IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Civ) 25/2013
G 129/2011

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Rt Hon Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

GEORGE DAVIDSON and others

Appellants

-and-

KHALDOUN MOUALEM and others

Respondents

Mr Peter Jervis instructed by Sam Dawson of Solomon Harris appeared for the appellants
Mr Tom Lowe QC instructed by Laura Clemens of Bodden & Bodden appeared for the second to fifth respondents

Hearing: 4 November 2013
Judgment: 6 November 2013

JUDGMENT
Revised from transcript and Approved
Released 8 January 2014

Sir John Chadwick, President:

1. This is an appeal from an order made by Justice Henderson on 4 December 2012 in proceedings brought by George Davidson, his wife Maureen Davidson, and a company, Allendale Limited, which they control against Khaldoun Moualem and four other defendants. Mr. and Mrs. Davidson are resident in the Cayman Islands. Allendale Limited is a company incorporated in the Isle of Man. Mr. Moualem has an address in England; as does the fourth defendant, Martin Slowe. The three corporate defendants have registered offices in England.

2. The present proceedings were commenced by the issue of a writ on 7 April 2011. Order 6 Rule 8(1) of the Grand Court Rules is in these terms:

> "(1) For the purpose of service, a writ (other than an office copy of a writ) is valid in the first instance —
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> (a) where leave to serve the writ out of the jurisdiction is required under Order 11, for 6 months; and
> (b) in any other case, for 4 months,
>
> beginning with the date of its issue and an office copy of a writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the office copy."

If the writ in these proceedings was to be served upon the defendants at the addresses shown in it - that is to say, if it was to be served on the defendants in the United Kingdom - leave to serve out of this jurisdiction was required; and so the claimants were entitled to rely on the extended period of validity provided for in subparagraph (a) of the sub rule. That sixth-month period expired on 6 October 2011.

3. The writ was not served within that six-month period. It could not be served on or before 6 October 2011 because leave to serve out of the jurisdiction had not been obtained. Order 6 Rule 8(2) of the Grand Court Rules provides that, subject to subrule (3):

> ". . . 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 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."

The subrule must be read with subrule (3), which is in these terms:

> "(3) 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."

4. On 5 October 2011 - that is to say, on the day before the day on which the validity of the writ would otherwise have expired - the claimants filed a statement of claim bearing that date (5 October 2011) and applied to the Grand Court for orders: (i) that the writ and statement of claim might be served on the defendants at their respective addresses stated in the writ and (ii) that the validity of the writ be extended for a period of four months from 6 October 2011.

5. That application was supported by the affidavit of Mr Davidson sworn on 5 October 2011. It came before Justice Henderson *ex parte* and without notice for hearing on 29 and 30 October 2011. The judge adjourned that hearing, generally, to allow the claimants to prepare and present further argument. On 29 December 2011, the judge made an order in the terms sought. That order was amended (but not in a manner material in the present context) on 30 January 2012.

6. The defendants acknowledged service of the writ on 21 and 23 February 2012. On 9 March 2012 they applied by summons for orders that paragraphs (1) and (2) of the order of 29 December 2011 - that is to say, the orders giving leave to serve the writ out of the jurisdiction and extending the validity of the writ for four months from 6 October 2011 - be discharged.

7. That application came before Justice Henderson for hearing on 28 and 29 August 2012. On 4 December 2012, he delivered a written judgment explaining why, on review of his *ex parte* order of 29 December 2011, he had concluded that that order should be set aside and the application for an extension of the validity of the writ made in the summons issued on 5 October 2011 should be dismissed. Effect was given to his decision by an order dated 4 December 2012 and filed on 7 January 2013. It was ordered: (i) that paragraph (2) of the order dated 29 December 2011, as amended on 30 January 2012, extending the validity of the writ of summons for a period of four months from 6 October 2011, be set aside and (ii) that the claimants pay the defendants' costs of and incidental to that summons on the standard basis.

8. The order of 4 December 2012 does not, in terms, set aside paragraph (1) of the order of 29 December 2011 - which gave leave to serve the statement of claim out of the jurisdiction - but nothing turns on that. The effect of setting aside paragraph (2) of the order of 29 December 2011 was that there was no valid writ capable of being served at the time, in or about February 2012, when service took place.

