JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 49/77

BEFORE: The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Rowe, J.A. (Ag.)

BETWEEN	JOHN MUIR	DEFENDANT/APPELLANT
A N D	LESTER MORRIS	PLAINTIFF/RESPONDENT

Mr. W.K. Chin-See and Mr. Howard Malcolm for Defendant/Appellant

Mr. A. Dabdoub for Plaintiff/Respondent

June 18, 1979

ROWE J.A. (Ag.)

The judgment I am about to deliver is the judgment of the Court.

This is an appeal against the order of Master Sinclair made on November 2, 1977 refusing an application by the appellant to set aside an exparte order made by him on June 15, 1977 renewing a Writ of Summons and ordering substituted service thereof.

On March 9, 1976 the respondent filed a Writ of Summons grounded in negligence alleging that the cause of action arose on March 10, 1972. Actions on the case, (other than slander) were by the Imperial Statute 21 James I Ch. 16 Sec III (2) barred after 6 years. This Statute is declared by section 46 of the Limitations of Actions Act to be "recognised and is now esteemed, used, accepted and received as one of the Laws of this Island." For no discernible reason the plaintiff delayed the commencement of his action until the very last day but one.

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A plaintiff has twelve months within which to serve his Writ of Summons. Section 30 of the Civil Procedure Code provides inter alia

> "No original Writ of Summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date".

For a multiplicity of reasons a plaintiff may deliberately refrain from serving the Writ and due to default, oversight or difficulty he may fail to serve within the stipulated time. If the period of limitation has not run, at the expiration of one Writ, a plaintiff may simply take out another. An alternate procedure is available to a plaintiff who does not desire to file a second or subsequent Writ. That plaintiff may apply to a Court or a Judge to renew the Writ. Section 30 of the Civil Procedure Code not only provides for the renewal of the Writ but prescribes the conditions for such renewal. The relevant provision is:-

> "The Court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original Writ of Summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed Writ."

That section specifically says that the plaintiff may apply for the renewal of the Writ before the expiration of the twelve months. By virtue of section 676 of the Civil Procedure Code the Court has power to enlarge time and such enlargement may be ordered although the application for the same is not made until after the expiration of the time allowed. Administrator General for Jamaica v. Sewell and J.O.S Ltd., C. A. 18/66. A plaintiff may therefore apply for the renewal of a Writ of Summons

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either before or after the expiration of the original period of twelve months.

Mr. Chin-See for the appellant submitted that a Judge should exercise his discretion with caution when he is asked to renew a Writ in circumstances which would deprive a defendant of a defence of the limitation period. The burden he said was upon the plaintiff to establish why the Court should exercise its discretion in his favour, and he can only discharge this burden by showing a cogent reason. Further the Court should never exercise its discretion in favour of a plaintiff where to do so would result in prejudice to the defendant. He relied upon the fact that when the application for the renewal of the Writ was made on March 7, 1977 the limitation period of six years had already run.

As long ago as 1944 the Court of Appeal in England in Battersby and others v. Anglo American Oil Co., Ltd., and others(1944) 2 All E.R. 387 considered a provision identical with section 30 of the Civil Procedure Code of Jamaica and in the judgment of Goddard L.J. said:-

> "We conclude that even when an application for renewal of a Writ is made within 12 months of the date of issue the jurisdiction given by Order 64r.7 ought to be exercised with caution: It is the duty of a plaintiff who issues a Writ to serve it promptly, and renewal is certainly not be granted as of course, on an application which is necessarily made exparte. In every case care must be taken to see that the renewal will not prejudice any right of defence then existing, and in any case care must 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 reasons appear to excuse the delay in service, as indeed is laid down in the Order."

This decision was explained in Sheldon v. Brown Bayley's Steel Works Ltd., (1953) 2 Q.B. 393 to make it clear that a Writ does not become a nullity when its life of 12 months has expired.

