



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2  
3 CAUSE NO: 0262/08

4  
5 BETWEEN:

27/03/09

6  
7  
8 MIA POWELL

9 Plaintiff

10  
11 AND:

12  
13 (1) PORT AUTHORITY OF THE CAYMAN ISLANDS

14  
15 (2) ATTORNEY GENERAL

16  
17 Defendants

18  
19 Coram: The Hon. Mr. Justice Foster

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21 Appearances: Mrs. Keva of McKinney Reid for the Plaintiff  
22 Mr. Marcus Baldwin of Ritch & Conolly for the First Defendant  
23 Mr. Douglas Schofield of the Attorney General Chambers for the  
24 Second Defendant

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26 Heard on 26<sup>th</sup> and 27<sup>th</sup> February 2009

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29 RULING

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32 1. This an application by the Defendants to discharge or set aside an ex parte order  
33 made on 11<sup>th</sup> December 2008 extending the validity of the Plaintiff's writ which  
34 had been issued on 29<sup>th</sup> May 2008 and therefore had expired on 29<sup>th</sup> September  
35 2008.

36  
37 2. The Plaintiff was injured when she slipped on some stairs at the premises of her  
38 employer, the Port Authority. She actually gives different dates for the accident  
39 in her correspondence but in her affidavit filed in support of her application for  
40 extension of the writ in December 2008 she says that the accident was on 30<sup>th</sup>

1 May 2005. The relevant limitation period within which to bring a claim in respect  
2 of such an accident is 3 years and in the present case it therefore expired on 30<sup>th</sup>  
3 May 2008, over 6 months before the application to extend the writ was made.  
4

5 3. The Plaintiff sought medical treatment for her injury and in correspondence  
6 exhibited to her affidavit said that she had reported the accident to her supervisor  
7 upon her return to work a few days later. She then had some correspondence with  
8 her employers about compensation but that was not until about 9 months after the  
9 accident. She was asked in June 2006, approximately a year later, to provide a  
10 medical report to her employers which she apparently did. It is not clear which  
11 report she submitted. According to an undated medical report exhibited to her  
12 affidavit she had surgery on her shoulder in February 2007. According to that  
13 report the Plaintiff was apparently upset at the way her claim was being treated by  
14 her employers. However the Plaintiff seems to have had no future  
15 communication with her employer about the accident.  
16

17 4. At some point thereafter she consulted an attorney, Mrs. Keva Reid of McKinney  
18 Reid & Company, who apparently assisted her in applying for legal aid. On 12<sup>th</sup>  
19 October 2007 the Plaintiff was granted legal aid in respect of a personal injury  
20 claim as set out in a Civil Legal Aid Certificate dated 2<sup>nd</sup> November 2007.  
21 However, legal aid was limited to issuing a letter before action, any further steps  
22 requiring to be pre-approved.  
23

1 5. It appears that no letter before action was in fact sent to the Defendants or either  
2 of them but on 29<sup>th</sup> May 2008, one day before the limitation period expired, a  
3 generally endorsed writ was issued by Mrs. Reid but not served. There is no  
4 affidavit evidence from Mrs. Reid but according to the Plaintiff's own affidavit  
5 she was advised by Mrs. Reid that the writ had to be served within 4 months and  
6 that Mrs. Reid told her "once the writ was served that costs would flow and in any  
7 event I would have to properly retain Mrs. Reid or another attorney to represent  
8 me. I was in no position to do that and contacted the legal aid office on several  
9 occasions to ask if the legal aid could be extended to allow me to retain an  
10 attorney in the matter. I had difficulties in contacting the legal aid officer but  
11 eventually I spoke to her and she told me that it could be considered but that the  
12 Court would have to hear from Mrs. Reid and then determine if the legal aid could  
13 be extended".

14  
15 6. Mrs. Reid then emailed the legal aid officer on 16<sup>th</sup> September 2008, confirming  
16 that the Plaintiff's claim had not been resolved. She stated in her email that in her  
17 opinion the Plaintiff had a good case and that the First Defendant and the Customs  
18 Department (who are not in fact a defendant) could be held liable. She pointed  
19 out that the particulars were already on file with the legal aid officer and  
20 requested that as a matter of urgency the Plaintiff be considered for the further  
21 grant of legal aid to continue the matter. At this point some 3½ months had  
22 elapsed since the writ was issued and it would expire in approximately 2 weeks.  
23 Mrs. Reid sent a further email to the legal aid officer on 22<sup>nd</sup> September 2008,  
24 only 6 days after her first email, asking for an update on the application to extend

1 legal aid for the Plaintiff. Presumably Mrs. Reid was well aware that the writ  
2 would expire in a week's time.

