[2023] JMSC. CIV 134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV04073

BETWEEN	**SHANAN LAWRENCE**	**CLAIMANT**
AND	**BRANCH DEVELOPMENTS LIMITED T/A IBEROSTAR ROSEHALL BEACH AND SPA RESORT**	**DEFENDANT**

IN CHAMBERS

Mrs. Tamara Riley-Dunn and Mrs. Karlane McFarlane Richards instructed by Nelson Brown Guy and Francis for the Claimant.

Mr. Gavin Goffe and Mr. Jovan Bowes instructed by Myers Fletcher and Gordon for the Defendant.

March 13, 2023, March 28, 2023 & May 19, 2023.

Application challenging the jurisdiction of the court to hear the claim, whether the failure of the Claimant to serve the prescribed notes to the Defendant and form of defence with the claim form during the life of the claim is a nullity, whether amendments made after the expiration of the limitation period should be permitted to stand, the duty of a litigant to pursue his claim and to take all reasonable steps to secure a date for the hearing of the application, the requirement to file an application and a supporting affidavit simultaneously.

ORR, J (AG)

INTRODUCTION

[1] Before me is an application challenging the court's jurisdiction to hear this claim on the basis that the claim form served on the Defendant is invalid and therefore a nullity. The Defendant has also submitted that the claim is statute barred.

[2] The Defendant asks, in the alternative, that summary judgment be entered for the defendant, and also challenges amendments to the claimant's particulars of claim which she made after the expiration of the limitation period and without the court's permission. The Defendant says that these amendments should not be permitted to stand.

THE CLAIMANT'S PRELIMINARY POINT

[3] In the claimant's written submissions, Counsel took a preliminary point as to whether the application challenging the court's jurisdiction was properly before the court.

[4] The preliminary point, though included in the written submissions, was not taken prior to the start of the hearing. The issues raised were therefore not addressed as a preliminary point before the application was heard and only considered after the hearing.

[5] Relying on Rule 9.6(4), counsel submitted that the Defendant was required to file an application within the time for filing a defence and this application must be supported by affidavit evidence. There being no supporting affidavit filed with the application, and no application to permit the Defendant to file the affidavit out of time and amend the application, (which was subsequently amended in January 2023), counsel for the Claimant submitted that the application was not properly before the court and should not be heard.

[6] Counsel also submitted that the Defendant must file a defence where they seek to raise the limitation defence.

ANALYSIS

[7] Rule 11.4 provides that where an application is to be made within a particular time, it is made when it is filed at the court's registry. The Defendant would have therefore complied with the requirement to file the notice of application challenging the court's jurisdiction within the prescribed period to file a defence. The application

also included alternative orders sought, including an order to strike out the claim, summary judgment and that the amendments and medical reports attached to the amended particulars claim be struck out.

[8] Although the application challenging the jurisdiction of the court to hear the claim was amended, the amendment did not touch and concern the issue of the jurisdiction of the court. In the circumstances, I do not believe that counsel required permission to amend his application.

[9] An affidavit in support of the application was not filed when the application was made, but was filed six years later, in 2023. I have dealt with the issue of the defendant's delay in filing the supporting affidavit in detail later in this decision.

[10] In relation to the Defendant's submission that the claim was statute barred, and that where the claimant was allowed to pursue her claim, the defendant would be deprived of a statutory defence of limitation, counsel submitted that the defendant was required to file a defence in this regard. Counsel pointed out that this defendant did not file a defence and could not therefore pursue this aspect of the application.

[11] I do accept that I am bound by the cases counsel has referenced in her submissions which highlight that where a Defendant seeks to rely on the limitation defence, he must file a defence. This issue was also not raised orally as a preliminary point.

[12] It must be noted also, that when the application commenced before me, both counsel made submissions on the jurisdictional point only, thereafter the hearing was adjourned. Based on Mr. Goffe's submissions that the claim was a nullity, it was his submission that there was no need for the defendant to file a defence. He was confident to rely on the jurisdictional issue only and did not address the other issues in his application.

[13] Procedurally, if he succeeded on his application, the necessity to file a defence would not have arisen.

