IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 40 OF 2019

BETWEEN:

BALDWIN MARTIN TROY DAY

PLAINTIFF

AND

(1) HENRY MERREN
(2) ELISHA HYDES

DEFENDANTS

Appearances:

The Plaintiff in person (assisted by Mr Harold Davis as his McKenzie Friend)

Mr Paul Keeble of Hampson and Company on behalf of the Defendant

Before: **The Hon. Justice Kawaley**

Date of decision: **7 November 2019**

Draft Reasons Circulated: **12 November 2019**

Reasons Delivered: **26 November 2019**

HEADNOTE

Application for declaration of invalidity of purported service of expired writ after end of limitation period-cross-application-for renewal of writ-plaintiff a litigant in person who failed to comply with the time limits because of ignorance of the law-whether good reason shown for failing to effect service during validity of writ-whether failure to apply for renewal before expiry of writ satisfactorily explained-Grand Court Rules Order 6 rule 8

REASONS FOR DECISION

Background

1. On March 24, 2016, a road accident occurred involving a car driven by the Plaintiff and a car driven by the 1st Defendant which was owned by his wife, the 2nd Defendant. On March 14, 2019, 10 days short of three years after the accident, the Plaintiff issued a Writ against the Defendants[1] seeking damages for personal injuries alleged to have been sustained by him by reason of the 1st Defendant's negligence. The Writ was filed just over a week before the three year limitation period expired[2].

2. Under Grand Court Rules ("GCR") Order 6 rule 8(1) (b), a writ is valid in the first instance for 4 months. The Plaintiff's Writ herein accordingly expired on Saturday July 13, 2019.[3] The Defendants were not purportedly served until July 29, 2019, more than two weeks after the validity of the Writ had expired and over four months after the limitation period for the Plaintiff's claim had expired.

3. By a Summons dated July 30, 2019, the Defendants applied to set aside service of the Writ and/or to declare that service had not been validly effected. On September 13, 2019, I gave directions for the Plaintiff to apply to extend the validity of the Writ within seven days. By Summons dated September 20, 2019, the Plaintiff applied for an Order to extend the validity of the Writ, which Summons was supported by his Second Affidavit dated October 21, 2019.

4. The two applications came on for hearing on November 7, 2019. At the end of a short hearing I refused the Plaintiff's application to retrospectively extend the validity of Writ and granted the Defendants a declaration that the Wit had not been validly served on them on July 29, 2019. This was essentially because the Plaintiff had failed to establish a good reason for failing to serve in time and/or to satisfactorily explain why the application for an extension was not made in time. These are the reasons for that decision. It is appreciated that the Plaintiff may find much of this legalistic Judgment difficult to digest. I have attempted to summarise the key findings in a more accessible form in paragraphs 30-31 below.

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[1] The claim against the 1st and 2nd Defendants' insurer and their insurance agent/broker, the 3rd and 4th Defendants, was struck-out on September 13, 2019.

[2] Section 13(4)(a) of the Limitation Law (1996 Revision) prescribes a three year limitation period for negligence claims seeking damages for personal injuries.

[3] The Writ's validity begins on the date of issue. See Supreme Court Practice 1999 Order 6/8/5.

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Governing legal principles

Overview

5. The relevant legal principles governing applications to renew writs after their expiry were fully and clearly set out in Mr Keeble's clear and cogent Outline Submissions on behalf of the Defendants for the September 13 and November 7 hearings. Although the Plaintiff was unable to challenge the technical legal arguments, I scrutinised them critically before both the initial and subsequent hearings to ensure there was no point which could be taken in his favour.

6. It being common ground that the Writ was served after its validity had expired, the critical statutory rule was the following paragraph in GCR Order 6 rule 8:

> "*(2) Subject to paragraph (3)*[4]*, 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.*"

7. Although it appears that the rule confers an unfettered discretion on the Court to permit extensions of the time for making the application to renew the writ to a date after its expiry, the case law explains that the discretion is in fact a narrow one when the effect of the extension would be to deprive the defendant of the benefit of a limitation defence. In summary:

   (a) good reason must be shown by the Plaintiff for not serving the Writ while it was valid;

   (b) the failure to apply for an extension before the writ expired must be satisfactorily explained; and

   (c) (if good reason has been shown for the failure to serve during the Writ's validity), the Court must balance the prejudice each party would suffer if the renewal application is refused. If good reason for the failure to serve is not established, this more flexible balancing of competing justice considerations does not take place.

