

BARBADOS  
[Unreported]

IN THE HIGH COURT OF JUSTICE  
CIVIL DIVISION

No. 1147 of 2008

SIGNIA FINANCIAL GROUP INC.

PLAINTIFF

AND

PATTERSON GIBBS

FIRST DEFENDANT

ROSMA GIBBS

SECOND DEFENDANT

*Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High Court*

2013: February 15, 22

Ms. Anita Rampaul-Mohammed for the Plaintiff

**DECISION**

**THE APPLICATION**

- [1] By a summons filed on 15 November 2011 (“the 2011 summons”), the plaintiff seeks the following orders:
1. That the Writ in this action be renewed against the First Defendant from today’s date.
  2. Service of a copy of this Order and copy of the Summons dated the 11<sup>th</sup> day of July 2008 in this action by inserting an advertisement of such Order and Summons in one Friday issue of the Daily Nation newspaper of Barbados, shall be good and sufficient service of the said Summons and that service be deemed to have been effected on the day of the publication of the advertisement.
- [2] The application is made pursuant to *Order 6, rule 7(2)* of the *Rules of the Supreme Court, 1982* (“the RSC”). *RSC Order 6, rule 7(1)* provides that a writ is valid in the first instance for 12 months beginning with the date of its issue. *Order 6, rule 7(2)* reads as follows:
- 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 12 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 PROCEEDINGS

- [3] The writ to which the 2011 summons refers was filed on 11 July 2008. By that document, the plaintiff claims against the defendants the sum of \$24,852.29; interests on the said sum; the further sum of \$6,287.02 as contractual legal fees; and costs.
- [4] The defendants' address is shown on the writ as Forde's Road, Clapham, St. Michael. However, the plaintiff was unable to serve them at that address and on 15 April 2010, Woodstock-Riley J. (Ag) made an Order extending the validity of the writ against them from 11 July 2009 ("the 2009 Order").
- [5] The 2009 Order was made pursuant to a summons filed by the plaintiff on 23 June 2009 (the 2009 summons). That summons was supported by the affidavit of Mr. Tennyson Vaughn, Court Process Server ("Mr. Vaughn CPS") in which he deposed to his efforts between 11 and 25 July 2008 to find the defendants.

## THE EVIDENCE

- [6] The 2011 summons is supported by three affidavits. These were sworn by Mr. Vaughn CPS, Mr. Tennyson C. Vaughn, Attorney-at-Law and Mr. Charles Springer, respectively. Mr. Vaughn CPS deposed once more to his attempts at service up to 25 July 2008.
- [7] Mr. Springer deposed that he served the writ on the second defendant on 17 May 2010. His evidence is that she informed him that the first defendant no longer resided in Barbados but had migrated to Canada. His further evidence is that the Nation newspaper is circulated locally and internationally and that he believes that, if published in a Friday issue of that newspaper, a notice of the writ would come to the first defendant's attention.
- [8] Mr. Tennyson Vaughn, Attorney-at-Law, deposed to certain events that occurred with respect to an application, by the plaintiff, for a default judgment against the second defendant. I detail that evidence at paragraph [21] below.

## THE RULES

- [9] The *Supreme Court (Civil Procedure) Rules 2008* ("the CPR") came into force on 1 October 2008. However, the RSC remain pertinent to these proceedings. It is convenient at this stage to reproduce *RSC Order 2, rules 1(1) and (2)* and *RSC Order 3, rule 5(1) and (2)* to which I make reference below. The former provides:
- (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these or any other rules of court, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
  - (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in the those proceedings or any document, judgment or order therein or exercise its powers under these Rules

to allow such amendments, if any, to be made and to make such order if any, dealing with the proceedings generally as it thinks fit.

