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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO 2003 HCV 02205

BETWEEN	MICHAEL KEATING	CLAIMANT
A N D	PRINCE ROY WILLIAMS	DEFENDANT

Stacy Ann Soltau-Robinson instructed by Samuda and Johnson for Claimant

Camille Wignall instructed by Nunes Scholefield DeLeon & Co. for Applicant

Practice and Procedure – Order for substituted service on insurer of defendant's motor vehicle – Claim form invalid at the time of order – Whether order properly made - Application to set aside

BROOKS, J.

5th and 11th October, 2007

The Insurance Company of the West Indies is not a named party to these proceedings. It has however, become an interested party because of an *ex parte* order made by this court. That order allowed Mr. Michael Keating to serve ICWI with the Claim Form herein, by way of substituted service on the Defendant Mr. Prince Roy Williams. It has now applied to set aside that order, claiming that it is not in contact with Mr. Williams, does not know of his whereabouts and did not insure him while he drove the vehicle which is said to have caused Mr. Keating's loss. Miss Wignall appearing for ICWI has also submitted that the order for the substituted service is improper, as it was made when the Claim Form had expired and was invalid.

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There are some factual issues and a legal procedural point to be considered in dealing with this application. The legal issue is whether, after the period for service of a Claim Form has expired, the court may properly entertain applications for extensions of the time for service or applications for substituted service of that Claim Form. No issue was taken with regard to the standing of ICWI in making the application.

Factual Background

The case has its genesis in a motor vehicle collision which occurred on December 11, 2001. The vehicles involved were a motor car owned and driven by Mr. Keating and another, driven by Mr. Williams. There is some controversy as to who was the owner of the latter vehicle on that date. Mr. Keating's attorneys-at-law were originally of the view that it was Mr. Williams as they wrote to ICWI concerning the matter in that vein. However when ICWI replied in May 2003, it stated, as part of the heading of its letter; "Our Insured – Estate Lloyd Hodelyn/Princeroy Williams".

The claim form was filed on November 18, 2003. It not having been served, an application to extend the time for service was filed on June 8, 2004. The application was for an extension for six months from May 18, 2004. The application was heard and granted on September 28, 2004. It was then that the order for substituted service on ICWI was made. Again,

the claim form was not served and a second application for extension of time was filed. This was on November 30, 2004 and it sought the extension as of November 18, 2004. This second application was heard and granted on April 7, 2005. The claim form was served on ICWI later that very day.

Ms. Gretchen Garriques of ICWI, at paragraphs 8 and 9 of her affidavit in support, states that ICWI insured Estate Lloyd Hodelyn as the owner of the motor car. She says that up to February 18, 2003, ICWI was of the view that Mr. Williams was merely the driver of the vehicle at the relevant time, but on that date ICWI was notified that the motor car had been sold to Mr. Williams and that he was, by then, residing outside of Jamaica. In the circumstances, says Ms. Garriques, ICWI no longer insures the vehicle. She says ICWI has no contact with, or responsibility for, Mr. Williams in respect of the vehicle. No documentation was tendered to substantiate any transfer of ownership of the motor car. Ms. Garriques' information concerning Mr. Williams was all hearsay and in part, hearsay upon hearsay. I find that it is insufficient by itself, to cause this court to set aside its order.

The Law

When the Civil Procedure Rules 2002 (CPR) were brought into effect on January 1, 2003, rule 8.14 (1) stated as follows:

"The **general rule** is that a claim form **must** be served within 6 months after the date when the claim was issued **or the claim form ceases to be valid**." (Emphasis supplied)

Rule 8.15 provided for extensions of the time for service:

"(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 on affidavit...."(Emphasis supplied)

Rule 8.14 was amended in 2006 to increase the initial validity to 12 months, but that development does not affect these considerations, what is important to note, is that unless served within time, "the claim form ceases to be valid".

Although conceding that the application was made outside of the time specified by rule 8.15 (3), counsel for Mr. Keating, Mrs. Soltau-Robinson submitted that his attorneys-at-law were forced into that position by the inefficiency of the Supreme Court Registry. She referred to the affidavit evidence that the attorneys-at-law made futile efforts to secure from the Registry the sealed copy of the order made on September 28, 2004. Without the copy, submitted counsel, any service of the claim form would have been in breach of rule 8.15(5) (b). This rule also uses mandatory language:

> "Where an order is made extending the validity of the claim form – …
> (b) a sealed copy of any order made must be served with the claim form"

Counsel's submitted that, because of this mandatory requirement to serve the sealed copy, the Registry's failure created the "peculiar circumstances in which the application to further extend the period …was made". In those circumstances, submitted Mrs. Soltau-Robinson, "the Court would have properly relied on its case management power as outlined in CPR Rule 26.1 (2) (c) to extend the time for serving …in order to comply with the overriding objective…". Counsel cited the case of *The Gniezno* [1967] 2 All E.R. 738 as authority for the proposition that "a writ is not a nullity even though the period for service has expired", and therefore the time for service could properly be extended. She submitted that the principle extended to claim forms in the regime created by the CPR.

I cannot agree with counsel's submission. It contains both factual and legal deficiencies. Firstly, the submission ignores the fact that the initial application to extend, was made out of time. Counsel submitted that this was done because ICWI's attorneys-at-law did not make any complaint about the first extension. If, barring a properly granted extension of time, the claim form ceased to be valid, then the instant claim form would have been invalid since May 18, 2004. In my view, the positions of the first and second extensions are indistinguishable.