Megaw J., at first instance, enunicated the general rule applicable for the renewal of a Writ under a provision identical to section 30 of the Civil Procedure Code in the case of Heaven v. Road and Rail Wagons Ltd., (1965) 2 W.L.R. 1249. There he said at page 1255:-

> "The principle, or the general rule, to be applied is that leave will not be given to extend the validity of a Writ when application is made retrospectively after the period of twelve months prescribed by the rules has expired, if the effect of so doing would be to deprive the defendant of a defence which he would have had under the relevant statute of limitation supposing that leave to extend were not given and the plaintiff were thus compelled to serve a fresh Writ. To justify the exercise of the discretion there must be exceptional circumstances."

He then went on to give an indication of what he considered to be some exceptional circumstances and among these he included circumstances where the defendant was evading service.

The Court of Appeal in England had an opportunity to discuss the principles which ought to guide a Court or judge in exercising his discretion to grant the renewal of a Writ in Baker v. Bowketts Cakes Ltd. (1966) 1 W.L.R. 861. In that case an application was made for the renewal of the Writ 4 days before it was due to expire. Browne J. granted the application for renewal but on an application to set aside his order he reversed himself holding that as a matter of discretion it was not right to extend the Writ. On appeal Lord Denning M.R. in the course of his judgment said:-

> "In seeing whether the discretion should be exercised under that rule, we must remember the Statute of Limitations. A plaintiff in an action for personal injuries has three years (in Jamaica 6 years) to issue his Writ. If he issues it within those three years, he has another 12 months within which he can serve the Writ. If he requires to extend it for a further time before service, he ought to show sufficient reason for an extension of time. That follows from what Lord Goddard said in Battersby v. Anglo American Oil Co, Ltd., and from what Megaw J. said in Heaven v. Road and Rail Wagons Ltd., In particular when the Statute of Limitations has run or is running in favour of a defendant, as here, the plaintiff who desires a further extension must show sufficient reason for an extension. These cases ought to be brought on for trial as soon as reasonably may be, while the facts are fresh in people's minds and while medical evidence and so forth can be obtained. If the plaintiff delays until the very last minute, he has only himself to thank. If it is his Solicitors fault, he can blame them. But he ought not to get an extension, to the prejudice of the defendants, except for good cause:"

In that same case Harman L.J. used language to the same effect. Said he:

> "He who leaves a thing like this until the last possible moment must run the risk that the last possible moment will go by and he will find that he has not got over the fence."
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> And further:-
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> "Now it is true that you may wait until the 364th day of the third year before issuing your Writ and until the 364th day of one year more before serving it and you will still be in time. But if you choose to wait until the last moment like that, you must be very careful to be right and there is no reason why you should be given any further indulgence. The nearner you get to the last moment, the stricter ought to be the attitude of the Court:...."

If further authority is required, I will refer briefly to the judgment by Fox J.A. in Administrator General for Jamaica v. Sewell

and J. O. S. Civil Appeal 18/66 (unreported). A Writ had been renewed after the expiration of the 12 months period of validity and to this Writ the defendants had entered unconditional appearance. Fox J.A. reminded the profession of what would have been the proper practice to be followed by a defendant who wished to challenge the service upon him of such a Writ. He said:-

> "In the instant case the second defendant could have entered a conditional appearance and applied to have the Writ set aside under section 67 of Cap 177. If such application had been made, the probabilities of success are overwhelming, since the Court would never have exercised its discretion to deprive a defendant of the benefit of a limitation which had accrued."

The defendant in the instant case heeded the advice of Fox J.A. On August 22, 1977 he entered Conditional Appearance and applied to the Master to have the renewal of the Writ of Summons set aside.

The Court can discover no urgency on the part of the plaintiff/respondent or his Attorney-at-law to have this action brought to trial. Mr. Dabdoub told the Court in the course of argument that the respondent had suffered injuries as a result of a hit and run accident. Somehow the respondent obtained from the Collector of Taxes the address "6 Lincoln Road Kingston 5" as that of the appellant. It was never shown to this court or to the Master when, if ever, the appellant lived or worked or could be found at that address. Be that as it may, this is what Mr. Dabdoub said in his affidavit that he did on behalf of the respondent in an effort to contact the appellant:-

"4 That at the time of and shortly after the accident Lester Morris did not have all the necessary information to complete his instructions in this matter.

"5 That I subsequently wrote to the defendant Mr. John Muir of 6, Lincoln Road, Kingston 5 the owner and driver of motor car licensed and registered No. BC 612 and also to his Insurers, Dyoll Insurance Co., Ltd., 33 Tobago Avenue, Kingston 5."

Mr. Dabdoub's affidavit did not disclose when the letters to the appellant or to Dyoll Insurance Company Ltd were written, if they were sent by registered post, if there was a reply to either of them, or if either of them was returned unclaimed.

At the very last moment the Writ was filed on March 9, 1976. Five weeks later on April 15, 1976 the attorney for the respondent forwarded the Writ to the bailiff, St. Andrew for service. Fully 6 months later, the respondent's attorney made his next move. He wrote to the bailiff requesting particulars of service. But he received no answer. In February 1977 when the Writ was in its twelfth month of life, Mr. Dabdoub's secretary telephoned the bailiff and was told that the bailiff had not received the letters from the respondent's attorney. Two enquires in eleven months do not indicate even a modicum of urgency in a situtation where stirring activity alone could dispel disaster.

Mr. Dabdoub said he had with him a second sealed copy of the Writ and this he entrusted to his private process server with instructions. Mr. Samuda, the process-server, went to No. 6 Lincoln Road on November 18, 1976 and he did not find the appellant. Indeed he was told that the appellant was not known at that address. He waited for 10 weeks and returned on January 27, 1977 to No. 6 Lincoln Road, Kingston 5. His

last visit to this address was on February 28, 1977. The appellant had not been found. He was not known at the address. Mr. Samuda spoke to several persons in the area, he made extensive enquires but he was in his own words "not able to find any trace of the said defendant" Mr. Samuda also enquired of Dyoll Insurance Company Ltd for the appellant and he was told that there was no information that the insurers could give him.

On these facts Mr. Dabdoub submitted that the Order of the Master renewing the Writ of Summons ought not to be disturbed as the respondent had made reasonable efforts to effect service of the Writ within the period of twelve months and his application for renewal was made within that time.

After November 1976, the respondent had no reasonable ground for believing that the appellant could be located at No. 6 Lincoln Road, Kingston 5. Mr. Samuda's visit confirmed or ought to have confirmed in the mind of the respondent's attorney that the appellant would not be found at No. 6 Lincoln Road. The respondent's attorney could have telephoned the bailiff at Half-way-tree to see what report he had and the attorney would then have discovered that the bailiff had never received the Copy Writ for Service. The delay between November 1976 and March 7, 1977 when the application for renewal of the Writ was made is absolutely inexcusable. It must be noticed in passing that the two affidavits filed in support of the Summons of March 7, 1977 were not sworn to until the 28th and 29th April, 1977.

When it became apparent to the respondent's attorney that personal service was not likely to be effected upon the appellant, he

he ought straightway to have applied to the court for substituted service. This course he did not take.

Here is a case in which the respondent gives no explanation whatever as to why he waited until the last day but one to file his Writ. When at length the Writ was filed he went about effecting service in the most dilatory manner. The period of limitation had run in favour of the appellant for more than one year before the order for the renewal of the writ was made. This order could only have been made if the respondent had shown good cause or to use another pharse, exceptional circumstances sufficient to persuade the Master that notwithstanding the obvious prejudice to the appellant, the Writ ought to be renewed. No such evidence was tendered by respondent and accordingly there was no material before the Master on which he could have exercised his discretion to renew the Writ and to order substituted service thereof.

The appeal is allowed. The order for the renewal of the Writ is set aside and substituted service of the Writ is also set aside with costs to the appellant in respect of the appeal and in the Court below to be taxed or agreed.

I.D. ROWE