8. These principles are derived from the leading English pre-CPR case of *Kleinwort Benson Ltd-v-Barbrak Ltd* [1987] 2 All ER 289, as applied by the Cayman Islands

[4] Paragraph (3) permits an extension for up to 12 months where service within the next four months is not possible.

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courts. The House of Lords there described the situation where an application to renew a writ was being made after it had expired as a "*category (3)*" case.

What the Plaintiff must establish as a precondition for the Court considering whether justice requires renewal

9. In *Davidson and others-v-Moulam and others* [2014 (1) CILR 99], the Cayman Islands Court of Appeal (Chadwick P, Mottley and Campbell JJ.A concurring) held:

> (a) "*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…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*" (at paragraph 24, citing Lord Brandon in *Kleinwort Benson*);
>
> (b) "*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 v. Whitecroft Scovell Ltd*[5]*... and Baly*[6]*... which are referred to in Lord Browne-Wilkinson's judgment in Dagnell*[7] *…*" (at paragraph 30).

The legal meaning of a "good reason"

10. In *Weavering Fixed Income Macro-Fund-v-Ernst and Young* [2014 (1) CILR 296], Quin J opined as follows:

> "*52 The best summary of principles can be found at The Supreme Court Practice 1999, at para. 6/8/6. ... I regard them as representing the law in relation to this issue in the Cayman Islands…*"

11. His judgment then helpfully sets out in full the relevant commentary on Order 6 rule 8 found in the 1999 White Book. The following passages are pertinent for the purposes of the present case:

> "*(3) It is not possible to define or circumscribe what is a good reason. Whether a reason is good or bad depends on the circumstances of the case.*

[5] [1988] 1 W.L.R. 389; [1988] 3 All E.R. 996.
[6] [1988] N.I. 368.
[7] [1993] 1W.L.R. 388; [1993] 2 All ER 161.

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Normally the showing of good reason for failure to serve the writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension...

(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:

(d)carelessness...

(7) A writ will not normally be renewed so as to deprive the defendant of the accrued benefit of a limitation period... Possible exceptions are the good reasons in 4(a) or (b), above, or very sharp practice by the defendants which has deceived the plaintiff into inactivity..."

12. In summary, there is no fixed legal definition of what does or does not amount to a "good reason" for not serving within the initial validity period. The question of what is a good reason for not serving and, where the application itself is made late, what is a satisfactory explanation for the delay "*depends on the circumstances of the case*". On the other hand, when a plaintiff seeks permission to renew a writ in circumstances where a new claim would be potentially time-barred, the Court's discretion is a narrow one and the Court is not entitled to take a lenient view of the procedural irregularities which have occurred.

The Affidavit evidence

13. The Plaintiff's Second Affidavit advanced the following brief explanation of why service was not effected within the four month period when the Writ was valid:

"*5. Mr Henry Merren have [sic]... been trying to avoid the consequence of his actions from March 14, 2016 until this very day...He further more avoided the writ of summons issue [sic] against the 1st and 2nd defendant from the inception until the day it expired. It is my belief that the insurance company and their attorney that both defendant the 1st and 2nd shared made them aware that the summon [sic] was in force during the period of 14th of March until the 14th of July and as a result they avoided the service upon themselves. Weather [sic] they, the 1st and 2nd defendant was in Cayman or overseas or staying in some other place. I do not know. The only thing I*

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know is that on many occasions even when the light was on at 15 Simmons Way no person answer the door bell, nor did any person cared [sic] enough to answer the knocks on the door even when some cars was parked in the yard. "

14. The issue of evading service was identified by me at the September 13, 2019 hearing as something which the Plaintiff needed to address. The Plaintiff offered no explanation of why he was unable to apply to extend the validity of the Writ before it had expired. It is possible that I did not direct, or did not effectively direct, the Plaintiff's attention to this particular issue.