[14] It was only after hearing from counsel on the jurisdictional issue and after the adjournment that I asked counsel to file further submissions on the other issues that the Defendant had raised in its application so that all of the issues could have been considered in one hearing.

THE JURISDICTIONAL ISSUE

[15] I have considered the jurisdictional issue first, this being a threshold issue. The findings of the court on this point will determine whether it is necessary to address the other orders requested in the defendant's application.

[16] The basis of the defendant's challenge, is that while the claim form and particulars of claim filed on November 29, 2017, were served before the validity of the claim form expired, the defence form and prescribed notes to the Defendant were not served with the claim form.

[17] Mr. Goffe pointed out that on February 16, 2023, a further amended claim form was filed and served on the defendant. The missing prescribed notes to the Defendant and the form of defence were attached to this amended particulars of claim.

[18] Relying on rule 8.16(1), counsel has argued that the claim is a nullity because the missing documents must be served with the claim form. Where they are attached to an amended claim, service of this amended claim must be effected during the six-month life of the claim.

[19] Mr. Goffe relied on the affidavit of service filed on behalf of the Claimant on December 15, 2017, wherein the process server clearly outlined that he only served the claim form, particulars of claim and the acknowledgment of service on the defendant.

[20] In his oral submissions, Mr. Goffe pointed out that the court must accept this evidence of the process server who should not be allowed to give further evidence as to service at this stage.

[21] Mr. Goffe further submitted that the claim form having already expired when the amended particulars of claim was served, this would preclude the Claimant from relying on the amended particulars of claim.

[22] He relied on the recent decision of this court in ***Oral Williams v Diamond Paints Manufacturing Company Limited*** *[2022] JMSC Civ 113*, to support his position.

[23] There being no proper service of the claim form with all of the documents required by Rule 8.16(1) (b) & (c), the Defendant would not be required to file a defence, and it was on this basis that no defence was filed.

[24] Further, there being no application before the court to extend the validity of the claim form, not only had the claim expired, but the court could not entertain an application to extend the validity of the claim, after the claim form had expired.

[25] In closing, he submitted that the Claimant could not find solace in Rule 26.9(3) and the court's power to rectify matters where there had been a procedural error. That rule applied only in cases where the rule that was breached did not attach a sanction. The sanction for failing to serve the defence form and prescribed notes to the Defendant during the validity of the claim, was that the claim was a nullity. He concluded his submissions by stating that since the Claimant could not overcome this hurdle, there was no need for the court to venture further into the other grounds of the defendant's application.

THE CLAIMANT'S SUBMISSIONS

[26] Mrs. McFarlane Richards conceded that the Defendant was not served with all of the documents as required by Rule 8.16. She submitted however that this error was an irregularity that could be cured by the court's powers in Rule 26.9(3). The procedural breach was therefore not a nullity and fatal to the claimant's claim.

[27] She too relied heavily on ***Williams v Diamond Paints Manufacturing Limited***. Counsel submitted that the amended claim took its life or validity from the original claim which was served before it expired. The validity of the amended claim "relates back" to this original claim thus any subsequent amendment to the claim gets its validity from the original claim. The amended claim was therefore still valid and properly served. Mrs. McFarlane Richard's interpretation of that case was therefore at odds with that of counsel for the defendant.

ANALYSIS

[28] In challenging this court's jurisdiction to hear Miss Lawrence's claim, the court must consider whether the claimant's failure to serve the prescribed notes to the defendant and the form of defence with the original claim and during its six-month validity is a nullity; or as the Claimant has suggested, a mere irregularity.

[29] Both counsel cannot be correct in their interpretation of ***Williams v Diamond Paints Manufacturing Limited***, as their arguments are at opposite poles. Thus before considering the court's reasoning in that case, I have revisited the first instance decision in ***Joseph Nanco v Anthony Lugg & B & J Equipment Limited*** *[2012] JMSC Civ. 81* which I found most useful in my analysis.

[30] Decisions of this court, have customarily referenced the Court of Appeal's decision, in **Nanco,** however McDonald-Bishop, J (as she then was) made a bold departure from the decision in ***Dorothy Vendryes v Dr. Richard Keane and Another*** *[2011] JMCA Civ 15*. In doing so she provided a clear explanation as to what amounts to a nullity and an irregularity.

