

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANGUILLA CIRCUIT

CLAIM NO: AXAHCV2022/0004

BETWEEN:-

- [1] TOMAŽ SLIVNIK**
- [2] SATAY LIMITED**
- [3] HELEN BAYER CONSTABLE**
- [4] PATRICK CONSTABLE**
- [5] WALTER BAYER II**
- [6] TERESA BAYER**
- [7] SUNNY DAYS MANAGEMENT CORPORATION**
- [8] RHINO LLC**
- [9] DIAMONT COMPANY N.V.**
- [10] SYNECTICS CAPITAL CORP**
- [11] IHATSU FUDOSAN CAPITAL LIMITED**
- [12] DUNA HOLDING LIMITED**
- [13] MARS EXPLORATION INC.**
- [14] ESTATE OF DAVID A. CROWLEY**
- [15] EQUIPMENT LEASING LTD**
- [16] INTERNATIONAL MORTGAGES LIMITED**
- [17] THE LITTLE SHIP COMPANY LTD**
- [18] ESTATE OF RAYMOND LONGBOTTOM**
- [19] MARLAM LTD**
- [20] MONIQUE BAUSSAN LIMITED**

Claimants

-and-

- [1] MARTIN DINNING (AS CONSERVATOR)**
- [2] HUDSON CARR (AS CONSERVATOR)**
- [3] SHAWN WILLIAMS (AS CONSERVATOR)**
- [4] ROBERT MILLER (AS CONSERVATOR)**
- [5] EASTERN CARIBBEAN CENTRAL BANK**
- [6] ANGUILLA FINANCIAL SERVICES COMMISSION**
- [7] ATTORNEY GENERAL OF ANGUILLA**
- [8] FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE**
- [9] NATIONAL BANK OF ANGUILLA LIMITED (IN RECEIVERSHIP)**
- [10] CARIBBEAN COMMERCIAL BANK (IN RECEIVERSHIP)**
- [11] GARY MOVING (AS RECEIVER OF NBA AND CCB)**
- [12] NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED**

Defendants

Before: Master Alvin Pariagsingh

Appearances: First Claimant in person and representing the Claimants who are not represented by Counsel (the Third, Fourth, Fifth and Sixth Claimants); Kennedy W. Hodge for the Second, Seventh to Twentieth Claimants; James Willan KC leading William Hare instructed by Alex Richardson for the Twelfth Defendant; Paul Dennis KC leading Nadine Whyte Laing instructed by Navine Fleming for the Second, Third, Fifth, Ninth, Tenth and Eleventh Defendants; Yanique Stewart for the Sixth Defendant; and Theon Tross, Sasha Courtney for the Seventh Defendant.

2023: February 27;
April 25.

JUDGMENT

Application to set aside order made without notice on August 18, 2022

INTRODUCTION:

[1] **PARIAGSINGH, M:** - Before the Court are four (4) applications¹ to set aside an order made on August 18, 2022² extending the validity of the claim form filed in this matter.³ There are other ancillary applications which have become otiose by this decision which the Court will also dispose of at the end of this decision.

[2] This is a claim by the Claimants who are all depositors of the Ninth and Tenth Defendants. The Claimants claim that as a result of a conspiracy, they have together suffered loss to the tune of US\$14,850,981.22. By this claim, they seek to recover these sums from the Defendants jointly.

¹ Application of the Twelfth Defendant filed on December 07, 2022, Application of the Third Defendant filed on December 08, 2022, Application of the Second Defendant filed on December 30, 2022 and Application of the Sixth Defendant filed on January 11, 2023.

² Order of Moise J (sitting as a Judge in Chambers) made on August 18, 2022 on the application filed on August 16, 2022

³ Filed on February 21, 2022.

RELEVANT CHRONOLOGY OF PROCEEDINGS:

— February 21, 2022	Claim Form and Statement of Claim filed
— August 16, 2022	Notice of Application to extend the validity of Claim Form and supporting affidavit of Janelle Brooks filed.
— August 18, 2022	Order made on paper without a hearing extending the validity of the claim from to January 21, 2023;
— November 21, 2022	Notice of Application to amend claim and remove parties and supporting affidavit of Janelle Brooks
— November 22, 2022	Ninth Defendant served with claim
— November 23, 2022	Third Defendant served with claim
— November 23, 2022	Fifth Defendant served with claim
— November 24, 2022	Tenth Defendant served with claim
— November 24, 2022	Eleventh Defendant served with claim
— November 24, 2022	Twelfth Defendant served with claim
— November 24, 2022	Seventh Defendant served with claim
— December 07, 2022	Notice of Application of the Twelfth Defendant to set aside order dated August 18, 2022 supported by the Affidavit of Sharmaine Vaughn
— December 08, 2022	Notice of Application of the Fifth, Ninth, Tenth and Eleventh Defendants to set aside order dated August 18, 2022 supported by the affidavit of Shearon Perkins
— December 14, 2022	Second Defendant served with the claim
— December 14, 2022	Sixth Defendant served with claim
— December 16, 2022	Notice of Discontinuance filed by the Twentieth Claimant against the Twelfth Defendant
— December 16, 2022	Notice of Discontinuance filed by the Nineteenth Claimant against the Twelfth Defendant
— December 16, 2022	Notice of Application by the Claimants for leave to serve this claim out of the jurisdiction on the First Defendant and supporting affidavit of Janelle Brooks

