have regard to the balance of hardship between the parties.The prejudice which is likely to be suffered by the Defendants if this application were granted heavily weighs against the exercise of my discretion in the Claimant's favour.

[28] Learned Counsel for the Applicant/Claimant raised, with some reluctance, another reason. He drew the Court's attention to the fact that the order for service out was not drawn by the Court as required by CPR 42.5 (1). He alleged that as a result, there were issues with the form and date of the said order and it took some time for the order to be settled and perfected. This, failure by the Court, he contended, contributed to the delay and so the Court ought to take that in consideration.

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[8] Civil Appeal 2011/012 (British Virgin Island) - unreported

[9] Similar to the Limitation Act of the Federation.

[10] See: Para 73 of the Judgment

[29] This matter was being raised by Counsel at the Bar table. While this may explain the reluctance of Learned Counsel to bring up the matter, I am required to consider the facts that are properly before me.

[30] I will nonetheless consider the point for what it is worth. CPR 11.7(2) provides that *"[t]he applicant must file with the application or not less than 3 days before the hearing of the application a draft of the order sought ..."*. CPR 11.7(3) further provides that *"[i]f the application is made without notice, the draft order must be filed with the application"*. On Counsel's own admission, the draft order that was filed was settled by the learned judge in April 2011. With greatest respect to counsel, I find that CPR 42.5(1) is inapplicable to the application. I am fortified in my conclusion in this regard inasmuch as CPR 42.1(2) provides that Part 42 *"does not apply to the extent that any other rule makes a different provision in relation to the ... order in question"*.

[31] In any case, on the Applicant's/Claimant's own evidence he was not in contact with Learned Counsel until 22nd June, 2012 and only provided him with the process server's address at that time. It seems therefore that the alleged delay in settling the Order was not the cause for the delay in serving the claim form.

[32] Having considered those reasons adduced into evidence through the Affidavit of the Applicant/Claimant, I find nothing in any of them that would constitute a good reason for me to exercise my discretion in favour of the Applicant and extend the validity of the Claim Form.

[33] In the case at bar, I find that no satisfactory, credible reasons were tendered in evidence. I do not find the preoccupation of the Applicant with getting witness statements and then losing them to be a good reason for not even attempting to serve the Defendants. It is passing curious that the Applicant was getting witness statements since he had not even served the Defendants and would not have known what their case was about. Also, not much weight can be given to the fact

that the Applicant was incarcerated and failed to communicate with his solicitor as I was not provided with the period of such incarceration to enable me to determine if such could sufficiently impact him failing to provide instructions for the life of the claim and therefore to be considered good enough reason for dispensation of the rule.

[34] I will now address the issue whether the Court should exercise its general discretionary power under CPR 26.1(2)(k) and grant an extension of the period within which the claim may be served, notwithstanding that the power to extend time for service of the claim form is circumscribed by Rule 8.13 of the CPR. It seems to me that the policy behind CPR 8.13 would be defeated if the conditions for obtaining extension of time could be sidestepped by appealing to the court's discretionary powers under CPR 26.1(2)(k). The English Court of Appeal recognizing this has blocked the escape routes from the strictures of CPR 8.13 via CPR 26.1(2)(k). It has been held that general discretionary powers cannot be used to achieve something that is prohibited under another rule[11]. I find that since CPR 8.13 constitutes an exhaustive arrangement for dealing with extensions of the time to serve the claim form, it displaces the general discretion to extend time, in particular the discretion under CPR 26.1(2)(k)[12].

[35] For the reasons stated herein I will deny the Application.

Yvette A. Wallace
High Court Judge (Ag)

[11] Steele v. Mooney [2005] 2 All ER 256, [24].
[12] Vinos v. Marks & Spencer Plc [2001] 3 All ER 784.