[31] She also clarified whether a claim form served without the attendant prescribed notes for the defendant, defence form or acknowledgement of service amounts to an irregularity or a nullity.

[32] Briefly, in **Nanco** the 2nd Defendant applied to have an Interlocutory Judgment in default of defence entered against the company set aside. The 2nd Defendant

argued that their failure to file and serve a defence was because they had not been served with the prescribed notes to the defence and form of defence when served with the claim form in accordance with Rule 8.16(1).

[33] There were other grounds argued, but this was the basis upon which B & J Equipment Limited hoisted its argument, as did the Defendant in this claim.

[34] At paragraph [22] of her judgment McDonald-Bishop clarified that:

> *"The Vendreys decision is clearly distinguishable. Firstly, in Vendreys the judgment was in default of acknowledgment of service, in this case an acknowledgment of service was filed by the 2nd defendant's former attorney, in which it was clearly stated that there was an intention to defend the claim. The default was, therefore, not in relation to service but in relation to the failure to file a defence. Accordingly, the court ought not to be concerned about the issue of service of the claim form because by filing the acknowledgment of service, the 2nd Defendant acknowledged that he had received the claim form and particulars of claim." (emphasis mine)*

[35] In distinguishing **Vendreys**, McDonald-Bishop, J (as she then was) emphasised that Rule 8.16(1) which provides for the mandatory service of the prescribed notes, acknowledgment of service and the defence forms, does not specify any consequence for failing to comply with that rule.

[36] There is no rule, order or practice direction which provides that the failure to serve these documents with the claim form has any effect on the validity of the claim. [paragraph 38]

[37] The penalty prescribed in Rule 8.14 results from the failure to serve the claim form (which is the only document that expires) during the life of the claim or any extension granted by the court.

[38] Rule 8.14(1) provides:

> *"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."*

[39] She said further, that the rules cannot be read in such a way as to extend the penalty attached to Rule 8.14(1) to Rule 8.16(1), because if this was the intention

of the Rules Committee they would have had to have explicitly so stated in the rules.

[40] On appeal, Morrison, JA (as he then was) upheld her decision and said quite succinctly (at paragraph 37), that:

> *"…**it is difficult to see, why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying document should be a nullity… I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR, which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non- compliance with rule 8.16 (1), should not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule**."*

[41] Understandably, neither court said that the Claimant was required to re-serve the claim form with the prescribed forms during its period of validity or any subsequent extension.

[42] Earlier at paragraph [22] Morrison, JA (as he then was) accepted and endorsed the lower court's finding that "*the court ought not to be concerned about the issue of service of the claim form because by filing the acknowledgment of service the 2nd Defendant acknowledged that [it] had received the claim form and particulars of claim."*

[43] This is especially important because it is the claim form and particulars of claim that tell the Defendant what the claim is about and the case he must answer to. Indeed, it is the claim form that the Defendant acknowledges receiving in the acknowledgment of service. The Defendant is not asked to acknowledge whether he received the prescribed notes to the defendant, the acknowledgment of service or the defence forms.

[44] In ***Oral Williams v Diamond Paints Manufacturing Limited***, Mott-Tulloch-Reid, J said [at paragraph 22]:

> *"Like every other amended claim form, the amended document gets its life from the original document. In this case, I already held there was service by fax. Since irregularity of service does not nullify the claim form, the claim form continued to exist and be valid. It is from that valid document that the amended claim form gets its life. And it is on that basis that service of the amended document will be allowed. But what of the limitation you may ask? Again I will emphasise that this is an amendment to correct an irregularity as to form and not substance. The amendment would not affect the claim itself…" (emphasis mine)*

[45] Further at paragraph [24], Her Ladyship made reference to the case of **Nanco** where she said:

> *" … In the case before me, as was the case in Nanco, the claim form was served but served without the accompanying documents. It had to be served with the form of defence attached to it in order to regularise the service. I agree with Mr. Spence that service of the claim form with the defence form attached has to be done during the validity of the claim. Is the claim form in this case valid?* ***Nanco has made it clear that irregular service does not invalidate the claim form. When the claim was filed…time stopped running as it relates to the limitation period. Time started to run for service. When the claim form was served… time stopped running as to the validity of the claim form. …"*** *(emphasis mine)*

[46] Importantly, once the claim form is served, time in relation to the validity of the claim form and the limitation period, stops running against the claimant in relation to the defendant that has been served.

