

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. C.L. 2001/R 216

BETWEEN	JULIANNE RICKETTS	CLAIMANT/APPLICANT
AND	GARFIELD EWERS	1 <sup>ST</sup> DEFENDANT/RESPONDENT
AND	LLOYD WALTERS	2 <sup>ND</sup> DEFENDANT/RESPONDENT

Mr. Audel Cunningham and Mr. Courtney Bailey instructed by DunnCox for the claimant.

Mr. Maurice Manning and Miss Ayana Thomas instructed by Nunes Scholefield, Deleon & Co. for Victoria Mutual Insurance Company.

**Heard 22<sup>nd</sup> and 30<sup>th</sup> July 2004**

**Sinclair-Haynes, J. (Ag.)**

As promised, I now put my reasons in writing.

The Claimant, Miss Julianne Ricketts alleges that on the 2<sup>nd</sup> day of January 1996 she was injured in a motor vehicle accident.

On the 31<sup>st</sup> day of December 2001, she instituted proceedings against Garfield Ewers who she claims was the driver of the vehicle which struck her and Lloyd Walters, the owner of the vehicle.

On the 25<sup>th</sup> day of July 2003 she applied to the Court for the following:

(a) renewal of the Writ;

- (b) for personal service of the documents on the defendants to be dispensed with;
- (c) for substituted service by way of publication in the Daily Gleaner and by leaving the documents at the registered office of Victoria Mutual Insurance Company.

In her affidavit in support, Ms. Julianne Mais-Cox, Attorney-at-Law for Miss Ricketts averred that on several occasions in 2002 a number of attempts were made by Mr. Melton Jackson to locate the defendants in order to effect service. She further stated that Mr. Jackson was informed when he visited the last known addresses of the Defendants that their whereabouts were unknown.

At the time of the application, the Writ had expired.

On the 7<sup>th</sup> October 2003, Master McDonald ordered that the Writ of Summons dated 31<sup>st</sup> December 2001 be renewed “for consecutive periods of six months each beginning on the 31<sup>st</sup> December 2002 and ending on the 31<sup>st</sup> December 2003”. She dispensed with personal service and granted permission to effect service by way of publication in the Daily Gleaner newspaper and by leaving the documents at the registered offices of the second defendant’s insurer, Victoria Mutual Insurance Co. (VMIC)

On the 2<sup>nd</sup> of December 2003, the Claimant applied for permission to vary the order of the Master by effecting service of the renewed Writ of Summons and Amended Statement of Claim by leaving the documents at the registered office of VMIC, the insurers of the Defendants.

In his affidavit in support of the application, Mr. Courtney Bailey, the Attorney-at-Law for Miss Julianne Ricketts, averred that she was unable to bear the cost of publishing in the newspaper.

On the 12<sup>th</sup> February 2004, Victoria Mutual Insurance Co. applied to the Court to set aside the order for the renewal of the Writ of Summons and substituted service. The application was made on the following grounds:

- (a) the Order was made in breach of rule 8.15 (2) of the Civil Procedure Rules.
- (b) The application for renewal of the Writ was made outside rule 8.15 of the Civil Procedure Rule and outside the period of limitation.
- (c) The applicant has not been in communication with the second defendant since the expiry of his insurance on September 13, 1996 and hence the documents were unlikely to come to the attention of the second defendant through them.

In the affidavit in support of the application, Miss Peta-Gaye McCook, Manager of Victoria Mutual, deposed that VMIC, upon being served with the renewed Writ and other documents, endeavoured to contact Mr. Lloyd Walters by employing the service of Binoc Visions Investigations Ltd. However, the efforts were futile as they were unable to ascertain his whereabouts.

### **Submissions on behalf of Victoria Mutual Insurance Company**

- (1) Rule 8.15 of the Civil Procedure Rule states that the period by which time for serving the claim form is extended may not be longer than six months on any one application. The Master extended the Writ for two successive periods of six months.