15. The proposition that the Defendants were deliberately evading service was hotly disputed by the Defendants. The 1st Defendant is a practising lawyer and he deposed that he was at all material times easily contactable as he worked from his home law office at the 15 Simmons Way address (off Hinds Way and Walkers Road), details which a simple Google search would reveal; but was never contacted until service was purportedly effected on him and his wife on July 29, 2019. He also deposed that he was only abroad for a family wedding in Canada during the period July 16-24, 2019. The 2nd Defendant admitted that she was abroad for the same period but also abroad on her own during the period July 9-15, 2019 but also denied evading service.

16. At the present hearing I afforded the Plaintiff an opportunity to elaborate upon his service attempts and explain why he did not apply within time to extend the validity of the Writ. He insisted that he began service attempts not at the last minute but stated that he attempted service on 14 March 2019, the date the Writ was issued. When I asked why he did not apply for substituted service or apply to renew the Writ earlier, he very honestly replied: "*lack of knowledge*".

17. I was unable to resolve the conflict on the evidence as to whether or not the Defendants had been deliberately evading service by refusing to answer the door even when they were home either over a period of nearly four months (on the assumption that the Plaintiff initiated service attempts promptly as he claimed to have done) or over a period of 1-2 weeks (on the assumption that the Plaintiff initiated service attempts towards the end of the validity of the Writ, being unaware when it was due to expire). It seemed inherently improbable that the Plaintiff had been over a four month period repeatedly visiting the Defendants' residential address without making any attempts to locate at least the 1st Defendant by other means. But it did seem plausible that the Plaintiff had initiated service attempts at least as early as April, 2019.

18. The Plaintiff initially focussed attention on the Defendants' insurers and insurance agent/broker the 3rd and 4th Defendants. Attached to the Writ was pre-action correspondence with the Defendants' insurer (that from the insurer marked "without prejudice") who filed an Acknowledgement of Service (through the same attorneys who ultimately represented the 1st and 2nd Defendants) as early as March 18, 2019. The 3rd and 4th Defendants filed a Defence on March 26, 2019, which alleged that no reasonable cause of action existed against these Defendants and that the Plaintiff's claim was liable to be struck-out. By early April, the Plaintiff knew or ought to have

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known that he had to focus attention on the 1st and 2nd Defendants, to the extent that he had not done so before then.

19. Nonetheless, for the purposes of dealing with the present applications, I decided to take the Plaintiff's case at its highest and assume that he had indeed made repeated attempts to serve the Writ on the Defendants at their home address and that whenever he attended either no one was home or no one came to the door because they were seeking to evade service. This sworn evidence could not be said on its face to be incapable of belief. On the other hand, I placed no reliance on his speculative assertions that the 1st and 2nd Defendants' insurers, their attorneys and the 1st and 2nd Defendant had, in effect, conspired together to ensure that the individual Defendants would not be served.

Findings: has the Plaintiff shown a good reason for not serving the Writ during its validity and provided a satisfactory explanation for not applying to extend the validity of the Writ before it expired?

Factual findings

20. The Plaintiff's evidence taken at its highest supports a finding that the predominant reason for his not serving the Writ in time was the Plaintiff's ignorance of the existence of a legal remedy for impracticability of personal service, namely an application for substituted service under GCR Order 65 rule 4, combined with his ignorance of the limited period during which the Writ was valid and the legal requirement to apply to renew the Writ before it expired. The complaint was not that service was first attempted just before the Writ expired so that the Defendants' evasive actions made it impossible to effect service. The complaint was that from the outset, in circumstances where service was first attempted the date the Writ was issued, and the 3rd and 4th Defendants had been served, the 1st and 2nd Defendants deliberately evaded service over an approximately four months' long period. The Rules contemplate that unless a plaintiff carelessly waits to make first attempts at service just before the writ is about to expire, as soon as it becomes apparent that the defendant is evading personal service, an application will be made for substituted service. Applications for substituted service are in my experience typically made (a) before the Writ has expired, and (b) only after attempts have been made to serve the defendant at all addresses the plaintiff is reasonably able find.