[47] The claim form filed on November 11, 2017 was duly served on the Defendant during the life of the claim without the attendant documents. While the prescribed notes to the Defendant and form of defence were not served on the defendant with the original claim, the claimant's procedural error is an irregularity, and not a nullity which can therefore be cured as provided in Rule 26.9 (2), (3) & (4).

[48] Rule 26.9(2) importantly provides that *"An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders."* This is why the court is able to put matters right even where there is no application by the defaulting party.

[49] As Mrs. McFarlane Richards submitted, the amended claim form which was served on the Defendant cured the irregularity in service. The fact that the missing documents were served several years after the initial claim was served on the defendant, does not in any way affect the validity of the claim. I have dealt with the issue of prejudice later in this judgment as it is also a consideration the court must have when exercising its discretion to cure an irregularity.

[50] The Defendant cannot therefore succeed on this leg of its submissions.

WHETHER THE CLAIM IS STATUTE BARRED AND SHOULD BE STRUCK OUT

[51] Ground 3 on which the Defendant challenges the claim and the basis on which the company seeks to strike out the claimant's claim is as follows:

> *"3. The causes of action are all statue barred, having been brought more than 6 years after the incident allegedly occurred. The Claimant therefore has no reasonable grounds for bringing or defending this claim and no real prospect of success against anyone."*

[52] In relation to the effect of the limitation period, Mr. Goffe addressed this issue in his oral submissions. He said that in so far that the Claimant seeks to rely on the original injury (i.e. the injury she sustained on May 24, 2011), to recover any type of damages arising from this alleged breach of duty, her claim is statute barred.

[53] The defendant's position at the hearing was thus no longer that the entire claim was statute barred. It only sought to strike out that aspect of Miss Lawrence's claim which they said was for damages arising out of the injury she is alleged to have sustained on May 24, 2011.

[54] In her oral submissions in response to this challenge to the claimant's claim, Mrs. Riley-Dunn dealt with the issue of the amendments to the claim and the impact of the Statute of Limitations simultaneously. I will only make reference to her submissions in relation to the effect of the limitation period on Miss Lawrence's claim.

[55] Counsel carefully submitted that there was never an attempt through the amendments to the claim to sneak in a claim for the injury Miss Lawrence sustained in May of 2011. Mrs. Riley-Dunn explained that the claimant, by raising the issue of the injury she sustained in May 2011 only sought to show her vulnerability as a result of the earlier injury. She reiterated that Miss Lawrence's claim was only in relation to the injures she sustained as a result of the incident on December 2011.

[56] Mrs. Riley-Dunn further submitted that the Claimant's reference to the incident in May 2011, was also consistent with the medical report attached to her amended particulars of claim which she intended to rely on. Counsel submitted that the reference to the earlier incident was to enable the court to assess the Claimant's injuries as at December 2011. As a result of this earlier incident, she sustained further injury to her back during the course of her employment with the Defendant and as a result of the actions of an individual who she alleges was also employed by the defendant.

[57] Counsel was careful to emphasize that there were two separate incidents. The Claimant was not pursuing the earlier incident in May 2011 and never intended to do so.

[58] Miss Lawrence would be relying on the eggshell skull principle, and the reference to the earlier incident was simply to give the Defendant notice of her intention to do so and to put her claim in context.

ANALYSIS

[59] It is important to note that the Claimant's pleadings were drafted by two different attorneys-at-law. Counsel on record for the Claimant did not draft the original claim form and particulars of claim, or the amended claim and amended particulars of claim. She only filed the further amended particulars of claim.

[60] While pleadings are a matter of style, they must always properly explain the statement of case whether this be in the form of a particulars of claim or a defence.

[61] In determining whether any part of the Claimant's claim is statute barred I have considered the claimant's pleadings in totality and have repeated them here.