(2) the application for the renewal of the Writ and Statement of Claim was made over six months after the expiry of the Writ of Summons and limitation period. Reliance was placed on the case of *Lewis v Harewood S.C.C.A. (1997) P.I.Q.R p 58*. It was submitted that the failure of the applicant to provide a reason for not applying for renewal before the validity of the Writ expired was fatal in light of the prejudice suffered by the defendant in the loss of a limitation defence.

### The Law

*Rule 8.15 (2)* of the CPR states:

“The period by which the time for serving the claim form is extended may not be longer than 6 months on any one application.”

In the instant case, the Writ was extended on one application for two successive periods of six months in contravention of Rule 8.15(2).

In as much as the Court may grant two extensions, the applications must be separately made. The applicant may apply within the period to have the claim form renewed for a further six months.

However, the Court has the power to rectify matters where there has been a procedural error as long as the consequence of failure to comply has not been specified. See Rule 26.9(1).

Rule 8.15 of the CPR states:

“(1)The claimant may apply for an order extending the period within which the claim form may be served.

(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

(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...”

**Has the Applicant satisfied the requirement of Rule 8.15?**

I am obliged to answer in the negative.

In her affidavit in support of her application, Ms. Julianne Mais-Cox merely makes a bald statement that she was informed by Mr. Melton Jackson that his attempts to serve the defendant were futile. No outline of these efforts was presented to the court; for example, details of dates and times and to whom he spoke. Why is there not an affidavit from Mr. Jackson? Ms Peta-Gaye McCook however supported Ms. Mais –Cox that the second defendant’s whereabouts are unknown. In her affidavit Ms. Peta-Gaye McCook outlined the efforts made by V.M.I.C. to locate him. The fact that the defendant’s whereabouts are unknown would constitute good reason to renew the writ.

## Discussion on the law

The claimant has however failed to provide any reason for her failure to apply for an extension before the expiry of the Writ of Summons and limitation period. The CPR does not provide any guidance on the matter. However, this application falls within category 3 of the categories outlined by Lord Brandon of Oakbrook in **Kleinwort Benson Ltd v Barbrak Ltd. Et al (1987) 2 ALL ER 289.**

“That is where the application is made at a time when the Writ has ceased to be valid and the relevant period of limitation has expired.... In category (3) cases, however, it is not possible for the plaintiff to serve the Writ effectively unless its validity is first retrospectively extended.

In category (3) cases, therefore, it can properly be said that, at the time when the application for extension is made, a defendant on whom the Writ has not been served has an accrued right of limitation.

It would not be right, however, to regard the question whether at the time of the application for extension, a defendant on whom a Writ has not been served has an accrued right of limitation, as the only significant factor in relation to such extension.”

In Lewis v Harewood at page 58, Waite L.J with the concurrence of Morrit

L.J said:

“A judge exercising the discretion to extend time at the suit of a party seeking an extension of time for service after the validity of the proceedings has expired and after expiry of any relevant limitation period, has to conduct the inquiry in two stages.

He must first be satisfied at stage one that there is good reason to extend time, and also that the plaintiff has given a

satisfactory explanation for his failure to apply before the validity of the proceedings expired. If he is not so satisfied, that is the end of the application and stage two will never arise. If he is so satisfied, then he must go on, at stage two, to a general exercise of a discretion involving a consideration of all the circumstances including the balance of prejudice or hardship. Matters relevant at stage two are not however relevant at stage one. There is a degree of overlap, and a Judge addressing the inquiry at stage one is entitled and bound to take into account any matters which appear to him to be relevant to the issues of good reason and satisfactory explanation, notwithstanding that the same matters will also be relevant (assuming it arises at all) to the exercise of his discretion at stage two.”

