COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2013/CLE/gen/FP/00078

BETWEEN

KEVIN ARCHER

Plaintiff

AND

FREEPORT CONTAINER PORT LIMITED

1st Defendant

AND

HUTCHISON PORTS (BAHAMAS) HOLDINGS LIMITED

2nd Defendant

AND

THE ATTORNEY GENERAL
(as the Minister Responsible for the Ministry of the Environment and Department of Meteorology)

3rd Defendant

RULING

Before: Mr. Roderick D. Malone
Deputy Registrar (Acting)

Appearances: Mr. Osman R. C. Johnson for the Plaintiff

Hearing dates: 27th April, 2018; 1st May, 2018; and 22nd May, 2018

Introduction

1. This ruling is in respect of an ex parte application brought by the Plaintiff, Mr. Kevin Archer ("**Mr. Archer**"), by which Mr. Archer seeks an Order that:

> "**. . . the Plaintiff be granted a renewal of the Writ of Summons and an extension of the validity of the Writ of Summons in order to effect service of the same on the 2nd Defendant, [Hutchinson Ports (Bahamas) Holdings Limited ("Hutchison")] in the action.**"

2. The application was heard together with similar applications filed in Supreme Court Action 2013/CLE/gen/FP/00079 brought by Samuel Donovan Swann and in Supreme Court Action 2013/CLE/gen/FP/00080 brought by Harrison Moultrie respectively. The Swann and Moultrie actions were brought against the same Defendants as those in Mr. Archer's action and, in all 3 actions, the respective Plaintiffs are seeking the same order, (i.e. an extension of the validity of the respective Writ of Summonses to effect service upon Hutchison) and are based upon similar evidence, grounds and submissions. In this ruling, I shall only refer to Mr. Archer's documentation for ease of reference.

Background

3. The Writ of Summons was filed on 5th March, 2013 ("**the Writ**").

4. According to paragraph 3 of the Amended Writ of Summons filed on 3rd March, 2014 ("**Amended Writ**"), Hutchison is a company duly incorporated and registered in The Bahamas.

5. Messrs. Lennox Paton entered an appearance on behalf of the First Defendant, Freeport Container Port Limited ("FCP") on 14th March, 2014 and subsequently filed a Defence on 31st March, 2014.

6. On 10th April, 2014, Mr. Archer filed his Reply to FCP's Defence.

7. In April 2014, Mr. Archer filed an application for judgment in default of appearance against the 3rd Defendant, The Attorney General ("AG"). There is no indication that the application was ever heard. However subsequently, on 8th May, 2014, the AG entered an appearance.

8. On 27th January, 2016 and on 13th October, 2017, Mr. Archer filed Notices of Intention to Proceed. By letter dated 29th January, 2018 a case management conference was requested by Mr. Archer's Counsel.

9. On 4th April, 2018 Mr. Archer filed a summons which is the subject of this Ruling.

The Application

10. As previously stated, the application is for a renewal of the Writ of Summons to permit Mr. Archer to effect service thereof upon Hutchison.

11. The application is supported by an Affidavit sworn by Kendra McKinney on 4th April, 2018 entitled "Affidavit in support of an application for renewal of a Writ of Summons as against 2nd Defendant".

12. Ms. McKinney's affidavit is very short wherein she deposes as follows:-

> "1. THAT I am a Legal Assistant employed with the Firm of Ayse Rengin Dengizer Johnson & Co., Attorneys for the Plaintiff in the above action.
>
> 2. THAT, I am duly authorized to swear this Affidavit on my behalf and in support of my application pursuant to Order 6 Rule 7 of the Rules of the Supreme Court for the renewal of the Writ of Summons and an Order extending the validity of the writ, so the same can be served on the 2nd Defendant in this matter, which application has been made by way of Summons filed herein on even date.
>
> 3. THAT, the statements of the fact and matters set out by me in this Affidavit are entirely within my knowledge and are therefore true or are

known to me from the sources stated which I believe to be true and correct.

4. THAT, a Writ of Summons and Statement of Claim was filed on behalf of the Plaintiff and against the 1st and 2nd Defendants on the 5th March, 2013 under the law firm Ayse Rengin Dengizer Johnson & Co.

5. THAT, a Notice of Change of Attorney from Ayse Rengin Dengizer Johnson & Co. to the chambers of Osman R. C. Johnson Esq., was filed on March 3rd, 2014 appointing the chambers of Osman R. C. Johnson Esq. to act as Attorneys for the Plaintiff.

6. THAT, an amended Writ of Summons adding the 3rd Defendant to the action was filed thereafter by the chambers of Osman R. C. Johnson on March 3rd 2014 and served on the 1st and 3rd Defendants on the 3rd and 4th of March respectively and not served on the 2nd Defendant before the twelve (12) month period had expired.