[62] The original claim form filed on November 29, 2017 states as follows:

> *"…during the course of her employment and while undertaking her duties as Housekeeper/Room Attendant was hit in the back by a linen trolley being pushed recklessly by another member of staff and subsequently further injured her back while attempting to lift a heavy linen bag as a consequence of which the Claimant suffered injury loss and damage"*

[63] In her particulars of claim filed on the same day at, paragraphs 6 and 7, Miss Lawrence states that:

> *"6. Prior to December 16, 2011 the Claimant had an active lifestyle inclusive of normal relations with her spouse, physical exercise and recreational activities.*
>
> *7. On December 16, 2011 and also during the course of her employment, the Claimant was directed by her supervisor to lift a linen bag that was filled with linen and take the said linen bag from the ground floor to the first floor of the said property for storage. The said bag weighed approximately 60 pounds."*

[64] Paragraphs 8 and 9 further detail her injuries and also the Particulars of Negligence and/or Breach of Contract and/or Breach of Statutory Duty of the Defendant.

[65] There is no mention of the incident which is alleged to have occurred on May 24, 2011, save and except the single reference in the Claim Form.

[66] In the amended Claim form filed on December 12, 2022, and after the defendant's application was filed to strike out the claim, any reference to the previous incident in May of 2011 is removed.

[67] The Amended Particulars of Claim does make one reference to the previous injury. At paragraph 6 the Claimant states:

> *"Prior to December 16, 2011 the Claimant had an earlier injury which was sustained on May 24, 2011 which caused her back to become vulnerable to injures."*

[68] At paragraphs 7 and 10 she states further that:

> *"7. On December 16, 2011 and also during the course of her employment the Claimant lifted a heavy (sic) linen which weighed approximately sixty pounds.*
>
> *10. The Defendant failed to provide a houseman or other safety measures for the use of the Claimant in order this injury during the course of her duties."*

[69] The Particulars of Negligence/Breach of Contract and/or Breach of Statuary Duty remain as previously pleaded. Importantly, there is no detailed claim for the incident which occurred on May 24, 2011.

[70] Under the Particulars of Special Damages, I do note that Miss Lawrence claims the cost of medication and supplies from January 1, 2012 to December 13, 2013 and continuing. There is no mention of any expenses prior to January 1, 2012. Her loss of income is claimed from December 2011 to March 2015 and continuing.

[71] The receipts listed to substantiate her claim for special damages do not predate January 12, 2012, save and except for the item listed at xxi – receipt dated 24.05.11, "Medical treatment by Dr. Douglas Street $2800.00". I will address this receipt later in my analysis.

[72] As both counsel submitted, the Further Amended Claim filed on February 16, 2023 is substantially the same as the claim filed on December 12, 2022.

[73] Clear and precise pleadings are always necessary to enable the opposing party to know the case he must meet. Rule 8.9 details the claimant's duty to set out his/her case.

[74] Rule 8.9(1) specifically provides that the Claimant must include in the claim form or in the particulars of claim a statement of all of the facts on which the Claimant intends to rely.

[75] Importantly, Rule 8.9A further provides that the Claimant may not rely upon any allegation or factual argument which is not set out in the particulars of claim, but which could have been included, unless the court gives permission to do so.

[76] In ***Rasheed Wilks v Donovan Williams*** *[2022] JMCA Civ 15*, the court goes further to point out that a Claimant who has not properly particularized her claim cannot seek to introduce evidence via a witness statement.

[77] So too, even where a document is disclosed, a party cannot rely on the document unless the information he wishes to raise on the document has been pleaded.

[78] In this case, the Claimant has made no claim for the May 2011 incident. She has not particularised any claim arising from the incident which occurred on May 24, 2011 to support the receipt for $2800.00 from Dr. Street. She could not therefore seek to rely on this receipt to support her claim for special damages.

[79] Having considered the claimant's particulars of claim, I could not accept Mr. Goffe's submission that there is a claim for the May 24, 2011 injury, which is statute barred. While she has alluded to this injury, it has not been particularised in her statement of case.

[80] I would therefore accept, as Mrs. Riley-Dunn has submitted, that the claimant's reference to the May 2011 injury was not to include a claim for this earlier injury, but rather to mention her previous injury to show her vulnerability. It is this vulnerability she says which hampered her ability to lift the 60lb linen basket without injuring herself. By mentioning this injury in her pleadings, she is able to later rely on the fact of this injury at trial.