3 7. An amended Legal Aid Certificate, effective 2<sup>nd</sup> October 2008 and dated 8<sup>th</sup>  
4 October 2008 to cover the continuance of the matter was duly issued, although it  
5 is not clear exactly when Mrs. Reid was notified or became aware of this. In any  
6 event, the writ had clearly expired by then. On 13<sup>th</sup> November 2008 an ex parte  
7 application to extend the validity of the writ was filed by Mrs. Reid and, as I have  
8 said, this was heard on 11<sup>th</sup> December 2008 when an ex parte order was made  
9 extending the validity of the writ to 19<sup>th</sup> December 2008. The writ was served on  
10 the Defendants a week later, on 18<sup>th</sup> December 2008. The Defendants filed their  
11 applications to discharge or set aside the ex parte order on 9<sup>th</sup> and 20<sup>th</sup> January  
12 2009 respectively (the Christmas and New Year holidays having intervened) and  
13 their applications were heard by me yesterday, 26<sup>th</sup> March 2009.

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15 8. There appear to be no relevant reported decisions of this Court relating to  
16 extension of the validity of a writ pursuant to GCR O.6, r.8 (2). That rule  
17 provides:

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19 *"...where a writ has not been served on a defendant, the court may by order*  
20 *extend the validity of the writ from time to time for such period, not exceeding 4*  
21 *months at any one time, beginning with the day next following that on which it*  
22 *would otherwise expire, as may be specified in the order, if an application for*  
23 *extension is made court for that day or such later day (if any) as the court may*  
24 *allow".*

1 9. There is, however, English authority concerning the equivalent provision there,  
2 the terms of which, at least in the RSC which the reported cases concern, are  
3 identical, although at the time a writ in England expired after 12 months, not 4  
4 months as provided by GCR O.6, r.8 (1). The parties counsel all agreed that the  
5 leading English authority is the decision of the House of Lords in Kleinwort  
6 Benson Ltd. v Barbrak Ltd. [1987] AC 597. In that case Lord Brandon identified  
7 three main categories of case relating to an application for an extension of the  
8 validity of a writ when the writ has been issued before the relevant limitation has  
9 expired, as is the case here. He described them as Category (1) where the  
10 application for extension is made at a time when the writ is still valid and before  
11 the limitation period has expired; Category (2) where the application for  
12 extension is made at a time when the writ is still valid but the limitation period  
13 has already expired and Category (3) where the application for extension is made  
14 when the writ has ceased to be valid (in this jurisdiction after 4 months have  
15 elapsed) and the limitation period has also expired. The present case is a  
16 Category (3) case. Lord Brandon pointed out that in Category (1) and (2) cases it  
17 is still possible for the writ to be served before it becomes invalid and if so the  
18 defendant will not be able to plead a defence of limitation. After further  
19 comments about Category (1) and (2) cases, he went on to point out that in  
20 Category (3) cases like the present it is not possible to serve the writ effectively  
21 unless its validity is first retrospectively extended. Accordingly in Category (3)  
22 cases at the time when the application for extension of the writ is made the  
23 defendant who has not been served has an accrued right of limitation.

24

1 10. After reviewing various previous authorities, Lord Brandon concluded (page 622)  
2 that the rule (enabling the court to extend the validity of a writ) should be  
3 interpreted as requiring “good reason” for such extension to be established by the  
4 applicant. He then considered what might properly amount to good reason and  
5 said that it was not possible to define or circumscribe the scope of that expression  
6 but that whether or not there is good reason in any particular case must depend on  
7 all the circumstances of the case and therefore left to the judgment of the judge.  
8 However, it was also emphasized that in Category (3) cases the applicant for an  
9 extension of a writ has an extra difficulty in that he must also give a satisfactory  
10 explanation for his failure to apply for an extension before the validity of the writ  
11 expired.

12  
13 11. Lord Brandor. went on to explain, after emphasizing that the decision whether an  
14 extension of a writ should or should not be allowed is a discretionary one for the  
15 judge, that in exercising that discretion the judge is entitled to have regard to the  
16 balance of hardship as between the parties and that in doing so he may well need  
17 to consider whether allowing an extension would cause prejudice to the defendant  
18 in all the circumstances.