In Battersby v Anglo American Oil Co. Ltd. (1944) 2 All ER 387 Lord Goddard made the following observations at page 391 which Lord Brandon in Kleinworth Benson Ltd.v. Barbrak Ltd. stated were applicable to Category (2) cases perhaps also to Category (1) cases.

*“We conclude by saying that even when an application for removal of a writ is made within 12 months of the date of issuance, the jurisdiction given by Order 64.... ought to be exercised with caution. It is the duty of a plaintiff, who issues a writ to serve it properly, as renewal is certainly not to be granted as of course, on an application which is necessarily made ex parte. In every case there 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 reason appear to excuse the delay in service, as indeed is laid down in the order. The best reason of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others.”*

The following passage from Barr v Barr (1994) PIQR page 45 was cited and relied upon by Waite L.J in Lewis v Harewood.

“It has been made clear in a series of cases, and the court repeated yet again in Ward-Lee v. Lineham, that the rules are there to be observed and that the court will not, as a matter of course, extend time or overlook failures to comply with the rules. I refer to the passage in the court’s judgment on page 763(H) where the court said:

‘Time limits such as these are intended to be short; it is incumbent on parties to comply with them; and if extensions were granted at all readily the time limits would very quickly become a dead letter. That is why the discretion to extend must be sparingly exercised.’

The court has those principles very much in mind, and similar principles stated in other cases, and does not wish in any way to countenance the notion that obtaining an extension is a formality, or that such relief is granted as a matter of course, or on the nod. The first condition that any applicant must satisfy is to give an explanation for the failure to comply with the rules and to show good reason why relief should be granted. [The Master of the Rolls then proceeded to give reasons why a satisfactory explanation had been advanced on the facts of that case and continued] ...

So far as good reason is concerned one is conscious of the fact that the result of not extending is to stifle the plaintiff’s action. That, however, overlaps with consideration of the question of discretion and it is of course the case that this court cannot simply exercise its discretion afresh unless it is satisfied that the judge below, whose discretion it was, had made an error in the exercise of his discretion.”

Waite L.J expressed the opinion in the said case that failure to advert to or apply the principles emphasised in Ward-Lee v Lineham (1993) 2 All ER 1006

was a misdirection. He further opined that not only must consideration be given to the issue of satisfactory explanation but must be treated separately and with equal importance.

It is noteworthy that in Lewis v Harewood, the applicant was a mere twelve days out of time.

The settled approach in exercising the discretion to renew the Writ is to take into consideration all relevant issues. A period of six months has elapsed since the validity of the Writ has expired. 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. She has not even proffered a reason, more so, satisfactory reason for not having applied within the specified period. In balancing the scales of hardship and prejudice, I am of the view that the scales must be tipped in the favour of the defendant.

### **Submissions by VMIC**

It is Victoria Mutual's contention that they have not been in communication with the 2<sup>nd</sup> defendant. He was only insured with them for one year. Since the expiry of his insurance on September 13, 1996 they have not been in communication with him. In the circumstances, it was unlikely that the documents

would come to the attention of the 2<sup>nd</sup> defendant through them. If the order is not set aside, the defendants will be unaware of the proceedings. Hence, they will be unable to give instructions.

### **What is the Law on the matter?**

Rule 5.14 (2)(b) states

“An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit,

(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim.”

Victoria Mutual employed the services of Binoc in an effort to locate Mr Lloyd Walters but without success. It is therefore unlikely that the 2<sup>nd</sup> defendant will be able to ascertain the contents of the claim form and Statement of Claim through Victoria Mutual.

### **Whether Victoria Mutual has the right to intervene**

It is the contention of Mr. Audel Cunningham that Victoria Mutual has no locus standi to intervene in the matter to set aside the orders made by the Master. He argues that Victoria Mutual is only able to intervene at the point where default judgment is obtained, as it is only at that point the company might be liable by virtue of the judgment.

Mr Manning is however of a contrary opinion. He argues that Victoria Mutual can rightly intervene at this stage.