9. As I have said, the claimants appeal to this Court from the order dated 4 December 2012. They do so pursuant to leave granted by the judge on 9 August 2013.

10. In reaching his conclusion that paragraph (2) of the order of 29 December 2011 should be set aside and that the application for an extension of the validity of the writ beyond the period of six months, for which Order 6 Rule 8(1)(a) of the Grand Court

Rules provided, should be dismissed, the judge placed reliance on the fact, as he put it, that an extension of the validity of the writ would deprive the defendants of an arguable limitation defence. It is pertinent, therefore, to understand the basis upon which he reached that view.

11. At paragraphs 1 to 19 of his judgment - under the heading "Nature of the Claim", the judge described, carefully and in detail, the circumstances which gave rise to the claims advanced in these proceedings. There has been no challenge on this appeal to the judge's account of the history; and I gratefully adopt it:

    (1) Put very shortly, the claims are said to arise out of a joint venture agreement between the second, third and fifth defendant companies, (together "the Starmount companies") and Mr. Davidson, the first defendant, Mr. Moualem, and Allendale Limited (together referred to as "Portland") made in December 1996 in relation to the development of properties located in the Botchergate area in the centre of Carlisle.

    (2) It is said that in, February 1997, Mr. Moualem and the fourth defendant, Mr. Slowe, agreed to substantial variations to the joint venture agreement which were contrary to the interests of the claimants and which would have had the effect of reducing, substantially, the claimants' share of the proceeds of sale of properties under the joint venture.

    (3) It is said that Mr. Moualem had made a secret agreement with Mr. Slowe and the Starmount companies in the summer of 1997; and that, subsequently, Mr. Slowe caused the process of offering the properties for sale by tender as contemplated by the joint venture to be conducted in a commercially unreasonable manner, with the consequence that no tenders were, in fact, received.

    (4) In December 1997, Mr. Slowe declared the joint venture agreement to be frustrated and thereupon terminated. Subsequently, in February of 1998, the bank which was funding the joint venture appointed a receiver over the properties; with the consequence that the Starmount companies were able to acquire the properties with the benefit of a planning consent at what is said to have been a price well below their true value.

    On the basis of those allegations, the causes of action which the claimants assert – that is to say, causes of action based on torts of conspiracy, fraud, misrepresentation and damage to economic interests - arose during the period 1996 to 1998.

12. The statutory limitation period in respect of causes of action which arose during the period 1996 to 1998 would have ended (at the latest) in the course of 2004; and the present claims would have been defeated by the defence of limitation. As the judge put it, at paragraph 53 of his judgment, the ordinary time limit of six years applicable to actions in tort in this jurisdiction would have expired by the middle of 2004.

13. The claimants sought to overcome that difficulty by relying on the extended period of limitation available in actions based upon fraud of the defendant, or the deliberate concealment by the defendant from the claimant of any fact relevant to the claimant's rights of action, by section 37(1) of the Limitation Law (1996 Revision). That section provides that, in a case to which it applies, the period of limitation does not begin to run until the claimant has discovered, or could with reasonable diligence have discovered, the fraud or the concealment. So as the judge explained, a relevant question was: by what date could it be said that the claimants had discovered, or could with reasonable diligence have discovered, the facts demonstrating that they had been defrauded or that facts had been concealed from them?

14. In addressing that question, the judge had regard to previous proceedings brought by the claimants in England and Wales ("the English proceedings"). He set out the procedural history of those proceedings from paragraph 20 (the second paragraph 20 of the judgment) to paragraph 29 of his judgment. In summary (and so far as material):

    (1) Mr. Davidson and Allendale had commenced proceedings in the High Court of England and Wales on the 27 August 2003 against, amongst others, Mr. Moualem, Mr. Slowe and the Starmount companies.

    (2) In June 2004, the claimants in those proceedings requested limited disclosure of certain documents which, as they alleged, were required in order that they could plead their case. In response to that request the defendants to those proceedings provide documents for inspection.