21. On the Plaintiff's own case, he was aware that the Defendants were evading service early in the four months validity period, made no attempts to effect service at more than one address and made no attempts to contact the 1st Defendant by other means. He was a practising lawyer apparently with a functioning office at a published address. Alternative supplementary service options included telephone or email or contacting the insurers' attorneys of record. Not only were the attempts at service which the Plaintiff did claim he undertook (repeatedly going the same address) quite weak. The Plaintiff could have applied for substituted service before the writ expired and failed to do so because he lacked the requisite legal knowledge as a litigant in

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person as to how to manage the service process. Any evasion of service which might have occurred had no material impact on the Plaintiff's ability to serve and apply in time, because he ought to have applied for substituted service well before the Writ expired. The Court would likely have permitted him to simply leave the Writ at the Defendants' residential address and the need to apply to renew the Writ would not have arisen.

22. The explanation for not making the application in time was based on the same facts. The Plaintiff in my judgment ought, on any sensible view of the facts, to have realised long before the Writ expired that he might not be able to serve it in time and ought to have made the requisite application for substituted service so that the need to apply to renew the Writ would not arise. Mr Keeble rightly submitted that the Plaintiff's difficulties were in substance due the fact that he had chosen not to obtain legal representation and sought help instead from an unqualified person. The Plaintiff, as already noted above, frankly admitted that he had not applied in time because of a "*lack of knowledge*". It is also clear from *Weavering Fixed Income Macro-Fund-v-Ernst and Young* [2014 (1) CILR 296] (Quin J at paragraph 52) that carelessness is not a good reason for failing to serve in time.

Findings: there was no good reason for failing to serve the writ in time nor was there any satisfactory explanation for the failure to seek an extension within time

23. The Plaintiff's reason for not serving in time and his explanation for not applying to extend the Writ in time were essentially the same: "*lack of knowledge*". I found that this did not in all the circumstances of the present case amount to a good reason or satisfactory explanation for failing to serve the Writ before it expired and failing to apply to renew it. These failures occurred in the context of a claim which was filed 10 days before the limitation period expired which accentuated the need for the Plaintiff to act with due diligence because renewal of the Writ would entail depriving the Defendants of a limitation defence to a new claim. As I observed in the course of the hearing, "ignorance of the law is no excuse".

24. It appeared to me that the ultimate consequence of finding that the Plaintiff's ignorance of the law amounted to a good reason for failing to serve or to apply to extend the Writ in time would be as follows. Order 6 rule 8 would effectively not be enforceable according to its terms in any case brought by a litigant person. It would be easy for every litigant in person to complain that they failed to serve during the life of a writ because they did not understand the governing legal rules. This would be inconsistent with the well-established principles on how Order 6 rule 8 should be applied, namely that the merits of each posited good reason for failing to serve in time must be considered not on a generic basis, but having regard to the factual merits of each case. It would also entail construing the Rules in a manner which was inconsistent with paragraph 1.2 (b) of the Overriding Objective, which requires the management of cases with a view to "*ensuring that the normal advancement of the proceeding is facilitated rather than delayed*".

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25. There may be certain exceptional circumstances where ignorance of the law can be taken into account; for instance if money is paid under a mistake of law or knowledge of the law is an element of a particular civil claim or criminal offence. But generally, as matter of legal policy, it is not permissible for a party to justify not following the correct legal procedure by pleading ignorance of the law as an excuse. The legal principle is of longstanding and is derived from Roman law. One reason for the rule is that while it is possible for a court to assess the merits of a party's assertions about their knowledge of the facts, it is impossible to effectively determine the extent of a person's legal knowledge. In *Dixons-v-Monkland Canal Company* [1835] UKHL 5 WS 445, the Lord Chancellor stated (at page 451):

> "*It is in the nature of what you would call an exception of estoppel, that a man shall not be heard to say that he does not know the law, inasmuch that if you allow him to say he does not know the law you have no certain rule whereby to ascertain whether he knows it or not; you have no means of knowing whether it is a bona fide defence, or a defence in pessima fide; and you have no such hold over persons as you have where the only question is as to their ignorance of the fact.*"