[10] **Order 3, rules 5(1) and (2)** read:

- (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.
- (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

### **THE SUBMISSIONS**

[11] Counsel for the plaintiff, Ms. Anita Rampaul-Mohammed, asked the court to exercise its discretion in favour of the renewal of the writ. She referred me to paragraph 6/8/4 of the ***Supreme Court Practice 1995 Volume 1*** which sets out a summary of the principles relating to the renewal of writs. Of those underscored by Counsel, I found the following to be most relevant:

- (1) It is the duty of the plaintiff to serve the Writ promptly. He should not dally for the period of its validity; if he does so and gets into difficulties as a result he will get scant sympathy.
- (2) Accordingly there must always be good reason for the grant of an extension. This is so even if the application is made during the validity of the Writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.
- (3) It is not possible to define or circumscribe what is good reason. Whether a reason is good or bad depends on the circumstances of the case. Normally the showing of good reason for failure to serve the writ in its original period of validity will be a necessary step to establishing good reason for the grant of the extension (*Waddon v. Whitecroft-Scovill Ltd* [1988] 1 W.L.R. 309; ...).
- (4) ...
- (5) ...
- (6) The application for renewal should ordinarily be made before the writ has expired. The court has power to permit a later application but it *must* be made within the appropriate period of the first expiry. The laxer practice of allowing two or more successive renewals to bring the writ up to date is no longer available since *Chappell v Cooper* [1980] 1 W.L.R. 958 ... and see *Singh (Joginger) v. Duport Harper Foundries Ltd* [1994] 1 W.L.R 769 ...
- (7) ...
- (8) ...
- (9) The decision whether an extension to the validity of a writ should be allowed or disallowed is a matter for the discretion of the court

dealing with the application. *Jones v Jones* [1970] 2 Q.B. 576; ... shows that in exercising the discretion the judge is entitled to have regard to the balance of hardship. The exercise of the discretion, however, follows upon the showing of good reason by the applicant. Hardship to the applicant if the extension is disallowed is not a substitute for good reason (see *Waddon* ...

## DISCUSSION

- [12] The principle expressed at (6) above constitutes one good reason why the plaintiff's application cannot succeed. While the Court has power to permit an application made after a writ has expired, the application must be made within the twelve month period of the expiry.
- [13] This principle has had a somewhat chequered history. It has its genesis in *Chappell v Cooper; sub nom. Player v Bruguere* [1980] 1 W.L.R. 958. In that case, Mrs. Player sought to have the validity of a writ extended some four and a half years after the date of issue. The limitation period with respect to the action had passed by the date of the application to renew. Lord Roskill opined, at page 966 letter A, that the principle results from 'the true construction' of Order 6, rule 8(2) of the Rules of the Supreme Court, 1965, United Kingdom, after which *RSC Order 6, rule 7(2)* is patterned. Making specific reference to the facts of the case, he explained the position this way, at **page 966 letters C and D**:
- Let me give the dates. The writ in the action of *Player v. Bruguere* was issued on December 6, 1974. The 12 months therefore expired on December 5, 1975, and the second period of 12 months, which would be the maximum for which a timeous extension might be allowed, would have run out on December 5, 1976. But the affidavit in support of this application was not sworn until June 13, 1979, some three and a half years after that last date. In view of those dates it seems to me clear...beyond doubt that we have no power under the rules to grant the extension sought.
- [14] In *Caribbean Gold Ltd. v Alga Shipping Co. Ltd.* [1993] 1 W.L.R. 1100, Potter J. held that the application of the principle was limited to cases in which the limitation had expired, as was the case in *Chappell*. Commenting on a submission advocating a general application of the principle, he stated at **page 1111**:
- I do not think that is right. I consider that such a submission places an undue restriction upon the meaning and operation of the words "or such later day (if any) as the court may allow" which appear in sub-rule (2). The sub-rule itself contains nothing to indicate such an overall restriction on the discretion of the court.
- [15] In *Ward-Lee v Lineham* [1993] 1 W.L.R. 754, the court allowed an extension even though the application had been made beyond the date by which a timeous application would have been permissible under the principle. The court had failed to serve the proceedings on the defendant, as was required by the applicable court rules. It was held that the trial court had jurisdiction, on proper grounds, to extend the time for service under Order 13, rule 4 of the Country Court Rules 1981 and to treat the failure to have

the originating application extended as an irregularity under Order 37, rule 4. Those rules correspond with *RSC Order 3, rule 5* and *RSC Order 2, rule 1*.