In *Jacques v Harrison* (1883) 12 QBD 136 judgment in default was set aside on the application of the equitable mortgagees.

In *Windsor v Chalcraft* (1939) 1 KB 279 the insurer successfully intervened to set aside default judgment that had been obtained.

In *Linton Williams v Jean Wilson and Harris Williams and Insurance Company of the West Indies*, (1989) 26 JLR 172 the insurance company, it was held, could properly intervene to set aside a default judgment. Does this mean that only in circumstances where default judgment has been obtained that the insurer can intervene? In light of Rowe P's decision in *Williams v Wilson* and *Williams v Lewis*, I am ineluctably driven to the conclusion in that this is not so.

The English position as stated in *Jacques v Harrison* and *Windsor v Chalcraft* was expressly approved by Rowe P in *Williams v Wilson*, *Williams and ICWI* (1989) 26 JLR 172 Rowe P. opined that the insurance company had a right and not just a liberty to do so. As a consequence of this right, the insurers could intervene in a suit. He was of the view that a person who had a contractual relationship with the defendant by virtue of the Motor Vehicle Insurance (Third Party Risks) Act could intervene in a suit on its own motion "if the possibility that such an insurance company could be liable in judgment by virtue of section 18 (1)

of the said Act”. It is clear that the right to intervene to set aside a default judgment, as Rowe P. stated is a consequence of the general right to intervene.

Rowe P. in his judgment cited copiously from Bowen L.J at page 175. He said:

“Bowen L.J took the opportunity to restate the proper practice to be adhered to in such proceedings. He said at page 167 of the Report:

‘There are, so far as we can see, only two modes open by which a stranger to an action who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside; and these two modes are amply sufficient to protect any such stranger in all cases in all his rights. He may, in the first place, obtain the defendants’ name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendants’ name, apply to have the judgment set aside on such terms as the Judge may think reasonable or just. Or he may, if he is not entitled without further proceedings to use the defendants’ name, take out a Summons in his own name at chambers to be served on both the defendant and the plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the Judge may consider right or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act 1873 24 subs 6.’

It is important to note that Bowen L.J thought that a stranger could be fully protected ‘in all cases in all his rights’ by recourse to one or other of the modes set out above.”(emphasis mine)

Rowe P. has made it clear that the right to intervene is not only confined to the setting aside of default judgments but open to an interested party in a myriad of circumstances “in all cases in all his rights”.

In Gurter v Grant the Motor Insurer’s Bureau applied to set aside substituted service on the insurance company. In that case, Diplock L.J stated:

“Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A Matter in dispute is not in my view effectively and completely ‘*adjudicated upon*’ (my italics) unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard. In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third party liability policy give to the insurer a contractual right to conduct the defence of the running-down action in the name of the insured.”

It is axiomatic that an insurer can intervene at any stage since it would be responsible to “foot the bill”.

Lord Devlin applied the following proposition to the said case.

“If the Motor Insurers’ Bureau are not allowed to come in as a defendant, what will happen? The order for substituted service will go unchallenged. The service on the defendant will be good, even though he knows nothing of the proceedings. He will not enter an appearance. The plaintiff will sign judgment in default of appearance. The judgment will be for damages to be assessed. The master will assess the damages with no- one to oppose. The judgment will be completed for the ascertained sum. The defendant will not pay it. Then the plaintiff will be able to come down on the Motor Insurers’ Bureau and call on

them to pay because they have made a solemn agreement that they will pay.”

Accordingly, the ex parte order dated 7<sup>th</sup> day of October 2003 and the 16<sup>th</sup> day of December 2003 granting the claimant leave to renew the Writ of Summons and the effect substituted service of the renewed Writ of Summons, Statement of Claim and amended Statement of Claim on the defendant to be set aside.

That service of the renewed Writ of Summons, Statement of Claim and amended Statement of Claim on Victoria Mutual be set aside.

Leave to appeal granted.