[81] Miss Lawrence was, as Mrs. Riley-Dunn explained, relying on the egg shell skull principle which requires a Defendant to take his victim as he sees him.

[82] Under the eggshell skull principle, a Defendant will be liable for any actual damage caused to a Claimant in spite of the fact that the average Claimant would not have suffered the same injury as severely as the Claimant with the egg shell thin skull.

[83] I have not seen any principle that states that the fact that Miss Lawrence's alleged pre-existing condition arises from an injury which she says occurred as a result of the actions of the same defendant, (an employee of the same defendant) this precludes her from relying on the principle. As Mrs. Riley-Dunn has pointed out, they are still two separate incidents.

[84] So too, the fact that the previous incident is said to have occurred a mere few months prior to the incident from which this claim arises, or that both injuries are to her back, these factors do not affect her ability to rely on the egg shell skull principle.

[85] Lindo, J applied the egg shell skull principle in ***Trudy Ann Silent-Hyatt v Rohan Marley and Anor*** *[2021] JMSC Civ. 52*, where she found that the accident caused by the 2nd Defendant resulted in a painful experience for the claimant. She also accepted that the Claimant was already vulnerable, due to her pre-existing condition. On appeal, Straw, JA upheld the decision only varying the amount awarded for future medical care.

[86] ***Vera Dallas v LP Mortimer Co Ltd*** *[2018] JMSC Civ 78*, and ***Courtney Livermore v Ezekiel Russell Limited*** *[2017] JMSC Civ 134* are other examples of cases from this jurisdiction where the court has accepted and applied the eggshell skull principle.

[87] As with any Claimant relying on the eggshell skull principle, Miss Lawrence cannot and has not claimed damages for the pre-existing injury.

[88] She will have the task of using expert evidence to establish how much of her loss is attributable to the actions of the defendant's agent as a result of the injury she is alleged to have sustained in December 2011 as distinct from her injury in May 2011.

[89] Jackson-Haisley, J in **Vera Dallas**, was tasked with assessing the claimant's damages, in circumstances where the Claimant relied on the eggshell skull

principle. Miss Dallas led evidence establishing that the major depressive disorder she suffered was not caused solely from the actions of the defendant. In determining what portion of the emotional disorder was caused by the defendant's actions, the learned judge pointed out at paragraph [67] that:

> *"…The doctor did not attempt to apportion the element of the disorder that resulted from the inability to care for her son appropriately and the uncertainty, no doubt because this would have been a difficult if not impossible task. But then the court is called upon to do that, to do what the medical expert did not attempt to do…It is the Claimant who bears the burden of proof throughout and it is her duty to satisfy me on a balance of probabilities as to how much of her loss is attributable to the actions of the Defendant alone."*

[90] Under the eggshell skull principle, the Claimant will not be compensated for both injuries, she will only be compensated for the latter injury. As Jackson-Haisley, J has pointed out it is her duty to satisfy the court as to how much of her loss is attributable to the second injury.

[91] To my mind, the claim as pleaded is not statute barred and the Claimant should not be precluded from having an opportunity to pursue her claim relying on the eggshell skull principle.

THE AMENDMENTS AFTER THE LIMITATON PERIOD

[92] Counsel in challenging the amendments made to the claimant's particulars of claim has correctly outlined the law in relation to amendments after the expiry of the limitation period. I will only therefore make reference to aspects of these submissions.

[93] In his written submissions, Mr. Goffe, stated that the Claimant provided inconsistent statements concerning the date on which the cause of action arose. He also took issue with the medical report of May 24, 2011 which speaks to both of Miss Lawrence's injuries.

[94] He submitted further, that even if the court accepts that the claim was filed within the limitation period, the Claimant would have needed permission to make these amendments.

[95] Counsel also argued that this is not an appropriate case for the court's favourable exercise of its discretion to enable the Claimant to amend her claim as the amendments are not necessary to decide real issues in controversy and will create prejudice to the Defendant and is unfair in all the circumstances.