26. In *Oladeji-v-Social Security Commissioners* [2001] EWCA Civ 389, a case where an extension of time for claiming was refused at first instance but granted on appeal, the reason for the delay was that the appellant positively believed he had no entitlement to a claim. Mummery LJ accepted that:

> "*19... there is a difference between a case where a claimant positively believes that he is not entitled to claim and a case where he simply does not know of the possibility of entitlement; indicating that in the latter case that ignorance of the law is no excuse is more apt...*"

27. In the present case, the Plaintiff essentially failed to serve the Writ during its validity and failed to apply to renew it in time because "*he simply* [did not know] *of the possibility of*" doing so. He did not know that faced with the difficulties of effecting service of which he complained, the law provided a simple remedy of applying for substituted service. Nor did he know that if he did not effect service by July 13, 2019, he was required to apply before the Writ expired because the effect of a renewal would be to deprive the Defendants of the ability to rely upon a limitation defence if he was forced to commence a new action. I was sympathetic to the Plaintiff's plight, but took the view that it was not properly open to me to apply the law in a different way than the law would ordinarily be applied simply because the Plaintiff was a litigant in person. The Defendants had retained attorneys to make an application which they no doubt were advised would likely succeed. It would have been an injustice to the Defendants if the Court were to move the procedural law goalposts simply because the Plaintiff was not legally represented and did not understand the

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law. As Lord Sumption recently opined in *Barton-v-Wright-Hassel LLP* [2018] UKSC 12 (2 February 2018), where the complaint was that a litigant in person's fair hearing rights were contravened by applying the usual legal approach to his irregular service of process:

> "*19. Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2015] 2 P & CR 3, [2014] EWCA Civ 1652. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.*" [Emphasis added]

28. The critical legal requirement to serve the Writ within four months was not hidden away in an obscure corner of the Grand Court Rules. A note at the bottom of page 1 of the Writ the Plaintiff issued provided as follows:

"*NOTE-this Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.*"

Possible alternative remedy for the Plaintiff

29. At the conclusion of the hearing, I sought to assist the Plaintiff by identifying a possible legal answer to the Defendants limitation defence if he issued a fresh writ, while cautioning him that it would be extremely difficult for him to advance such a fresh claim without legal representation. I also made it clear that the Court should not be understood to be offering him advice. Attached to the Plaintiff's present Writ was a Police Accident Report which supported his case on liability and a letter from the Defendants' insurers which arguably admitted liability because although marked "without prejudice", the letter only by its terms can potentially be read as only expressly inviting negotiations about quantum. Section 39(1) (a) of the Limitation Law (1996 Revision) confers a broad equitable jurisdiction to extend the usual limitation period for personal injuries claims. In the exercise of this jurisdiction, the Court would have greater leeway to consider the substantive aspects of the competing interests of justice to the Plaintiff and prejudice to the Defendants. Persuasive authorities on the corresponding jurisdiction in England and Wales includes *Leeson-v-Marsden and Another* [2008] EWHC 1011 (QB) (Cox J) and *Aktas-v-Adepta* [2010] EWCA Civ 1170 (Rix LJ).

Summary

30. In summary, the Plaintiff's claim has failed because he did not serve his Writ on the Defendants before it expired on July 13, 2019. He also failed to apply to renew the Writ before it expired. These failures were not technical, because if the Court granted the Plaintiff's application to renew the Writ, the Defendants would lose the right to defend a new writ by complaining that the 3 year limitation period had expired on March 24, 2019 and it was too late to validly pursue a new claim against them.

31. The law required the Plaintiff in these circumstances to (a) demonstrate he had a good reason for not serving in time, and (b) provide a satisfactory explanation of why he did not make his application to renew the Writ in time. Assuming his partially disputed evidence to be true, the substantial reason for his failure to serve and to apply to renew the Writ in time was his lack of understanding of the legal requirements relating to service of writs. I found that in these circumstances ignorance of the law was not a valid excuse.

32. For these reasons on November 7, 2019, I refused the Plaintiff's late application to renew the Writ and granted the Defendants' application for a declaration that the

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purported service of the Writ on them just over two weeks after it had expired was invalid.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT