

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2023/CLE/gen/FP/00073

IN THE MATTER OF Section 1 (Law Reform Miscellaneous) Act 1976.

AND IN THE MATTER OF the Fatal Accident Act 1976

AND IN THE MATTER OF the Survival of Action 1992

B E T W E E N

GERARD TURNER

First Claimant

GERANDA TURNER-TAYLOR

Second Claimant

GERARD TURNER II

Third Claimant

AND

THE ATTORNEY GENERAL

Defendant

AND

THE PUBLIC HOSPITAL AUTHORITY

Second Party

AND

THE RAND MEMORIAL HOSPITAL

Third Party

Before: The Honourable Justice Constance Delancy (Acting)

Appearances: Crystal J. Kelly-Newman, for the Claimant

Hearing date(s): 19 March, 2024

DECISION

DELANCY, J (ACTING)

[1.] This is the Claimant's application for an order to extend the period within which to serve the Standard Claim Form filed herein.

Background

[2.] On 12 May 2023, the Claimant filed the following documents:

- i. Standard Claim Form, no statement of claim or affidavit in support was filed;
- ii. Notice of Application seeking leave to issue and serve the Claim without a Statement of Claim (this application was not pursued); and
- iii. Affidavit of First Claimant in support thereof.

[3.] On 13 December, 2023 the Claimant filed a Notice of Application for an order to extend the period within which to serve the Standard Claim Form, which is the present application before the Court. This Application is supported by an Affidavit and Supplemental Affidavit of the First Claimant filed 13 December, 2023 and 12 March, 2024 respectively.

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 Standard Claim Form filed herein.

Evidence

[5.] The Standard Claim Form and the First Claimant's Affidavit and Supplemental Affidavit in support of this application which may be summarized as follows:

- i. Cassandra Turner died on or about 14 May, 2022 while in the care of the Third Defendant [*para.1(a) Standard Claim Form*];
- ii. Statement of Claim not furnished as the toxicology and medical report not received from the relevant authorities within the prescribed period [*para.3 of Affidavit*];
- iii. On 19 May, 2022 the First Claimant requested a toxicology report from Third Defendant [*para. 2 of Supplemental Affidavit*];
- iv. On 20 March, 2023 the First Claimant sought legal counsel and retained the services of Counsel three days later [*para. 4 of Supplemental Affidavit*];
- v. On 23 March, 2023 Counsel wrote to Royal Bahamas Police Force requesting a toxicology report; and to the Legal Advisor of the Second Defendant requesting a medical report and copies of invoices [*para. 5 of Supplemental Affidavit*];

- vi. On 25 May, 2023 the toxicology report was received by the Claimants [*para. 8 of Supplemental Affidavit*]; and
- vii. On 25 May, 2023 and 14 June, 2023 requests were sent to the Third Defendant requesting a medical report. [*paras. 9 and 10 of Supplemental Affidavit*].

Law

[6.] The Civil Procedure Rules, 2022 (the CPR) at Part 8.2 provides the procedure for issuance and service of a Standard Claim Form:

- (1) A claim form may be issued and served without the statement of claim, affidavit or other document required by rule 8.1(2)(b) or (c) only if the —
 - (a) claimant has included in the claim form, all the information required by rules 8.6, 8.7, 8.8 and 8.9; or
 - (b) the Court gives permission.
- (2) In a case of urgency when it is not practicable to include in the claim form all the information required by rules 8.6, 8.7, 8.8 and 8.9 or first to obtain the permission of the Court a claimant may issue and serve the claim form without a statement of claim or affidavit or other document required by rule 8.1(2)(b) or (c), provided that the claimant —
 - (a) certifies in writing that the issue and service of the claim form is a matter of urgency, stating why; and
 - (b) serves with the claim form a copy of —
 - (i) the certificate; and
 - (ii) an application for permission.
- (3) If a claim form is issued under paragraph (2), unless the Court otherwise orders, pending the granting of permission by the Court, the claimant may take no further steps in the action except to file and serve the claim form, together with the certificate and application for permission, and to take such steps as are necessary to pursue the application for permission.
- (4) The Court may give permission under paragraph (1)(b) only if it is satisfied that —
 - (a) a relevant limitation period is or was about to expire and the claimant has obtained legal advice relating to the claim for the first time within the twenty-eight days prior to the date that the claimant wishes to file the claim; or
 - (b) the claim form requires or required to be issued as a matter of urgency and that it is or was not practicable for the claimant to prepare a statement of claim or affidavit.
- (5) An application for permission may be made without notice but must be supported by evidence on affidavit.
- (6) Any order giving permission for the claim form to be filed and served without a statement of claim, affidavit or other document required by rule 8.2(1)(b) or (c), must state a date by which the statement of claim or other document must be filed and served.
- (7) Such date must in no case be more than twenty-eight days from the date of the order giving permission.

(8) A copy of the order, or certificate and application under paragraph (2), must be served with the claim form. [*Emphasis added*]

[7.] Part 8.9 of the CPR sets out additional requirements for Claims which involve personal injuries (as defined by Part 2.1 of the CPR):

(1) This rule sets out additional requirements with which a claimant making a claim for personal injuries must comply.

(2) The claimant's date of birth or age must be stated in the claim form or statement of claim.

(3) If the claimant intends to rely at trial on the evidence of a medical practitioner, the claimant must attach to the claim form a report from the medical practitioner on the personal injuries alleged in the claim.