[96] The claimant he submitted had been unable to come to a settled view as to when the cause of action arose. The several amendments created a confusing state of affairs in the allegations. Thus where the court allowed the amendments, the parties would not be any closer to resolving the issues in controversy.

[97] Mr. Goffe also raised the issue of the likely prejudice to the Defendant by the Claimant's delay, particularly where the Claimant was attempting to deny the Defendant the defence of limitation. He said that it would be severely prejudicial and unfair to the Defendant where the court permitted the amendments over a decade after the cause of action arose.

[98] The defendant he said was further severely prejudiced as its ability to put forth its strongest defence was significantly impacted by its ability to locate witnesses.

ANALYSIS

[99] The amendments to the pleadings include the addition of the prescribed notes to the Defendant and the defence form, which I have already addressed. That amendment was necessary to correct an irregularity.

[100] The amendments included the reference to the incident on May 11, 2011 and thereafter removed any such reference save the final amendment which Mrs. Riley-Dunn explained was to show the claimant's vulnerability.

[101] Having already addressed the amendments, I believe that there was never any confusion as to the date that the cause of action arose or whether the defendant was deprived of the statutory defence of limitation.

[102] As I have explained earlier, the amendments did not make any changes to the claimant's claim. Indeed, in my view the claim did not need to be amended. I believe that the Defendant would have seemingly placed too much emphasis on the claimant's reference to the May 2011, injury without realising that she had not particularised a claim for damages in relation to this incident. The Defendant also failed to appreciate that Miss Lawrence was relying on the egg shell skull principle, thus any mention of her initial injury in May 2011, was to put the defendant on notice and enable her to later rely on the eggshell skull principal.

[103] The medical reports which should have been attached to her original particulars of claim were also included in her amended particulars of claim. Mrs. Riley-Dunn has submitted that the amended pleadings support the medical report provided by Dr. Scott. This report does speak to both incidents –May and December 2011.

[104] The Claimant would need to rely on this medical report to substantiate her claim. It is also a requirement of Rule 8.9 (3) that she attach the documents which she intends to rely on. In this case, the medical report attached to the amended particulars of claim was a necessary document to substantiate her claim.

[105] Also, Miss Lawrence's amendments raised no new issues and there is nothing in the amendments that would take the Defendant by surprise.

[106] In ***Gloria Moo Young & Anor. v Geoffrey Chung & Anor.*** *S.C.C.A No 117/99* [delivered March 23, 2000], which Mr. Goffe relied on, the court said that it would exercise its discretionary power to grant amendments liberally as long as there would be no injustice to the other party.

[107] The Defendant has in this instance raised the issues of prejudice and delay. The defendant company has complained that the delay on the part of the claimant is of

itself prejudicial. This delay has also affected its ability to locate witnesses to put forth their best defence.

[108] I do not believe that any of these parties can complain of the effect of any delay in this claim, most particularly the defendant.

[109] It is the defendant's application that was filed on December 15, 2017 which challenged the jurisdiction of the court to hear the claim that halted these proceedings.

[110] There is no evidence that the Defendant took any steps to secure a hearing date for the application despite the court's admonishments in ***Sandals Management Limited v Mahoe Bay Limited*** *[2019] JMCA App 12*, that it is the duty of the Registrar to set dates, but it is the duty of the litigant to pursue his/her claim and this is done by taking steps to ensure that a hearing date is received from the Registry.

[111] In light of the court's overriding objective to deal with cases expeditiously, and the requirement in Rule 1.3 for all parties to assist the court in furthering the overriding objective, the duty imposed on litigants to pursue their claims must also require parties to assiduously pursue any applications they file.

[112] It is not sufficient for a party to simply file an application and sit back and await a hearing date. All reasonable steps must be taken to pursue a date through the Registry. Such that where a hearing date is not forthcoming, besides making enquiries at the Registry, correspondence must also be sent to the Registrar to bring the matter to her immediate attention so that she can instruct her staff to issue a date in a timely manner. It makes no difference who files the application, each party must ensure that their application is pursued.

[113] There is no evidence that this defendant took any steps to secure a hearing date for this application.