    (3) A statement of claim was filed in 2004. Defences were filed in September 2004 and February 2005. The statement of claim was subsequently amended in the light of the documents which had been disclosed. The judge found that the allegations in the amended statement of claim filed in the English proceedings mirrored those in the present Cayman proceedings.

(4) In February 2005, the claimants were ordered to provide security for costs in the English proceedings and to make standard disclosure.

(6) The defendants in the English proceedings made standard disclosure by list on the 28 April 2005. Inspection of the documents disclosed by that list took place on the 13 May 2005.

(7) The claimants were unable to provide the security of costs that had been ordered; with the consequence that the English proceedings were dismissed in December 2005.

15. On the basis of that history - and after setting out the evidence in paragraphs 32 to 39 of Mr. Davidson's first affidavit in these proceedings - the judge concluded that, for the purposes of the application which was before him, the limitation period could be taken to have expired on 31 May 2011. At paragraph 58 of his judgment he said this:

> " . . . it seems to be accepted that inspection of these documents occurred on May 13, 2005. I will allow a further short period for the study of the documents and proceed on the basis that the material facts were discovered, or could with reasonable diligence have been discovered, by the plaintiffs by May 31, 2005. It follows that the limitation period for present purposes can be taken to have expired on May 31, 2011."

He went on to say that, as a consequence, he was satisfied that the extension would, at least arguably, have the effect of depriving the defendants of a limitation period defence.

16. In a section of his judgment headed "Extension of the Validity of the Writ", the judge reminded himself of the provisions of Order 6 Rule 8 of the Grand Court Rules. He asked himself: "of what must the court be satisfied before granting a 4-month extension pursuant to the power conferred by Rule 8(2)". He pointed out, correctly, that Rule 8(2) itself provided no guidance. He observed, at paragraph 40 of his judgment, that the question posed had been examined by the House of Lords in depth in *Kleinwort Benson Ltd. v Barbrak Ltd. & others ("The Myrto")* [1987] AC 597. He said this:

> "At the time of the decision, the UK counterpart of our Order 6 rule 8(2) was a provision (also O. 6 r.8(2)) in identical terms except that the maximum period of extension in the UK version is 12 months not four. Lord Brandon (with whom the other Law Lords agreed) concluded that 'there must be implied in [the rule], as a matter of construction, a condition that the power to extend shall only be extended for good reason.'. (at p. 622). He said that 'it is not possible to define or circumscribe' the scope of the expression 'good reason'. The court must consider all of the circumstances and is entitled to have regard

to the balance of hardship which includes any prejudice to a defendant (see p.623)."

The judge went on to note, at paragraph 41 of his judgment, that the *Kleinwort Benson* case had been applied twice in the Cayman Islands: in *Powell v. Port Authority and Attorney General* [2009] CILR 169, and *in Masri and Manning v. Consolidated Contractors International Co.* [2010] (1)CILR 265. He said this: "Thus, it is well established that Kleinwort defines the test I must apply.".

17. At paragraphs 42-49 of his judgment, the judge analysed the judgments in *Cecil and others v Bayat and others* [2011] EWCA Civ 135, a decision of the Court of Appeal of England and Wales. As he said, that was the only additional authority cited to him as providing guidance in relation to the exercise of the power to extend the validity of a writ under a provision equivalent to that contained in GCR Order 6 Rule 8(2). At paragraphs 50 and 51 of his judgment he said this:

> "50. *Bayat* was a decision arising from a CPR application. Nothing turns on that. The imperatives addressed in strong terms in the two judgments of the Court — the marked distinction between a deadline for service of originating process and subsequent procedural deadlines, and the 'primary question' of whether an extension of time will or arguably might deprive a defendant of a limitation defence — are equally compelling considerations under our Rules.
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> 51. In summary, I take the following from the decision in *Bayat*:
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> (1) the applicant must satisfy the court that there is a 'good reason' for an extension;
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> (2) there are many reasons for delay, such as difficulty in obtaining funding or in obtaining an expert's report, which may well provide a good reason to postpone the delivery of a statement of claim or other procedural step subsequent to service but which will not amount to a good reason to extend the validity of the writ;
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> (3) the primary question is whether the defendant will or may be deprived of a limitation defence;
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> (4) if the facts relevant to a limitation defence are unclear, the court should resist any invitation to embark upon an extended trial of the issue; it is enough for a defendant to show that he might be deprived of a limitation defence by an extension;
>
> (5) if the defendant might be deprived of a limitation defence, an extension should be granted only in exceptional circumstances."

