

**IN THE COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2019/CLE/gen/FP/00084**

**B E T W E E N**

**MARY HIGGS**

Claimant

**AND**

**KELLY'S FREEPORT LIMITED**

Defendant

**Before:** The Honourable Justice Constance Delancy (Acting)

**Appearances:** Osman Johnson for the Claimant

**Hearing date(s):** 19 March, 2024

**DECISION**

**DELANCY, J (ACTING)**

[1.] This is the Claimant's application filed on 4 January 2024 to extend the time within which to serve the Writ of Summons filed herein.

**Fact Summary:**

[2.] The Claimant's claim is for "compensation for injuries sustained on 9 April 2016 when she slipped and fell while shopping at the Defendant's place of business located at Yellow Pine Street, Freeport, Grand Bahama".

[3.] The Claimant filed a generally endorsed Writ of Summons on 8 April 2019 one day prior to the expiration of the limitation period.

**Issue**

[4.] The Court must determine whether to exercise its discretion and grant the Claimant leave to extend the period within which to serve the Writ of Summons filed herein.

### **Claimant's Evidence:**

[5.] The Claimant filed an Affidavit on 4 January, 2024 in support of this application avers that she instructed her previous Counsel to effect immediate service of the Writ of Summons which was filed on 8 April, 2019. Further, that there is no affidavit of service of the Writ of Summons on the Court records. The Claimant states that a compelling reason for the Court to exercise its discretion in her favour is she was “severely injured and suffered debilitating effects as a result” thereof.

### **Law**

[6.] Part 8.13 of the CPR provides the procedure for an extension of time to service of a claim form (formerly writ of summons) and in particular Part 8.13(1) to (4) and (6):

- (1) The claimant may apply for an order extending the period within which a claim form may be served.
- (2) The period by which the time for serving a claim form is extended may not be longer than six months on any one application.
- (3) An application under paragraph (1) —
  - (a) must be made within the period —
    - (i) for serving a claim form specified by rule 8.12; 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.
- (4) The Court may make an order under paragraph (1) only if it is satisfied that —
  - (a) the claimant has taken all reasonable steps to, but has been unable to —
    - (i) trace the defendant; and
    - (ii) serve the claim form;
  - (b) there is some other special reason for extending the period.....
- (6) No more than one extension may be allowed unless the Court is satisfied that —
  - (a) the defendant is deliberately avoiding service; or
  - (b) there is some other compelling reason for so doing.  
*[Emphasis added]*

### **Submissions**

[7.] Counsel for the Claimant submits that the Court ought to grant the extension for the service of the Writ of Summons filed herein on the basis that if the same is not renewed the claim would be statute barred.

[8.] That the reason for the Writ not being served lies with previous Counsel's failure to carry out the Claimant's instructions to serve the registered office of the Defendant. Furthermore, that her injuries were severe and debilitating and negatively impacted her ability to carry out everyday tasks.

[9.] Counsel also submitted that notwithstanding the provisions of Part 8.13 of the CPR under the overriding objective in Part 1 of the CPR the Court has a duty to ensure that matters are dealt with justly and at a proportionate costs. Further, that the Court ought to ensure that the parties are on an equal footing. Counsel argued that the Claimant is a private individual who is suing a multi-million dollar corporation. That there is a major disparity between the respective footing, financial and otherwise, of these two parties. An application of this kind, which allows for this claimant to exercise her rights to relief in the courts places the parties on an equal footing.

[10.] Counsel further submitted that the Court ought to adopt a liberal construction of Part 8.13 of the CPR and ought not to drive the Claimant away from the judgment seat.

### **Analysis**

[11.] The Court must be satisfied that the Claimants have taken all reasonable steps to serve the Writ of Summons (Claim Form) or there are special reasons for extending the period.

[12.] The Rules provide that an application for extension of time within which to serve a claim form must be made prior to the expiration of the relevant time period of the service thereof. The present application was filed on 4 January 2024 and the time period for the service of the Writ would have expired 8 April 2020.

[13.] The overriding objective contained Part 1 of the CPR provides the background against which the Rules must be applied "to deal with cases justly and at proportionate cost". Ensuring that "parties are on equal footing" and balancing any hardship between the parties is a part of that mandate. The Court ought to therefore consider whether the Defendants may be prejudiced with regard to any right of defence (including statutory defence) should the Court accede to the Claimant's application. In **Kleinwort Benson Ltd. v Barbrak Ltd.** [1987] 1 A.C. 597 *Lord Brandon* set out three categories of cases in which an application for an extension of time for service may be made:

Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant limitation period 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. Category (3) cases are

where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired. ‘Good reason is necessary for an extension in both category (2) cases and category (3) cases. But in category (3) cases, the applicant for an extension has an extra hurdle 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 [*Emphasis added*].

[14.] The Rules provide that the Court in exercising its discretion, Part 1.2 of the CPR, must seek to give effect to the overriding objective when —

- (a) exercising any powers under these Rules;
- (b) exercising any discretion given to it by the Rules; or
- (c) interpreting these Rules.

[15.] Although the Rules are to be “liberally construed to give effect to the overriding objective” it does not mean that the Rules are to be used to circumvent or misapply specific and existing rules in the CPR. In the case of **Treasure Island Co. v Audubon Holdings Ltd.** [2004] Court of Appeal, ECS (British Virgin Islands), Civ App No.22 of 2003, *Saunders, JA* at para. 24 states that:

..... it must not be assumed that a litigant can intentionally flout the rules and then ask the Court's mercy by invoking the overriding objective.... the overriding objective does not in or of itself empower the Court to do anything or grant to the Court any discretion. It is a statement of the principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself...

[*Emphasis added*]

[16.] The Claimant’s application falls within third category identified by *Lord Brandon* in **Kleinwort** (supra) after the period for service of the claim ceased to be valid and the limitation period expired. In **Kleinwort** (supra) *Lord Brandon* prejudice to a defendant should the Court grant leave in cases which fall within the third category:

In both category (1) cases 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 (2) cases but not category (1) 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) cases nor category (2) cases therefore, can it be properly said that at the time when the application for extension of time 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.

[17.] The provisions under Part 8.13 of the CPR are clear and unambiguous as it provides the timeline and procedure for the granting of extension of time for the service of a claim form which may be summarized as follows:

- i. application must be made before the period specified in Part 8.12 expires;
- ii. claimant has taken reasonable steps
- iii. some other special reason

[18.] Therefore the application must be made within the specified time frame then the Court may exercise its discretion only if the claimant has taken reasonable steps, there is some other special reason to extend the period of time per Part 8.13; moreover per **Kleinwort** that there is some satisfactory reason as to why an application to extend was not made before the expiration of the extension period. In the this case I find that no reasonable steps were taken by the Claimant and no other special reasons have been advanced upon which the Court may exercise its discretion to grant leave to extend the time for the service of the Writ. Furthermore, the Court must also balance any prejudice to the Defendant in granting such leave.

[19.] The Claimant's application for an order extending the time period for service the Claim form is hereby dismissed.

Dated 16<sup>th</sup> day of April, 2024

Constance A. Delancy  
Justice (Acting)