7. THAT, this matter has since been fixed for Case Management hearing pursuant to Order 31A, RSC and which is due to commence on May 10th 2018.

8. THAT, there is now produced and shown to me, copies of correspondence between the law firm of Ayse Rengin Dengizer Johnson & Co. and Osman R. C. Johnson Esq. to the firm Lennox Paton, Attorneys for the 1st and 2nd Defendants which demonstrates the attempts of settlement which were made, Exhibited with this Affidavit and marked, "KM2".

9. THAT, the contents of this Affidavit or to the best of my knowledge information and belief true and correct."

The Hearing on 27th April, 2018

13. The application was first listed for hearing on 27th April, 2018. At the hearing Counsel for Mr. Archer did not provide any written submissions or authorities in support of the application.

14. The Court referred Counsel to pages 54 to 56 of the Supreme Court Practice, 1999, Volume 1 ("**the White Book**") which provides guidance on such applications. The Court also referred Counsel to the case of **Frances Framer et al v Security & General Insurance Company Ltd**, SCCiv App No. 93 of 2011, Judgment of Conteh JA dated 13th December, 2012.

15. Counsel sought an adjournment to file submissions which was granted. The Court also, of its own violation, granted Mr. Archer leave to file further evidence in light of the White Book reference which indicates that settlement negotiations are not a sufficient reason for extending the validity of a Writ. Accordingly, all of the actions were adjourned to Tuesday 1st May, 2018 at 1:00 p.m.

The Hearing on 1st May, 2018

16. On the adjourned date Counsel for Mr. Archer appeared and advised the Court, that he did not file any submissions and he did not file any additional affidavits and that he was content to rely on the documents filed as previously submitted.

17. Counsel for Mr. Archer made various oral submissions which in summary are as follows:-

17.1 The renewal is a matter of course. A Plaintiff has a right to seek a renewal of a Writ once the deadline for service has expired and such renewal ought to be granted.

17.2 The authorities referred to in the White Book are merely common law positions in the UK and the Court ought to disregard the same because they rely strictly upon the UK rules.

17.3 That Parliament must have intended that applications for renewal can be made after the period for service has expired because the Rules of the Supreme Court of The Bahamas provide as follows:

> **"the Court may by Order extend the validity of the Writ <u>from time to time</u> for such period not exceeding 12 months at any point of time".**

17.4 Counsel submitted that the only prohibition by Parliament is that an extension can only be for 12 months at a time and therefore many renewal can be granted.

18. When the Court pointed out that the only difference between the Bahamian Rule and the relevant 1999 UK Rule was that under the Bahamian Rule the validity of a Writ could be extended for a period not exceeding 12 months whereas under the UK Rule the period by which a validity of the Writ could be extended was 4 months, Counsel maintained that the authorities in the White Book ought to be disregarded.

19. Counsel however subsequently acknowledged that the Court has a discretion and submitted that rather than this Court adhering to [settled] principles set out in the White Book, the Court should develop its own jurisprudence and in doing so disregard the UK position.

20. In relation to why the Court ought to exercise its discretion in Mr. Archer's favour, Counsel submitted, in summary as follows:-

20.1 Although there was no evidence before the Court, attempts were made to serve Hutchison;

20.2 There were attempts to reach a settlement with the Defendants;

20.3 All of the requirements under the Rules of the Supreme Court for a renewal were complied with.

21. In response to the Court's question as to whether Counsel considered the Court of Appeal's decision in the Frances Farmer case, Counsel indicated that he did not do so and that he would rely on the clear wording of the Rules to support his application.

22. The Court adjourned to consider the application.

Discussion

23. The relevant rule on this application is Order 6 Rule 7 (2) which provides as follows:

> "(2) Where a writ has not been served on a defendant, the Court may by Order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow."

24. The comparable UK rule referenced in the White Book is Order 6 Rule 8(2) which provides as follows:

> (2) Subject to paragraph (2A)[1], where a writ has not been served on a defendant, the Court may be order extend the validity of the writ from time to time for such period, not exceeding 4 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

25. The two rules are essentially the same save for the time period by which the validity of a writ may be extended. In that regard, the following commentary which was

[1] Where the Court is satisfied on an application under paragraph (2) that, despite the making of all reasonable efforts, it may not be possible to serve the writ within 4 months, the Court may, if it thinks fit, extend the validity of the writ for such period, not exceeding 12 months, as the Court may specify.

referred to Counsel from the White Book on 27th April, 2018 is relevant to the Court's exercise of its discretion:

25.1 White Book, page 55, paragraph 6/8/6

"Applications involve a two stage enquiry. At stage I the court must be satisfied that there was a good reason to extend time, and also that the plaintiff had given a satisfactory explanation for his failure to apply before the validity expired. If the Court was so satisfied then it should proceed to stage II and decide whether or not to exercise its discretion in favour of renewal by considering all the circumstances of the case including the balance of prejudice or hardship."