The second fallacy in counsel's outline is that Mr. Keating's attorneys-at-law were not placed in the inescapable dilemma that she has described. They had options open to them; while awaiting the Registry's pleasure they could have applied for the extension of the time before the claim form became invalid. Alternatively, the attorneys-at-law could have been more proactive in securing the sealed order before the expiry of the validity of the claim form. It is instructive that they appear to have secured and served the sealed copy of the order for the second extension on the same day that it was made. It perhaps was born of their previous experience, but it demonstrates that that course was available the first time around.

The legal objection to counsel's submission is that it ignores the mandatory element of rule 8.15(3). The authorities do not support such a manoeuvre. Firstly, reliance on the overriding objective is only permitted where the court seeks to exercise a discretion given to it under the rules. In *Totty v Snowden* [2001] 4 All E.R. 577 the court said at paragraph 34:

> "Rule 1.2 requires the court to have regard to the overriding objective in interpreting the rules. Where there are clear express words, as pointed out by Peter Gibson LJ in Vinos' case, the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case'. Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective."

I shall now consider the word 'must', as it used in the relevant rules. The judgment of Smith, J.A. in *Norma McNaughty v Clifton Wright and*

others SCCA 20/2005 (delivered May 25, 2005), is instructive in this regard. The issue then, was whether or not rule 26.1 (2) (c) of the CPR gave the court the discretion to enlarge the time to apply to restore proceedings. The relevant rule was rule 73.4 (4). Like rule 8.15 (3), that rule specified a time by which the application "must" have been made. His Lordship emphasised the mandatory nature of the word "must" as used in the rule and found that it excluded the consideration contemplated by rule 26.1 (2) (c). The latter rule, Smith J.A. emphasised, "specifically excludes its application "where these rules provide otherwise"". I find that similar reasons apply to rule 8.15(3). The court therefore had no discretion to extend the time within which to serve the claim form. This is because the application had not been made within the specified time. The *ex-parte* order must therefore be set aside on the basis that the court had no jurisdiction to make it.

I find support in the case of *Elise Kelly and another v Garfield Minott and another* 2004 HCV 03036 (delivered March 22, 2007). In that case Morrison J. (Ag.) considered a similar application to that in the instant case. His Lordship ruled that the insurance company could properly apply to set aside the order made for the extension of time for service and for the substituted service and also opined (at page 8):

> "One cannot fail to observe the mandatory language of 8.15(3) (a), that is, the application must be made within the period. I have seen no proof and certainly

> none was forthcoming to show that there was any basis in the rules for extending the time within which the claim form may be served."

The *Gniezno* case cited by Mrs. Soltau-Robinson belongs to a by-gone era. It is true that in *Ricketts v Ewers and another* C.L 2001/ R 216 (delivered July 30, 2004) Sinclair-Haynes, J. (Ag.) (as she was then) seems to have been of the view that an application to renew a claim form, may be made after the time specified in rule 8.15(3). It seems however, that Her Ladyship's attention was directed more to the pre-CPR line of authorities in the United Kingdom (UK) and the requirements of rule 8.15(4), than with the provisions of rules 8.14 and 8.15(3). The learned judge laid significant emphasis on the fact that the claimant had not provided a satisfactory reason for having failed to apply within the time allowed.

Even if the *Gniezno* case and the *Kleinworth Benson Ltd. v Barbrak Ltd* [1987] 2 All E.R. 289 case (referred to by Sinclair-Haynes, J.) could be said to still have some currency in the UK, I find that that is because the CPR of that jurisdiction allows it. After providing in rule 7.5, in terms of similar effect to rule 8.15 (3) of our CPR, the UK rule 7 goes on to provide:

> "7.6 (3) If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified in rule 7.5 or by an order made under this rule, the court may make such an order only if-..."

The difference is clear. The court in the UK is given an authority which this court does not possess. Even then, those courts recognize the

strict nature of the framework of the rules. In *Vinos v Marks & Spencer plc* [2001] 3 All E.R. 784 at page 789 (paragraph 20) May, LJ explained:

> "The meaning of r. 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have power to do otherwise. The discretionary power in the rules to extend time periods – r 3.1(2) (a) – does not apply because of the introductory words. The general words of r 3.10 cannot extend to enable the court to do what r 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time."

Rules 3.1(2) (a) and r 3.10 referred to in this quotation are very similar in terms to rules 26.1 (2) (c) and 26.9 (2) respectively, of our CPR.

Conclusion

ICWI is entitled to succeed on the legal challenge it has made to the order extending the time for the service of the claim form. The first application for that order was made at a time after the claim form had ceased to be valid. It was made in breach of rule 8.15 (3) of the CPR. The court therefore had no jurisdiction to entertain it. It follows that the order for substituted service of the invalid claim form is also invalid.

The orders therefore are:

1. The *ex-parte* orders made herein on 28th September, 2004 and the 7th April, 2005 are hereby set aside.

2. Service of the Claim Form and Particulars of Claim herein on The Insurance Company of the West Indies Limited is hereby set aside.

3. Costs of the application to The Insurance Company of the West Indies Limited in the sum of $16,000.00.