[114] Also contributing to this delay in securing a hearing date is the fact that the Defendant was not ready to pursue this application until January 27, 2023, as that is when the affidavit in support of the application was filed.

[115] I have therefore also considered the defendant's delay in filing an affidavit in support of this application as a contributing factor to the defendant's delay.

[116] As was highlighted in the claimant's written submissions, the Defendant did not file an affidavit with the application in 2017. The supporting affidavit was only filed in 2023, some nearly 6 years after the application was filed. The Defendant provided no explanation for the delay in filing the affidavit.

[117] Rule 11.9(2) provides that unless a rule, practice direction or court order provides otherwise, applications must be supported by affidavit evidence.

[118] While there is no stated provision that the application must be accompanied by an affidavit when it is filed, it has been the practice since time immemorial that applicants file a supporting affidavit with each application as the application cannot stand by itself. To my mind there need not be a rule for this requirement. It has been a practice which predated the CPR which has already been in place for more than 20 years.

[119] This is the practice that has always obtained in all courts including our Court of Appeal, and I say without apology, that no Attorney-at-Law would dare to file an application in that court without the accompanying affidavit.

[120] It is a bad habit that has developed over time in this court. It is not lost on me that this practice developed in an attempt to ensure that an applicant who must file an application within a prescribed timeline set out in the rules does so.

[121] In this case, Rule 9.6(3) requires the defendant seeking to challenge the jurisdiction of the court to file an application. That application *"must be made within the period for filing a defence"* the defendant therefore had to make its application to challenge the court's jurisdiction within 42 days of service of the claim form.

[122] One must not forget however that Rule 9.6(4) provides that *"An application under this rule must be supported by evidence on affidavit"*

[123] This defendant is not alone in this practice, as a similar practice has developed where a party in breach of a procedural rule or who is likely to be unable to meet a prescribed time limit and wishes to establish that he/she has made an application to rectify the breach as soon as possible, similarly files an application without a supporting affidavit.

[124] Applications to extend the time to file a defence or to set aside a default judgment are clear instances where applicants often only file an application without the supporting affidavit.

[125] Seemingly, the application is filed because the applicant believes that it stops time running against them in light of Rule 11.4 which says that an application is made when filed.

[126] But filing an application without the required affidavit cannot assist such an applicant, because unless the Rules provide otherwise, an application cannot be heard without affidavit evidence. The applicant cannot therefore be said to be ready to proceed with the application when there is no affidavit evidence filed with the application. If it were otherwise, it would make a mockery of Rule 11.4.

[127] When the affidavit is filed many months or years later, after the application is filed, the applicant of necessity must therefore explain the delay in filing the supporting affidavit, particularly when the evidence contained in the affidavit was available at the time the application was filed. Until the affidavit is filed, the application cannot be heard.

[128] Thus an applicant may believe that he/she has filed their application in compliance with a requirement to file same within a prescribed time line or as soon as possible after a procedural breach. But if there is no affidavit evidence filed with the

application as required by the rules, is the applicant really meeting the prescribed deadline or making the application as soon as possible after the breach occurred?

[129] The affidavit in support of this application was filed outside of the 42 days prescribed period to make the application, and nearly 6 years after the application was filed. The delay is egregious. This Defendant could not be said to have been ready to proceed with the application to challenge the court's jurisdiction until 2023, when the affidavit was filed.

[130] I accept and agree with the submissions filed on behalf of the claimant that such a delay in filling the supporting affidavit required an explanation. There was no explanation from the defendant in this case, but for the reasons already outlined, the defendant's application could not have succeeded in any event.

[131] The Defendant cannot therefore complain about any delay or prejudice arising from the delay, as it is the defendant's failure to pursue its application which caused the delay in this claim.

[132] While counsel for the Claimant did in fact file an application requesting that the claim be permitted to stand in response to the court's notice of intention to dismiss, to my mind counsel was merely protecting the claimant's interest.

[133] The nature of the defendant's application meant it had to be heard before any other steps could be taken in this claim. It was this application that was pending before the court for so many years. The Defendant is therefore not on good ground when it complains about delay in these particular circumstances.

[134] The defendant's application is therefore refused, and the Claimant's amendments are permitted to stand. In the circumstances, there is no order as to costs.