The judge's reference in paragraphs 50 and 51(3) of his judgment to "the primary question" being "whether the defendant would or might be deprived of a limitation defence" is taken from the observations of Lord Justice Stanley Burnton at paragraph 54 of his judgment in *Cecil v Bayat.*

18. The judge then went on, in a section of his judgment (comprising paragraphs 59 to 63) headed “Is there a good reason for the extension” to address that question. He explained, at paragraph 59, that: “The only reason for the extension which has been put forward has to do, again, with documents.” He observed that Mr. Jervis, who appeared for the claimants below as he does in this Court, had told him that he was aware of the significance of the limitation period issue to his application for an extension and to his related application to serve out of the jurisdiction; that he had explained that, in the course of his preparation, he became aware of that disclosure of documents had been made in the course of the English proceedings as early as 2004; that he appreciated that, depending on the nature and extent of this disclosure, it could have the effect of demonstrating that the relevant limitation period had expired sometime in 2010; and that he had taken the decision not to proceed with his applications until he had accurate information about what was disclosed in 2004. The judge then set out passages in the first and third affidavits of Mr. Davidson. In his third affidavit (sworn 25 June 2012) Mr. Davidson addressed the difficulty of obtaining documents from his former solicitors in Carlisle. The judge observed, at paragraphs 60 to 62 of his judgment, that:

> “60. When the documents were produced to Mr. Davidson’s English solicitors in 2004 they were delivered to his agent. They were, if not in his possession, at least under his control. At any time, he could have requested copies for himself. He had an unfettered right to inspect and copy the documents. (It is not alleged that Mr. Davidson's English solicitors ever claimed a solicitors’ lien over the documents).
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> 61. Assuming that Mr. Davidson’s evidence provides a good reason for the delay from May 2011 to August 2011, it is still entirely inadequate as it leaves many important questions unanswered. Why was he, a claimant in a major commercial action, unaware of the first disclosure of documents by the defendants in 2004? Why did he remain unaware until Counsel raised the subject with him in 2011? It is said that the 2004 documents were needed in order for the plaintiffs to plead; did not the content of the pleading, which Mr. Davidson must have reviewed, alert him to the existence of the documents? Throughout his dealings with the Cumbria police and higher authorities, did they not question him about the content of the 2004 documents? When Mr. Davidson consulted Mr. Jervis in 2009, why were the 2004 documents not obtained and reviewed?
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> 62. Mr. Davidson's extensive affidavit evidence does not begin to address these issues. I am unable to accept the plaintiff's assertion that ‘the delay has been fully explained and was necessarily and unavoidably incurred. (Skeleton, para. 144).”

At paragraph 63 of his judgment, the judge concluded:

> "63. In sum, I am asked to deprive the Defendants of an arguable limitation defence because the plaintiffs, having taken no (or at least inadequate) steps to familiarize themselves with the disclosed evidence in their earlier litigation, found, when they attempted to do so at the last minute in May 2011, that they could not do so in time. That is not a good reason to extend the validity of the Writ."

And, accordingly, as he said, he set aside his earlier *ex parte* order and dismissed the application for an extension.

19. Before turning to address the grounds on which it said that the judge erred in principle, it is convenient to mention four matters. First, although (as the judge pointed out) GCR Order 6 Rule 8(2) does not, itself, contain explicit guidance as to the basis upon which the discretion which it confers should be exercised, it must, of course, be read in conjunction with the overriding objective contained in Order 1 of the Grand Court Rules. The overriding objective is to enable the court to deal with every cause in a manner or matter in a just, expeditious and economical way. Order 1 Rule 2 requires that the Court must seek to give effect to the overriding objective when it applies or exercises any discretion given to it by the Rules.