[16] These cases were considered by Farquarson L.J. in *Singh (Joginder) v Duport Harper Foundries Ltd* [1994] 1 W.L.R. 769 who disapproved of the decision in *Caribbean Gold Ltd*. He stated at page 775:

R. S. C., Ord. 6, r. 8 was intended to provide a code whereby undue delay in the service of writs is avoided...Only in the most exceptional circumstances...will the court allow a further extension beyond that permitted by the rule. For that reason I am unable to agree with the interpretation put upon it by Potter J. in *Caribbean Gold Ltd. v. Alga Shipping Co. Ltd...*

[17] Farquarson L.J. went on to set out the propositions he considered applicable as follows:

(1) where a litigant seeks an extension of the validity of a writ the provision of Ord. 6, r. 8 will apply; (2) an application under that rule must be made during the validity of the writ, i.e. four months in the usual case, or during the four months next following; (3) only one extension of time can be granted on a particular application and that must be for a period not exceeding four months; (4) if the litigant has not conformed with the requirements of the rule he cannot be granted relief under Ord. 6, r. 8; and (5) in exceptional circumstances and where the interests of justice so require the court will entertain an application to extend the validity of the writ under the provisions of R.S.C., Ord. 2, r. 1 and Ord. 3, r. 5.

[18] In this case, the validity of the writ as extended by the 2009 Order expired on 10 July 2010. The application for an extension was not made before that date or within the immediately succeeding twelve month period. It was made on 15 November 2011. Thus, on an application of the principle enunciated in *Chappell* and endorsed in *Singh*, the application cannot succeed.

[19] A court cannot grant an extension under *Order 6, rule 7(2)* for a period of more than twelve months, at any one time, and the extended period must commence “on the day next following that on which the writ would otherwise expire”. The plaintiff seeks an order that the writ be renewed from the date of the summons.

[20] The Court has no power to make such an order under *Order 6, rule 7*. Any extension must be expressed to commence from 11 July 2010 and could only be for a period of twelve months. Without more, the writ would still be invalid for the purpose of service on the second defendant. This cements my view as to the prospects for this application under *Order 6, rule 7*.

[21] Counsel did not address me on whether the writ should be extended under the provisions of *RSC Order 2* or *RSC Order 3*. Nonetheless, it seems to me that the evidence of Mr. Tennyson Vaughn, Attorney-at-Law invites consideration as to whether the Court should exercise its discretion under these provisions to extend time, or otherwise allow for the service of the writ. That evidence is as follows:

“13. An application for Default Judgment was made on the 13<sup>th</sup> September 2010 before Deputy Registrar, Ms. Michelle Weekes. She was of the opinion that the Writ which was renewed

in July 2009 had again expired in July 2010 and that she therefore could not grant the Default Judgment order.

14. The Deputy Registrar was informed that the Writ of Summons was served on the Second Defendant before same was expired (sic) in July 2010 and that she could proceed to grant the said order as against the Second Defendant.
15. The Deputy Registrar informed the Attorney-at-Law for the Plaintiff that she would have to research the matter and adjourned the matter for decision.
16. At the adjourned hearing on 15<sup>th</sup> December 2010, The Deputy Registrar (ag) instructed the Attorney-at-Law for the Plaintiff to apply for renewal of the Writ as against the First Defendant. She advised that once served we can then apply for Default Judgment as against both the First Defendant and the Second Defendant.”

