

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

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2015CDOOO49**

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| **BETWEEN** | **COLDFIELD MANUFACTURING LIMITED** | **CLAIMANT** |
| **AND** | **WAYNE CHEN** | **DEFENDANT** |

**Civil Procedure – Application to renew order for seizure and sale- Whether application made within twelve months of issue date- Whether the "corresponding date rule" of computation of time applies - Whether interests of other judgment creditors affected.**

**Kereene Smith instructed by Gordon Mcgrath for Claimant**

**Kashima Moore instructed by Nigel Jones & Co. for Defendant**

**Heard: 7th and 15th October 2021**

**In Chambers: By Zoom.**

**COR: BATTS J.**

[1] My decision, and the orders at paragraph 24 of this judgment, were announced on the 15th October 2021.I promised then to give reasons in writing at a later date. This judgment fulfils that promise.

[2] The Claimant applied, by a "*Without Notice Application for Renewal of Writ of Execution*" filed on the 13th September 2019, for renewal of an Order for Seizure and Sale which had been issued on the 13th September 2018. That order empowered the Bailiff to execute, for the balance due and owing, on a consent

judgment made on the 14th July 2016. The Defendant opposes the application to renew as being out of time and hence jurisdictionally barred.

[3] The Claim Form, initiating these proceedings, was filed on the 27th April 2015. A Defence to the Claim was filed on the 16th July 2015. Mediation resulted in a settlement agreement dated the 22nd March 2016. By Order of Sykes J, made on the 14th July 2016, the mediation agreement became a judgment of the court which provided for certain terms of payment.

[4] The terms of payment were not met by the Defendant and, as a consequence, the Order for Seizure and Sale of goods, referenced above, was filed on the 27th August 2018. It was issued with respect to the balance of the judgment debt then due and owing of US$40,500.00. The affidavit of Kereene Smith, filed on the 13th September 2019, informs us that sometime in or after October 2018 the Defendant requested forbearance on its execution and promised a proposal for payment. The affidavit states that the proposal, when it came, was for payment of one half of the balance due and owing, see exhibit KS4 to the affidavit, being an email dated 4th June 2019. The affidavit states in paragraph 13 :

> *"The Claimant delayed the execution of the Order for Seizure and Sale of goods in good faith hoping to receive a fair proposal for payment of the outstanding debt from the Defendant to no avail. The Order is will (sic) expire shortly and, in the circumstances, the Claimant requires a renewal of the Order for a further six (6) months."*

[5] The application to renew the Order of Seizure and Sale came before the court on the 12th November 2019. On that date Laing J ordered that the application be served on the Defendant. It was adjourned to the 20th November 2019. On the 20th November 2019, the Minute of Order notes:

> *"The hearing of the application for Renewal of the Writ of Execution is Part-Heard UNTIL 20TH January 2020 at 3pm for ½ hour for affidavit from Defendant and service on Tiksi International Management Inc"*

[6] That order, by the Honourable Mr. Justice Laing, was in all likelihood prompted by the content of an affidavit of Liane Chung filed on the 26th November 2019.In that affidavit Ms Chung, an attorney in the firm representing the Defendant, stated that the Defendant had five other judgment creditors. These were listed and the details stated. One of those creditors was Tiksi International Management Inc. Ms. Chung ends her affidavit as follows:

> *"The Defendant's Attorney-at- Law was not made aware of the Order of the Seizure and Sale filed on 27th August 2018 until on or about June 4 2019 via email from the Claimant's Attorney-at-Law at which time the Defendant made attempts to settle this matter but same was unsuccessful as it was not accepted by the Claimant."*

[7] On the 20th January 2020 the application for renewal of the Order of Seizure and Sale was by consent further adjourned to the 30th April 2020. However, it appears not to have come back before the Court until the 21st May 2020 when the order noted was:

> *"The application for renewal of Writ of Execution [*adjourned*] until July 30th 2020 at 2pm for ½ hour pending settlement. "*
>
> It was again adjourned for similar reasons to the 22nd October 2020 and again further adjourned, for the same reasons, to the 12 January 2021. On that date, and again for similar reasons, the application was adjourned to 7th April 2021.

[8] The negotiations, having borne no fruit, on the 7th April 2021 Laing J. made the following orders:

> *"1. The hearing of the application for the renewal of the Writ of Execution is fixed for 21st June 2021 at 2pm for 2 hours.*
>
> *2. The Judgment creditor is permitted to file an affidavit updating the payments made to date.*
>
> *3. The parties are to file and serve skeleton submissions and authorities on or before 11th June 2021.*
>
> *4. No order as to costs*

*5. Applicants attorney- at –law to prepare file and serve a copy of the Order."*

[9] Both the Claimant and Defendant filed skeleton submissions. On the 21st June 2021 the application was listed before me on the "zoom platform". No parties appeared and I adjourned it for a date to be fixed by the Registrar. As it happened the attorneys, representing the parties, had been on the platform awaiting entry to Laing J's virtual meeting room. Given the history outlined above their expectation, that the matter would have been listed before Laing J, was reasonable. In the result the matter was again listed before me on the 7th October 2021. No objection was taken to my hearing the matter. I therefore commenced and completed the hearing before reserving my decision to the 15th October 2021.