20. Second, Order 6 Rule 8(2) must be read in the context in which it appears. It is necessary to have in mind: (i) that the effect of Rule 8(1) is to extend a limitation period which would otherwise expire on a date within the four, or six, month period after the issue of the writ until the end of that period. The reason why the rule has that effect was explained by Lord Justice Rix in *Aktas v Adepta* [2010] EWCA Civ 1170, [91], in a passage cited by Stanley Burnton LJ in *Cecil v Bayat* [2011] EWCA Civ 135 [48]; (ii) that the extension is more generous in a case where the leave to serve the writ out of the jurisdiction - that is to say, in a case which falls within subparagraph (a) of Rule 8(1) - than in a case where leave to serve out is not required – in a case within subparagraph (b); and (iii) that the period of extension which may be granted at any one time, although limited to four months under Rule 8(2), may be enlarged under Rule 8(3) in a case where the court is satisfied that, despite the making of all reasonable efforts, it is not possible, or it may not be possible, to serve the writ within four months.

21. Third, that the principles upon which the power to extend the validity of the writ are not in doubt. They were considered by the House of Lords in three appeals which came before that House between 1987 and 1989. As Lord Browne-Wilkinson

explained in the subsequent appeal in *Dagnell v Freedman & Co*. [1993] 1 WLR 388, 393B-394A:

> "The principles applicable to the extension of the validity of a writ under R.S.C., Ord. 6 r. 8 have recently been considered by this House on three occasions: *Kleinwort Benson Ltd. v. Barbrak Ltd.* [1987] A.C. 579; *Waddon v. Whitecroft Scovell Ltd.* [1998] 1 W.L.R. 309; *Baly v. Barrett* [1988] N.I. 369. The starting-point is that a defendant has a right to be sued, if at all, by means of a writ issued within the statutory period of limitation and served within the period of its initial validity which, at the relevant time, was 12 months. Ord. 6, r. 8(2) confers on the court a discretion to extend the period of the writ's validity. The rule expresses such discretion in entirely general terms, but the three decisions of this House to which I have referred have laid down the principles applicable to the exercise of such discretion. Lord Brandon of Oakbrook in *Baly v. Barrett* summarised those principles as follows, at pages 416-417:
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> > '(1) On the true construction of Ord. 6, r. 8 the power to extend the validity of a writ should only be exercised for good reason.
> >
> > (2) The question whether 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 take 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.
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> In the *Waddon* case the House corrected an apparent misunderstanding of principle (3) above by emphasising that the question of the balance of hardship between the parties can only arise if matters amounting to good reason for extension, or at least capable of so amounting, have first been established. In that case the balance of hardship between the parties may be a relevant factor in the exercise of the court's discretion. But, if no matters amounting to good reason for extension, or capable of so amounting, have been established, the effect of principle (1) is that there is no room for the exercise of discretion at all, and that the question of the balance of hardship between the parties does not therefore arise. It is also established by the *Waddon* case, at p. 314, that although what has to be shown is good reason for granting the extension of the writ, it is normally impossible to show such good reason without first showing good reason for the failure to serve the writ during the period of its validity."

When the question whether the period of validity was to be extended was reviewed recently by the Court of Appeal in England and Wales in *Cecil and others v. Bayat and others* [2011] EWCA Civ 135 [2011] 1 WLR 3086, Lord Justice Rix, at paragraph 109 in his judgment, after referring to the passage in *Dagnell's* case in which Lord Browne-Wilkinson had cited the passage in the judgment of Lord

Brandon *in Baly v Barrett* in which the latter set out principles applicable in "limitation" cases, said this:

> "It appears that 'balance of hardship' was used in the days of the RSC regime to describe the exercise of discretion if a claimant had first shown a good reason; but that if good reason had not been shown, the question of the balance of hardship did not arise. (*Dagnell's* case [1993] 1 WLR 388, 393 e-h, citing Lord Brandon of Oakbrook in *Baly v Barrett* [1988] NI 369, the fruit of three decisions of the House of Lords). In my judgment, it follows from the logic of the CPR decisions themselves that that remains the position. That means that in a limitation case, a claimant must show a (provisionally) good reason for an extension of time which properly takes on board the significance of limitation. If he does not do so, his reason cannot be described as a good reason. It is only if a good reason can be shown that the balance of hardship could arise."