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20 12. It was emphasized on behalf of the Defendants at the hearing before me that in a  
21 Category (3) case like the present the fact that the Plaintiff was waiting for legal  
22 aid is neither a satisfactory explanation for his failure to apply for an extension of  
23 the writ before it has elapsed nor a good reason for granting an extension. I was  
24 referred in particular to the judgment of Lord Denning in the English Court of

1 Appeal in Baker v Bowkett's Cakes Ltd. [1966] 1 WLR 861 when he determined,  
2 in considering an application for an extension of a writ which had expired after 12  
3 months (being the relevant period of validity), that the fact that the plaintiff's  
4 solicitors had been spending time in connection with obtaining legal aid was not a  
5 reason for extending time. He said:

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7 *"During the whole of the year from May 1964 to May 1965 the solicitors for the*  
8 *plaintiff could and should have got on with the case and done what was necessary*  
9 *for the purposes for legal aid and the writ, to have the writ served within the 12*  
10 *months. I see no sufficient reason why they should not have got on with the case.*  
11 *They ought to have got all the medical evidence together and done whatever was*  
12 *necessary within the 12 months. They did not do so. It was their fault. I see no*  
13 *reason for extending the claim".*

14  
15 He said further (page 865):

16  
17 *"In considering whether to extend the writ we must ignore legal aid".*  
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19 13. I was also referred on behalf of the Defendants to Stevens v Services Window  
20 Cleaning Co. Ltd. [1967] 1 QB 359 and the judgment of Chapman J. when he said  
21 that in considering whether good cause or sufficient reason had been shown for  
22 extending the validity of the writ:  
23

1           *"I must not allow myself to be affected by comings and goings between the*  
2           *plaintiff and the legal aid committee or by delays which may have occurred on the*  
3           *part of the latter – it would not be right that a defendant's position should be*  
4           *prejudiced by matters of that kind".*

5  
6           And he referred to the case of Baker (ibid) above.

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8       14.   Both the Plaintiff's and the Defendants' counsel referred me in this regard to  
9           Waddon v Whitecroft Scovell Ltd. [1988] 1 WLR 309, apparently the most recent  
10          decision of the House of Lords on the subject, with Lord Brandon again one of the  
11          judges. In that case Lord Brandon said, with reference to Baker (ibid) and  
12          Stevens (ibid) and the comments in those case about legal aid:

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14          *"These observations were made in relation to the particular facts of each case*  
15          *and may well have been justified in relation to them. If, however, those who made*  
16          *them intended to lay down as a general proposition of law that, in deciding*  
17          *whether there is good reason for extending the validity of a writ, delays caused by*  
18          *the operation of the legal aid system should never be taken into account, I am*  
19          *unable to agree with such a proposition. Such delays occur and where they do it*  
20          *would be unrealistic to disregard their effect.*

21  
22          Lord Brandon went on, in considering the circumstances of that case, to consider  
23          the question of whether, if the plaintiff had not been legally aided, what in fact

1 occurred would not have occurred, by reference to the analysis of Ackner LJ in  
2 the Court of Appeal. Ackner LJ concluded that analysis by saying:

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4 *“The result was this. During the crucial period that restriction on the legal aid*  
5 *certificate could have been removed if proper steps had been taken, those steps,*  
6 *which would have involved the plaintiff’s solicitors with no unreasonable*  
7 *problems or difficulties, were not taken. In those circumstances, it seems clear to*  
8 *me that the existence of the legal aid restriction, although a part of the*  
9 *background of this case, was not the cause of the failure to serve the writ in time;*  
10 *the cause of the failure to serve the writ in time was that the plaintiff’s solicitors*  
11 *did not within the 10 days which were available to them, following the receipt of*  
12 *the expert’s report, take the necessary steps. Instead they unwisely relied upon*  
13 *the ex parte order which they had obtained, overlooking the clear law on this*  
14 *subject, easily to be gathered from a reading from the relevant notes to the order*  
15 *to which I have made reference”.*

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17 15. In my opinion it is clear from the authorities referred to that in considering  
18 whether in its discretion it should extend the validity of a writ, the court must  
19 have regard to all of the circumstances. In a Category (3) case like the present the  
20 court must be satisfied that there is a satisfactory explanation for the plaintiff’s (or  
21 more likely his lawyer’s) failure to apply for an extension before the validity of  
22 the writ expired, and, if so satisfied, that there is good reason why the validity of  
23 the writ should be extended in all the circumstances, including the balance of  
24 hardship to the respective parties of agreeing or refusing to extend the validity of

1 the writ. In the present case it appears that the Defendants were aware fairly early  
2 on that the plaintiff was seeking compensation for her injuries sustained during  
3 the course of her employment and assistance with her resulting medical bills.  
4 However, her last letter to her employers appears to have been in November 2006  
5 and they apparently then heard no more about the matter. The writ was not  
6 issued, of course unknown to the Defendants, until 29<sup>th</sup> May 2008, some 18  
7 months later.