25.2 White Book, page 55 to 56, paragraph 6/8/7

"The discretion to extend the validity of the writ ought to be exercised with caution, and renewal is not to be granted as of course on any application which is necessarily made *ex parte* (see *per* Lord Goddard in *Battersby v Anglo-American Oil Co. Ltd* [1945] K.B. 23 at 32, CA). There must be "good reason" to justify the exercise of a discretion to extend the validity of a writ beyond the appropriate period allowed for its service; "exceptional circumstances" are not required. . . . this is especially so where the period allowed for service extends beyond the end of any relevant period of limitation, and still more so where the application for renewal is not made until after such period, and with it the validity of the writ, has expired. . . . Where there has been a delay it is incumbent on solicitors to act with all expedition. If solicitors allow a writ to remain unserved right up to the end of the time limit, and they make a mistake as to the date of the writ's expiry, the validity of the writ will not be extended ... . In exercising the discretion whether to grant or refuse renewal of the writ, the court is entitled to consider and to balance the relevant hardships that will be sustained by the plaintiff and the defendant respectively, e.g., that the plaintiff might be left without remedy or that the defendant may suffer as a result of long delay, but only where there are matters which, potentially at least, could constitute good reasons for the extension. Balance of hardship itself can not constitute good reason . . . . It is not sufficient or good reason justifying the exercise of discretion to extend the validity of the writ that the defendant knew of the existence of a claim, nor that he knew that a

writ had been issued, nor that he is unable to show that there would be a specific prejudice or detriment to him conducting his defence ... . Moreover, it is not a good reason for allowing the renewal of the writ that the parties have been negotiating for a settlement and that such negotiations are still proceeding at the time of the application for renewal. . . . .

25.3 White Book, page 54, paragraph 6/8/6, the authors of the White Book refer to *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto* (No. 3) [1987] A.C. 597 a House of Lord decision which sets out various principles from earlier cases and among those the following are noteworthy:

> (4) Examples of reasons which have been held to be good are:
> (a) a clear agreement with the defendant that service of the writ be deferred;
> (b) impossibility or great difficulty in finding or serving the defendant, more particularly if he is evading service.
> (5) Examples of reasons which have been held to be bad are:
> (a) that negotiations are proceeding. In the absence of an actual agreement that service be deferred, it is both incorrect and dangerous to defer service in hope that negotiations will succeed; too often the writ is forgotten until after the limitation period has elapsed; offers may then be withdrawn and the plaintiff left without remedy save against his solicitors. . . ."

26. While the Court accepts Counsel's submission that the application for the renewal of the Writ can be made at this stage for a period not exceeding 12 months, the onus is on Mr. Archer to demonstrate a good reason to justify the court exercising its discretion in his favour particularly in light of the fact that both the validity of the Writ has expired and the limitation period has expired before the application for renewal is being made.

27. In that regard, the Court also considered two Bahamian authorities.

28. In the case of Williams v. Stubbs-Rahming [1989] BHS J No. 128, Thorne J (Acting) hearing an application to set aside an order extending the validity of a Writ in the Supreme Court stated that:

> "5. The English Courts have long held that it is the duty of a plaintiff who issues a Writ to serve it promptly and that, even where the application to renew a Writ is made within twelve months of the date of issue, the discretion to extend the validity of the Writ ought to be exercised with caution and renewal is not to be granted as of course. (See per Lord Goddard in Battersby v. Anglo-American Oil Company Limited, [1945] K.B. 23). There must, therefore, be sufficient or good reason to justify the exercise of a discretion to extend the validity of a Writ beyond the period of twelve (12) months allowed for its service, and all the more so where the application is made after the twelve (12) months have expired. (See Heaven v. Road and Rail Wagons Limited, [1965] 2 Q.B. 355), or where the twelve (12) months extends beyond the end of any relevant period of limitation. As Lord Denning, M. R., said in Baker v. Bowketts Cakes Limited, [1966] 2 All ER 290 at 292:
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> > "In seeing whether the discretion should be exercised under that rule (that is RSC O.6 R.8(2)) we must remember the Limitation Act. A plaintiff in an action for personal injuries has three years to issue his Writ. If he issues it within those three years, he has another twelve 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"..

6. In Jones v Jones and Another, [1970] 3 All E.R. 47 at p 52 Salmon, L.J., pointed out that "the only question here is whether the learned judge could in his discretion properly take the view that there was "good cause" or "sufficient reason" for extending the time for service". He went on to emphasis that "when questions of this kind arise it is a material factor to take into account that if the action is dismissed, the innocent party, the plaintiff, will have no redress against anyone for damages which he has suffered ... That hardship must be balanced against the hardship which the judge recognized that the second defendant may suffer as a result of the long delay".

7. The principles governing the extension of the validity of a Writ were crystallized in Kleinwort Benson v Barbrak Limited, [1987] 2 W.C.R. R. p 1053. At p 1062, Lord Brandon of Oakbrooke put it this way:

> "My Lords, there are three main, categories of cases in which on an application for extension of the validity of a writ, questions of limitation of action arise, all being cases in which the writ has been issued before the relevant period of limitation, that is to say the period applicable to the cause of action on which the claim made by the writ is founded, has expired. Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired. Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. In both category (1) and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and if he does so, the defendant will not be able to rely on a defence of limitation. In category (1) cases but not category (2) cases, it is also possible for the plaintiff, before the original writ ceases to be valid, to issue a fresh writ which will remain valid for a further 12 months. In neither category (1) or (2) cases, therefore, can it properly be said that, at the time when the application for extension is made, a defendant who has not been served has an accrued right of limitation. 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."

> "Good reason is necessary for an extension in both category (2) and category (3) cases. But in category (3) cases, the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired".

29. In that case, the Defendant had available to him (as does Hutchinson in this case) that the limitation period for the cause of action has expired prior to the renewal being

sought. As in this case, the Plaintiff in Williams v Stubbs asserted that the renewal of the Writ should be granted because settlement negotiations were being conducted.

30. Thorne J at paragraph 12 concluded, that "it has been well established that it is not a good reason for allowing the renewal of a Writ that the parties have been negotiating a settlement". His Lordship proceeded to set aside the renewal of the Writ of Summons and dismissed the action.

31. The Court also considered the case of Frances Farmer et al v. Security & General Insurance Company Ltd., SCCiv App No. 93 of 2011 -the Ruling of Conteh, JA dated 13th December, 2012. The Court of Appeal applied the UK authorities which are set out in the White Book including, *Kleinwort Benson Ltd. v. Barbrak Ltd. and Others (Consolidated Appeals) on appeal from The Myrto* (No. 3) [1987] AC 597.

32. The Court of Appeal, in applying the principles enunciated in the Kleinwort Benson Ltd. v. Barbrak Ltd. case stated that in the exercise of the Court's discretion on

> "an application for extension of the validity of a writ in cases where questions of limitation of action are involved (1) On the true construction of Ord 6, 68 the power to extend the validity of a writ should only be exercised for good reason. (2) The question whether such good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason but it is not the only matter which is capable of doing so. (3) The balance of hardship between the parties can be a relevant matter to be taken into account in the exercise of the discretion. (4) The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well established."

33. In view of the foregoing authorities, Mr. Archer must, in the first instance, demonstrate that there is a good reason to extend time, and also that there was a satisfactory explanation for his failure to apply before the validity expired.

34. The affidavit of Kendra McKinney simply refers to the existence of correspondence pertaining to settlement negotiations without even expressly stating that they are the basis for the renewal application. In any event, it is clear from the authorities that settlement discussions are not a good reason to justify the extension of the validity of a Writ. Accordingly, Mr. Archer has failed to meet the first hurdle established by the authorities.

35. Having so concluded, there is no need for the Court to proceed to the second stage that is, to decide whether or not to exercise its discretion in favour of renewal by considering all the circumstances of the case including the balance of prejudice or hardship.

36. Even if the Court were to proceed to the second stage, the burden on Mr. Archer to demonstrate a good reason for his failure to apply before the Writ expired is even higher given that by the time the application was filed, Hutchison had an accrued right of limitation.

37. Mr. Archer's pleaded cause of action as against Hutchison is for damages for alleged personal injuries that occurred in March 2010. According to Section 9 of the Limitation Act, there is a three year limitation on such actions. Accordingly, the limitation period for a claim for damages for personal injuries against Hutchison expired during the same month in which the Writ of Summons was first filed in this case (i.e. March 2013).

38. The original Writ was filed on 5th March, 2013 meaning that it expired on 5th March, 2014. Not only has Mr. Archer failed to provide a good reason for his failure to serve the Writ during the period of its validity, he has provided no reason for his 4 year delay in making the extension application.

39. Settlement discussions are by their nature made without prejudice. Accordingly, there is no reason why Hutchison's registered office could not have been served in a timely manner even whilst the settlement negotiations were ongoing. Moreover, Counsel submitted on no less than two occasions that Hutchinson was not an essential party

for the prosecution of Mr. Archer's claim. If that is the case, there was no need for the extension application to be made and the fact that it was made with this self-defeating position in mind renders it an abuse of process. I find that to deprive Hutchison of its accrued right of limitation in these circumstances would be a grave injustice.

Conclusion

40. Accordingly, the application for an extension of the validity of the Writ and the action as against Hutchison is dismissed with no order as to costs.

Dated the 22nd day of May, 2018

R. Dawson Malone
Deputy Registrar (Acting)