22. Fourth, it must always be kept in mind by an appellate court that the exercise of discretion under Order 6 Rule 8(2) is entrusted to the judge. It is only in a case where the judge has erred in principle - that is to say where he has approached his task in the wrong way - that an appellate court can properly interfere with his decision.

23. I turn therefore to the grounds advanced by the claimants/appellants in their Memorandum and Grounds of Appeal dated 11th September 2013. It is said that the judge erred in law and in principle: (i) in taking the view that to extend the validity of the writ would deprive the defendants of "an arguable" limitation defence; (ii) in requiring the claimants to demonstrate "exceptional circumstances" to justify an extension of the validity of the Writ; (iii) in failing to find that the claimants had a good reason for the delay in serving the writ; and (iv) in failing to consider or appreciate that there was no limitation defence to the claimants' equitable proprietary claims. In opening the appeal at the oral hearing before this Court, however, counsel placed no reliance on the fourth of those grounds. It was said only that the judge erred in principle:

    (1) in failing to appreciate that the defendants had no accrued limitation defence at the date that the application for an extension was made (5 October 2011);

    (2) in applying, as the relevant test, exceptional circumstances rather than good reason; and

    (3) in failing to conduct a balance of hardship analysis.

    The third of those points had been advanced under ground (ii) in the Memorandum of Grounds of Appeal: and ground (iii) of the Memorandum became subsumed in the submissions addressed in support of point (2).

24. In support of the first ground on which the Appellants now rely - failure to appreciate that the defendants had no accrued limitation defence on 5 October 2011 -, the appellants rely on the observations of Lord Brandon of Oakbrook in the *Kleinwort Benson* case [1987] AC 597, 615g-616d. Lord Brandon (with whom the other Members of the House agreed) said this:

> "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 may 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 (i) 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 (ii) 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 (iii) cases are where the application for extension is made when the writ has ceased to be valid and the relevant period of limitation has expired.
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> In both category (i) cases and category (ii) 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 it does so, the defendant will not be able to rely on a defence of limitation. In category (i) cases, but not category (ii) 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 (i) cases nor category (ii) 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 (iii) cases, however, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In category (iii) 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."

It is said on behalf of the appellants, relying on Lord Brandon's categorisation - that the present case is a category (ii) case; and, on that basis, it is said that the judge erred in thinking that the claimants needed to give a satisfactory explanation for their failure to apply for an extension until the day before the validity of the writ would have expired. In support of that submission, counsel pointed to a passage at page 623 B in Lord Brandon's speech in *Kleinwort Benson*:

> "Good reason is necessary for an extension in both category (ii) cases and category (iii) cases. But in category (iii) 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."

It is important to note that whether this is a category (ii) case or a category (iii) case, it is necessary for the applicant to satisfy the court that there is a good reason for

granting an extension of the validity of the writ. The issue is whether, in this case, the claimants, as applicants were faced with the "extra difficulty" to which Lord Brandon referred: that is to say, whether they were required to give a satisfactory explanation for their failure to apply for extension before 5 October 2011 (the day before the validity of the writ would expire).

25. In my view, the submission that the claimants/applicants did not have to give a satisfactory explanation for their failure to apply for an extension of the validity of the writ until the day before the writ expired - because this is a case which falls within category (ii) and not category (iii) of Lord Brandon's categorisation in *Kleinwort Benson* - is to misunderstand the point which Lord Brandon was making in the first of the passages from his judgment in that case just cited. As Lord Brandon pointed out, the distinguishing feature of cases within his categories (i) and (ii) is that, in cases within either of those categories, "it is still possible for the plaintiff (subject to any difficulties of service there may be) to serve the writ before its validity expires" (p. 616 B). If he does so, the defendant will not be able to rely on a defence of limitation. It is for that reason, as it seems to me, that Lord Brandon went on to say, at p. 616 C of his judgment, that in neither category (i) nor category (ii) cases 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. It is because the claimant can serve the writ within time, even if no order extending its validity is made, that the making of an order extending the validity of the writ does not deprive the defendant of any limitation defence which he would otherwise have had. In such cases, at the time of the application, the defendant had no limitation defence. In those circumstances, there is no limitation question and the case is not one within the principle stated in *Baly v Barrett.*

26. In the present case, which Lord Brandon cannot be taken to have had in mind, the claimants could not have served the writ on 5th October 2011 or on the 6th October 2011 before its validity had expired. They could not have done so because they had not obtained leave to serve out of the jurisdiction. The inability to serve the writ was not caused by any difficulties of service. There may or may not have been practical difficulties in serving the writ on the defendants in England (none have been identified); but no attempt to serve the writ within the period of validity had been

made. The inability to serve, in the present case, was, on a true analysis, an inability to achieve effective service; in the sense of service that would bring the parties served within the jurisdiction of the court. Effective service could be achieved only if leave to serve the writ out of the jurisdiction had been obtained from the court; and, as of the date when the application for leave to extend the validity of the writ was made, leave to serve out had not been obtained.

27. To argue - as counsel for the appellants sought to do - that it was enough that, at the same time as the application was made for an order extending the validity of the writ, a parallel application was made for leave to serve out of the jurisdiction is circular; and so flawed. Leave to serve out of the jurisdiction could only have been granted if there were a valid writ to be served. It cannot be assumed that, in seeking an extension of the validity of the writ, that leave to serve out would or could be granted. That is to invite the court to approach each application - the one for leave to serve out and the other for an extension of the validity of the writ - on the basis of an assumption that it will grant the other application. As it was put by counsel for the respondents, the appellants seek, in that respect, "to hoist themselves by their own bootstraps".

28. In my view, properly understood, this is a case in which the applications made on 5 October 2011 did raise a limitation question. The writ could not be served unless the judge gave leave to serve out of the jurisdiction; and given the time at which the application was made, he could not give leave to serve out of the jurisdiction unless he extended the validity of the writ. To make the orders sought on 5 October 2011 would have had the effect of depriving the defendants of a limitation defence on which they could or might be entitled to rely if the orders were not made. That, as it seems to me, brings the matter plainly within the principles stated in *Baly v Barrett*. I reject the submission that the judge erred in thinking it important to consider whether good reason had been shown for the failure to serve the writ within the period of validity provided by Order 6 Rule 8.

29. The second and third of the grounds advanced can be addressed more shortly. The second ground is that the judge erred in applying as the relevant test "exceptional circumstances" rather than the test of "good reason". The foundation for that argument is the judge's observation, in the context of his analysis in subparagraph 51(5) of his judgment, that, if a defendant might be deprived of a limitation defence,

an extension should be granted only in exceptional circumstances. But it is necessary to have in mind that, when the judge came to consider how he should exercise his discretion, he did so in a section headed “Is There a Good Reason for the Extension?”. That that is the relevant question is not in doubt: it is the test applicable under the *Kleinwort Benson* principles as restated in *Baly v Barrett*. That was the test that the judge applied; and, applying that test, he reached the conclusion, for the reasons which he gave and set out in paragraph 63 of his judgment, that there was no good reason to extend the validity.

30. Having reached the conclusion that there was no good reason to extend the validity of the writ, the judge did not need to go on to conduct a balance of hardship analysis: that is made clear by the qualification to the *Kleinwort Benson* principles, introduced by both *Waddon* and *Baly*, which is referred to in Lord Browne-Wilkinson's judgment in *Dagnell’s* case). So, the criticism that the judge erred in failing to conduct a balance of hardship analysis is misplaced in the present case. The judge never reached the point at which he needed to conduct a balance of hardship analysis.

31. For those reasons, I would reject the grounds advanced under the second and third heads. Accordingly, in my judgment, this appeal should be dismissed.

32. Having reached that conclusion, it is unnecessary to address the point raised in the Respondent's Notice - that as at the date when the writ was issued Allendale had ceased to exist because it had been dissolved under Manx law - and I do not do so.

Elliott Mottley, Justice of Appeal:

33. I agree with the reasoning and conclusion reached.

Sir Anthony Campbell, Justice of Appeal:

34. I also agree.