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9 16. One of the circumstances I was urged by counsel for the Plaintiff to take into  
10 account is that the legal aid system in this country operates somewhat differently  
11 from the way it apparently operates in England. It was said that it is the practice  
12 here for parties themselves, rather than their attorneys or prospective attorneys to  
13 apply for legal aid. However, while it may well be the case that the parties  
14 themselves often make the first approach to the legal aid officer seeking legal aid,  
15 it is, in my opinion, important to understand that it is not the legal aid officer who  
16 grants legal aid. Legal aid is granted only by the Chief Justice or one of the other  
17 judges of the Grand Court. Applications for legal aid are processed and  
18 administered by the legal aid officer but she has no authority to grant legal aid and  
19 does not do so. While there was, as I have said, no evidence from the Plaintiff's  
20 attorney, Mrs. Reid, it is probable that in assisting the Plaintiff to obtain legal aid  
21 in the first instance in 2007 she would have had to provide to the legal aid officer  
22 for consideration by the Chief Justice or other judge an opinion that the Plaintiff  
23 had a proper and good claim against the Defendants. The limited legal aid which

1 was granted in October 2007 would most probably have been based upon such an  
2 opinion.

3  
4 17. It is not clear why Mrs. Reid, in May or June 2008, apparently left it to the  
5 Plaintiff herself to seek to have the limited legal aid granted some 7 or 8 months  
6 earlier extended. It was obvious, or should have been, that the limited legal aid  
7 certificate would not be extended by the Chief Justice or other judge without  
8 some explanation from Mrs. Reid as to what had transpired since the limited legal  
9 aid was granted and an opinion from her, however brief, that the Plaintiff still had  
10 a good case. This was in fact ultimately provided by Mrs. Reid by her email sent  
11 to the legal aid officer on 16<sup>th</sup> September 2009. However, by then there were only  
12 2 weeks before the writ expired. As counsel for the Second Defendant, in my  
13 view correctly, submitted, the clear and obvious proper course for Mrs. Reid in  
14 May or June 2008 was either to serve the writ and then apply for an extension of  
15 time (if not agreed) within which to serve a statement of claim on the ground that  
16 extended legal aid was being applied for, or at least to apply to extend the validity  
17 of the writ at that point while she assisted the Plaintiff to obtain extended legal aid  
18 as she knew, or should have known, she was bound to have to do. It does not in  
19 my opinion amount to a satisfactory explanation for not applying to extend the  
20 validity of the writ before it had expired that Mrs. Reid apparently simply left it to  
21 her lay client to obtain extended legal aid, knowing as she did that she herself  
22 would anyway have to provide some kind of opinion or further information to the  
23 Chief Justice or other judge before any such extension could or would be granted.  
24 Her delay in doing so until 2 weeks before the writ would expire cannot, in my

1 view, be properly or fairly attributed to any failure in the operation of the legal aid  
2 system. The fact that the Plaintiff apparently took some time to make contact  
3 with the legal aid officer, only to be told that the legal aid officer would have to  
4 hear from Mrs. Reid, as Mrs. Reid must have known would be the case, is in my  
5 opinion neither here nor there. In fact legal aid was granted within a matter of a  
6 few weeks from the time when Mrs. Reid provided the necessary further  
7 information and opinion. There was no failure in the operation of the legal aid  
8 system; more accurately there appears to have been a failure on the part of Mrs.  
9 Reid.

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11 18. Although I am satisfied as a result of the much fuller analysis at the inter parties  
12 hearing before me that there is no satisfactory explanation for the delay in  
13 applying for extension of the validity of the writ, I have naturally given anxious  
14 consideration to the balance of interest between the parties albeit that is not  
15 strictly to be taken into account in the absence of a satisfactory explanation for the  
16 delay. If the validity of the writ is not extended the Plaintiff will obviously not be  
17 able to serve a fresh writ because the limitation period in respect of her claim  
18 expired in May 2008, almost a year ago. Her only recourse, if she is able to  
19 satisfy the Court that she probably would have succeeded in the claim which she  
20 has been unable to pursue as a result of the acts or omissions of Mrs. Reid, would  
21 be to bring proceedings against Mrs. Reid. That is clearly not a particularly easy  
22 or attractive course for the Plaintiff but if she really has a good claim against the  
23 Defendants it is not impossible. As far as the Defendants are concerned, if the  
24 validity of the writ is not extended, they are in the clear because the limitation

1 period has elapsed. They say that, of course, that is their entitlement in the  
2 circumstances; that the Plaintiff had 3 years within which to initiate proceedings  
3 and a further 4 months within which to serve them and that if she did not do so  
4 that is not their fault. They had not heard from the Plaintiff since late 2006 and  
5 knew nothing more until the writ was served in December 2009, some 3 years  
6 later. While I have every sympathy for the Plaintiff herself, who only did what  
7 she apparently thought she had to do once the writ had been issued, I regret that I  
8 am not satisfied that there is a satisfactory explanation for the delay in applying  
9 for an extension of the writ or that in all the circumstances there is sufficiently  
10 good reason to extend it. I will therefore discharge the ex parte order of 11<sup>th</sup>  
11 December 2008.

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27<sup>th</sup> March 2009

  
Hon Justice Foster  
Judge of the Grand Court (Acting)