- [22] I have to determine if there is anything in the circumstances of the case, whether arising as a result of that evidence, or otherwise, that requires me to extend the validity of the writ, despite the failure of the application under *RSC Order 6, rule 7*. The guiding principle remains that expressed in *Singh*. It is only in exceptional circumstances and where the interest of justice so requires, that the Court will entertain an application to otherwise extend the validity of a writ.
- [23] I have found it useful to examine some decisions in which courts have considered whether this exacting standard has been met. To this end, I have reviewed the cases of *Bernstein v Jackson* [1982] 1 W.L.R. 1082; *Leal v. Dunlop Bio-Processes International Ltd* [1984] 1 W.L.R. 874; *Boocock v Hilton International* [1993] 1 W.L.R. 1065; *Kelliher v. E. H. Savill Engineering Ltd.* (1994) *The Times*, May 10; *Ward-Lee*; *Barr v. Barr* [1994] P.I.Q.R. P45 and *Ellis v. Klim Khwaja et al.* [2000] WL 1151388.
- [24] In *Ellis*, Waller L.J. noted, at paragraph 50, that “[t]he type of circumstances which the authorities indicate are exceptional are mistakes by the court or conduct of a defendant misleading the claimant in some way.” I do not regard this as an exhaustive statement as to what might be considered exceptional.
- [25] However, the authorities also support the proposition that the factor amounting to the exceptional circumstance must constitute a satisfactory explanation for the plaintiff’s failure to act timeously in applying for the extension of time. A plaintiff who fails to so act, without explanation, cannot rely on circumstances that in no way contributed to that failure.
- [26] The plaintiff obtained information on 17 May 2010 that the first defendant no longer resided in Barbados. Nonetheless, the plaintiff took no steps toward service nor did they file an application for a further extension before the expiration of the validity of the writ on 10 June 2010. The Deputy Registrar’s decision was given on 15 December 2010. Yet, the application for renewal was not filed until 15 November 2011, some five months after the expiration of the twelve month period following the end of the writ’s validity. The plaintiff gives no explanation for this failure to act timeously.

[27] These facts do not give rise to any exceptional circumstances and the interest of justice does not require that the Court consider an extension of the validity of the writ under the provisions of *RSC Order 2* or *3*.

[28] There is a further point. *Part 73.4 CPR* provides that a court may take account of the principles contained in those rules in exercising its discretion in proceedings to which the *RSC* apply. It reads:

Where in proceedings commenced before the commencement date the court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular, Parts 1 and 25.

Paragraph 38 of the decision of the Court of Appeal in *Maloney v. Roberts et al Civ. App. No. 7 of 2010 (date of decision, 30 September 2011)* confirms the Court's power in this regard.

[29] *Part 25 CPR* deals with the Court's duty to manage cases actively in furtherance of the overriding objective to deal with cases justly. *Part 1.2 CPR* requires the Court to seek to give effect to that objective. *Part 1.1(2) CPR* lists a number of factors that are included in dealing with a case justly. Among them are saving expense and ensuring that the case is dealt with expeditiously and fairly.

[30] I have considered the principles contained in those provisions. I have also looked at those contained in *Part 8.11 CPR* which deals with the extension of time for serving a claim form issued under the *CPR*. It provides:

- (1) The claimant may apply for an order extending the period within which the claim form may be served.
- (2) Save in special circumstances, an application under sub-rule (1) must be made within the period for serving the claim form specified by rule 8.10, or within the period of a previous extension by the court.
- (3) Save in special circumstances, the court may make such an order only if it is satisfied that the claimant has taken all reasonable steps
  - (i) to trace the defendant, and
  - (ii) to serve the claim form,
 but has been unable to effect service.
- (4)...
- (5)...
- (6) No more than one extension may be allowed unless the court is satisfied that the defendant is deliberately avoiding service, or that for some other reason it is impossible or extremely difficult for the claimant to effect service, or there is some other compelling ground for extending the time.

[31] A significant feature of this provision is the requirement for proof of special circumstances where the application is made beyond the period of validity or where the claimant has failed to take all reasonable steps to serve the claim form timeously.

[32] Nothing contained in the *CPR* provisions of which I have taken account requires that I depart from the established principles relating to applications under the *RSC* which I have discussed earlier.

**DISPOSAL**

[33] In the circumstances, I refuse the application for the renewal of the writ. It follows that I need not consider paragraph (b) of the application.

**Olson DeC. Alleyne**

Judge of the High Court