[10] The Defence objects to the order for renewal on the basis that:

*" …the Order for Seizure and Sale was issued on September 13, 2018 therefore when the application was made to the Supreme Court on 13th September 2019 the Order of Seizure and Sale had lapsed."* (see skeleton submission of Defendant filed 1st June 2021.)

Therefore, it is urged, as an application for renewal must be made while the Writ of Execution is valid, the Court should refuse this application. Reliance is placed on Rule 46.10(2) of the Civil Procedure Rules (hereinafter referred to as the CPR) and the authority of **Royal Caribbean Cruises Ltd et al v Access to Information Appeal Tribunal [2016] JMCA App19 (unreported judgment delivered 24th June 2016)**. In oral submissions Miss Moore also asserted that there was no explanation proffered as to why the application had not been made in time.

[11] The Claimant's submission was that on a true construction of the rules the application was within the life of the Order for Seizure and Sale. Miss Smith argued that part 46.9(1) of the Civil Procedure Rules says the Writ of Execution is valid for a period of 12 months. Month in Rule 2.4 is defined as calendar month. The reckoning of the period should begin on September 13th 2018 and extend to

September 13th 2019, that is twelve whole calendar months, as per Lord Russell of Killowen in **Dodds v Walker [1981]2 A11ER 609 @ 611g:**

> *"…… It is also common ground that ordinarily the calculation of a period of a calendar month or calendar months ends on what has conveniently been referred to as the corresponding date. For example when service of the relevant notice was on 28th September, time would begin to run at midnight 28-29 September and would end at midnight 29-29 January, a period embracing four calendar months……."*

[12] The Claimant also cited a passage at paragraph 23 of the court's judgment in **Henzel Clarke v David Vincent [2013] JMSC Civ 15.** The **Royal Caribbean case** (cited above) was also relied upon. In paragraphs 6 and 7, of the judgment of Brooks JA (as he then was), the "*clear days*" approach to computation of time was adopted. Therefore, I understood the Claimant's counsel to be saying, the first and last days of the period are not to be counted.

[13] Let me say at the outset it is not surprising that each party was able to find some solace in the Court of Appeal's decision in **The Royal Caribbean case** (cited above). Its ratio is not easily deciphered. That case considered the question whether judicial review proceedings had been filed out of time, that is, whether the 14 day period, provided for in Rule 56.14(2) of the CPR, had been breached. The Order, granting leave to apply for judicial review, had been made on the 7th July but the proceedings for judicial review had not been filed until the 22nd July. The CPR Rules 3.2(2) and 3.2(3) provided for the application of the "*clear days*" approach to computation in certain circumstances. If applied the first and last days of the period would not be counted and the filing would be in time.

[14] The Court of Appeal, by majority, decided that the proceedings were out of time. However, each of the judges gave a different reason for their decision. Justice of Appeal Williams, with whose conclusion Brooks JA agreed, decided that the CPR rule was not applicable and that resort was to be had to the Interpretation Act. She concluded that the first day of the period ought not to be counted but that the last day should be. The filing was therefore on the 15th day and out of time. Brooks JA,

unlike Williams JA, did not think the Interpretation Act should be resorted to because the CPR had specific rules for computation of time. Applying Rule 3.2 (3) (a) he found that the proceedings were to be filed "*within 14 days of receipt of the order granting leave*" and, therefore, the end of the period for filing was not defined by reference to an event. Brooks JA therefore decided, as did Williams JA, that the first day was excluded from the count but that the last day was not. Sinclair-Haynes JA, in a stirring dissent was, like Brooks JA, of the view that the Interpretation Act was not applicable because the CPR had specific provisions as to how time was to be reckoned. However, unlike Brooks JA , she found that the period of time to be computed was "*with reference to an event,*" within the meaning of Rule 3.2(3), because Rule 56.4(12) states that leave (to apply for judicial review) is conditional on the applicant making the claim "*within 14 days of receipt of the order granting leave*." Therefore, the "*clear days*" rule applied and neither the first nor last days of the period were to be counted. Justice of Appeal Hayes therefore concluded, unlike her colleagues, that the filing had been done within 14 days.

[15] That case concerned the computation of days and is not therefore directly relevant to the issues I have to be decide. The case before me concerns counting months not days and, in particular, understanding the phrase "*within twelve months*". The decision of the court is useful, to the extent that, a majority of the judges were agreed that resort to the Interpretation Act was unnecessary because the CPR had its own expressed provisions as to how time was to be computed. The judge's approach, to the question whether the time was expressed to be with reference to "*an event*" within the meaning of rule 3.2 (3) (b), diverged remarkably. Let me say, with respect, that there is an attractive logic to the reasoning and conclusion of Sinclair-Haynes JA and her approach did seem to meet the justice of the case. That issue is not before me and, therefore, that decision will have little or no impact on my determination.

[16] The question before me relates to the renewal of a Writ of Execution. Rule 46.10 (2) of the CPR states,

> *"The general rule is that an application for renewal must be made within the period for which the Writ is valid"*
>
> A Writ of Execution is defined by Rule 46.1 to include, among other things, an Order for the Seizure and Sale of Goods. Rule 46.9 *(1)* states:
>
> *"A Writ of Execution is valid for a period of twelve months beginning with the date of its issue."*

[17] It is common ground between the parties that the Order for Seizure and Sale was issued on the 13th September 2018. The application for renewal was filed on the 13th September 2019. The issue is whether the application was "*within the period for which the writ is valid*" that is, within "*twelve months beginning with its date of issue*." The CPR provisions, relating to the computation of time, give no guidance as to the approach to the computation of calendar months. Neither does the Interpretation Act, section 8 1(a) of, which references "*a period of days from the happening of the event*."

[18] The industry of Counsel has unearthed no applicable authority within this jurisdiction. In the United Kingdom the House of Lords considered the meaning of "*calendar months*" in **Dodds v Walker** (cited above). In that case the relevant statute enabled an application to be made not more than 4 months after an event. The event occurred on the 30th September. The application was made on the 31st January. The court decided, applying their Interpretation Act of 1978, that as month meant calendar month the four-month period ended on the 30th January not the 31st January. However, Lord Diplock, in arriving at this decision with which all the other judges agreed, stated,

> *"My lords, reference to a month in a statute is to be understood as a calendar month. The Interpretation Act 1978 says so. It is also clear under a rule that has been consistently applied by the courts since Lester v Garland (1808) 15 Ves 248 [1803-13] ALL ER Rep 436 that, in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established and is not disputed by counsel for the tenant, that when the relevant period is a month or a specified number of months after the giving of a notice the general rule is that the period ends on the*

> *corresponding date in the appropriate subsequent month ie the day of that month that bears the same number as the day, of the earlier month on which the notice was given."* [Emphasis added.]

[19] I agree with Lord Diplock who went on to indicate that this "*corresponding date rule*" is simple and easily understood. Where in the corresponding month there are fewer days, and therefore the period ends on a date not available, the period ends at the end of that month. Chief Justice Cockburn, as Lord Diplock indicated at page 10 j of the report, described the rule as being "in *accordance with common usage*… *and with the sense of mankind*" see **Freeman v Read (1863) 4B&S 174 @ 184**, or, **122 ER 425 @ 429**.

[20] Is it a distinguishing factor, sufficient to cause a departure from the "*corresponding date rule*", that the CPR Rule 46.9 attaches the phrase "*beginning with the date of its issue*." I think not. All computations of a period defined by calendar month begin with a date. The rule is merely indicating how that date, of the calendar month, is to be determined. In this case it is the issue date rather than the date of filing.

[21] It seems to me that the ordinary Jamaican would be astounded if told that a document, required to be filed 12 months from the 13th day of one month, was late because it was filed on the 13th day of the twelfth month. "*But that was one year'* the Jamaican would say. It is consistent with the overriding objective that our rules are construed in a manner that accords with common sense and, as far as possible, which makes them readily understood. In this regard I respectfully adopt the approach of the House of Lords in **Dodds** case. The corresponding date rule should therefore be applied.

[22] There is a further reason for applying the rule. The legislators must be taken to have been aware of the "*corresponding date rule*" at common law. They have not sought to depart from it either, in the Interpretation Act or, in the CPR of 2002. It ought therefore to be inferred that, when construing periods of time expressed in months, the rule at common law should be applicable.

[23] In the result therefore, and for all the reasons stated above, I hold that the application to renew the Order for Seizure and Sale was filed at a time when the Order was still valid, that is, within twelve months of the 13th September 2018. This decision meets the justice of the case given that it was the Claimant's forbearance to execute, in reliance on the Defendant's promise to settle, which precipitated in some measure the need to obtain renewal.

[24] In considering the application, and in accordance with Rule 46. 10, I bear in mind there are other creditors (see paragraph 6 above). There is no evidence of service on Tiksi International Management Inc, as was ordered by Laing J on the 20th November 2019. However, with respect to my brother, I am not at all satisfied that the presence of this creditor, as distinct from the others, would make any applicable difference to my determination. I therefore see no basis to refuse renewal of the Order of Seizure and Sale on that account. On the morning I gave my decision I raised the question of service on Tiksi in order to, if necessary, consider submissions on that question. To their credit neither counsel could think of any reason to further postpone the matter for that reason.

[25] The order for Execution of Writ of Seizure and Sale is therefore renewed for a period of 6 months commencing on the date of this order being the 15th day of October 2021. Costs of the application will go to the Claimant to be taxed or agreed.

**David Batts**
**Puisne Judge**.