(4) Paragraph (3) does not restrict the right of the claimant to call other or additional medical evidence at the trial of the claim.

(5) The claimant must include in, or attach to, the claim form or statement of claim a schedule of any special damages claimed. [*Emphasis added*]

[8.] 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

[9.] The Claimant Counsel's submitted that the Standard Claim Form cannot be served without the report from the medical practitioner Part 8.9(3) of CPR. Counsel cited the case of **Mark v Universal Coatings & Services Ltd. and another** [2018] EWHC 3206 (QB) to support this requirement.

[10.] Counsel also submitted that the Court ought to adopt a modern approach when applying the rules in determining whether it to exercise its discretion as stated in the Court of Appeal case of **Clearview Management Limited (d/b/a Sandals Resorts (Emerald Bay, Exuma) and Hilarena Nixon** SCCivApp & CAIS No.55 of 2023 as per Sir Michael Barnett, P at para. 10:

The modern approach is for the courts to be flexible. It looks to the interest of justice which seeks to have matters decided on its merits as opposed to being decided by default in not complying with the procedural rules.

Analysis

[11.] Part 8 of CPR sets of the procedure to be followed for the commencement of actions and requirements for the issuance and service of claim forms. Claims involving personal injuries must satisfy additional requirements in particular the attachment of the medical report for the claim form (Part 8.9(3)).

[12.] Counsel relied on the English case of **Mark v Universal Coatings & Services Ltd. and another** (*supra*) that the Claimants were unable to serve the Claim form due to unavailability of the medical report as is required by Part 8.9(3) of the CPR. In the case of **Mark v Universal Coatings & Services Ltd. and another** (*supra*) the Court notes the observations of *Spencer, J.* at para.49 thereof:

.....Frequently, particularly in complicated personal injury or clinical negligence litigation, the focus is on difficult questions of causation which may or may not resolve the matter. Often, at a relatively early stage, a medical report and schedule of loss served with the Particulars of Claim are simply uninformative. Thus, the medical report, which the practice direction requires should be "about the personal injuries which he alleges in his claim" is no more than a relatively anodyne and brief recitation of the claimant's condition and, so far as known, prognosis. So far as the schedule of past and future expenses and losses claimed is concerned, this frequently contains no more than outline heads of loss with "TBA" (to be advised) or "TBC" (to be confirmed or to be calculated) inserted. Although it may be possible to set out some of the special damages, such a schedule says nothing about the true value of the case when the heads of future loss cannot be determined until the case in relation to causation is fully explored and known. In such cases, the court, as part of its case management powers, will lay down a timetable for the service and exchange of properly drawn medical evidence and schedules of loss further on into the

litigation. In such cases, an alternative to serving an anodyne and relatively uninformative schedule of loss and medical report with the Particulars of Claim is to do what was done in the present case and state in the covering letter when the Particulars of Claim are served that these will follow and then leave it to the court to case manage the claim and make provision for service of these documents in due course. In such cases, it is always open to the defendant to ask the court to require the claimant to serve a schedule and medical report if the defendant so desires but, in the more complicated cases, there is no point because the document which will be served, although strictly compliant with the rules, will often take the matter no further forward at that stage. By contrast, in a simple personal injury action such as a road traffic accident claim, there will usually be no difficulty at all in serving a medical report and schedule of loss with the Particulars of Claim and this is the norm in such cases. That then enables the defendant to take a view about the merits and value of the case at an early stage and make an offer of settlement, if so advised, with a consequent saving of costs. It seems to me that 16 PD.4 sets a benchmark because it is a practice direction which covers all personal injury claims from the most simple to the most complicated but which, in many of the more complicated cases, is honoured more in the breach than in the observance where the parties sensibly recognise the limitations of what can be achieved at the early stage of service of the Particulars of Claim. Thus, a defendant's advisors will often agree that service of a medical report and schedule of loss at that stage is pointless. However, as I have stated, the defendant always has the option of recourse to the court. [*Emphasis added*]

[13.] The Court must be satisfied that the Claimants have taken all reasonable steps to serve the Claim form or there are special reason for extending the period. Part 8.9(4) provides a procedure for instances when a Claimant may be unable to meet the requirement Part 8.9(3) by allowing a claimant to call other or additional medical evidence at the trial of the claim.

[14.] Counsel for the Claimants filed an Application on 12 May 2023 seeking leave to issue and serve the Standard Claim Form without the Statement of Claim as the limitation period was about to expire and the toxicology and medical reports were not available. That application although filed was never pursued by the Claimants. While the Claimants may have encountered difficulties with producing a medical report to fulfil the requirements of Part 8.9(3) of the CPR the Claimants chose not to avail themselves of the mechanism in the Part 8.9(4).

[15.] 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 for the service thereof. The present application was filed on 13 December, 2023 and the time period for the service of the Standard Claim Form would have expired 12 November, 2023 approximately one month after the period provided by the Rules for service to be effected had expired.

[16.] 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.

[17.] 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]

[18.] 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 Claimants’ 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]*.

[19.] 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.

[20.] The provisions under Part 8.13 of the CPR are 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

[21.] 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 or there is some other special reason. In the this case I find that no reasonable steps were taken by the Claimants 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 claim form. Furthermore, the Court must balance any prejudice to the Defendants in granting such leave.

[22.] The Claimants' application for an order extending the time period for service the Claim form is hereby dismissed.

Dated the 28 day of March, 2024

Constance A. Delancy
Justice (Acting)