- December 21, 2022 Notice of Application by the Claimants for leave to dispense with personal service and substitute personal service on the Fourth Defendant and supporting affidavits of Janelle Brooks and Andrew Liburd
- December 30, 2022 Notice of Application by the Second Defendant to set aside the order dated August 18, 2022 supported by the affidavit of Shearon Perkins
- January 11, 2023 Notice of Application by the Sixth Defendant to set aside the order dated August 18, 2022 supported by the affidavit of Tina Bryan
- January 13, 2023 Affidavit in opposition to the applications to set aside order dated August 18, 2022 of David Bardfield (on behalf of the 7th to 18th Claimants)
- February 03, 2023 Notice of discontinuance of claim filed by Fourth Claimant
- February 03, 2023 Notice of discontinuance of claim filed by the Sixth Claimant
- February 03, 2023 Notice of discontinuance of claim filed by the Third Claimant
- February 03, 2023 Notice of discontinuance of claim filed by the Fifth Claimant
- February 06, 2023 Affidavit in opposition to application to set aside order dated August 18, 2022 of Tomaž Slivnik (on behalf of the First and Second Claimants)
- February 24, 2023 Affidavit in opposition of Tomaž Slivnik

[3] From the above mentioned chronology; and as of the date of hearing of the applications to set aside the order of August 18, 2022, the Third, Fourth, Fifth and Sixth Claimants had already withdrawn their claims. The Nineteenth and Twentieth Claimants had also already withdrawn their claim against the Twelfth Defendant.

[4] The above chronology also shows that the Defendants who have been served with the claim were all served after the order of August 12, 2022. There is no evidence

that any other Defendants (except the Second, Third, Fifth, Sixth, Tenth, Eleventh, Twelfth Defendants) have been served with the present claim.

THE APPLICABLE LEGAL PRINCIPLES:

- [5] In an application such as the present one, the Court is not reviewing or considering whether the Court was correct in granting the original order. The Court exercises a discretion afresh. The general principle is that a failure to serve in time has always been dealt with strictly.⁴
- [6] Consideration of the set aside application, takes the form of a rehearing and the Court is not concerned with the decision-making process leading to the impugned order made without notice.⁵
- [7] At this rehearing, the Claimants are entitled to rely on, in addition to the original evidence in support of the application, additional evidence.⁶ The burden is on the Claimants to demonstrate, at the rehearing, that they were entitled to the grant of the extension of time. It is not for the Defendants to prove anything.
- [8] The test is not the 'balance of hardship' test established in **Klienwort Benson Limited v Barbrak Ltd**⁷ as submitted by the Attorney General. That test relates to the RSC and not the CPR. The CPR has specific criterion for the grant of an extension of time in two defined circumstances. The discretion given in Rule 8.13 CPR is a truncated discretion. It is not a general discretion. To exercise that discretion favourably the Court must be satisfied that the Applicant falls into one of two gateways.⁸ The Court must be satisfied either that the Applicant has been unable to trace the defendant and serve the claim despite all reasonable steps or that there is some other special reason for extending the period.⁹

⁴ Aktas v Adepta [2011] QB 894

⁵ Hashroodi v Hancock [2004] 1 WLR 3206

⁶ See Al-Zahara (Pvt) Hospital v DDM [2019] EWCA Civ 1103 at [66] to [67] adopted locally in Steinberg v Swisstor & Co, HCVAP2011/012 (Un reported)

⁷ [1987] 2 ALL ER 289

⁸ Per Bannister J in Rondex v Ministry of Finance of the Czech Republic, BVIHCV2010/0069

⁹ Test set out in Part 8 Rule 8.13 of the CPR.

- [9] A special reason is something exceptional or out of the ordinary that would prompt the court to extend the time in the absence of a good reason.¹⁰

THE ORIGINAL APPLICATION OF AUGUST 16, 2022:

- [10] The Claimants did not state an address for any of the twelve named Defendants in their claim form or statement of claim. This is relevant to the extent that the Court is unable without more, to determine the life of the claim form in relation to each Defendant, i.e. six or twelve months.¹¹ It is only by the set aside applications that the Court was provided with evidence of the addresses of some of the Defendants to decipher the relevant validity period of the claim form against the Defendants.
- [11] In support of the application was an affidavit of a Senior Legal Assistant of Counsel for the Claimant. The tenor of the evidence is not what is expected to be given by a Legal Assistant of Counsel. The Court attached very little weight to this affidavit as most of the matters deposed are clearly not within the knowledge of the deponent and based on her advice from Counsel.
- [12] Legal Assistants are employees of Legal Practitioners. Legal Practitioners are not connected in a partisan way to litigation and ought to avoid giving evidence unless the evidence is on formal matters or required to meet the ends of justice. This principle is deep rooted in the **Code of Ethics**.¹²
- [13] The affidavit contains evidence regarding the First to Fifth Defendants only. It also makes fleeting mention of the Ninth and Tenth Defendants. Nowhere in the affidavit is there any mention of the other Defendants, suffice to say there is no evidence of any steps taken to trace or serve these other Defendants during the validity of the claim form or any other special reason why they were not served.

¹⁰ Per Glasgow M (as he then was) in *Herbert v Spencer*, ANUHCv2014/0391

¹¹ Rule 8.12 CPR – Service within the jurisdiction the claim form is valid for 6 months and service out of the jurisdiction the claim form is valid for 12 months.

¹² Rule 32 (1) of the Code of Ethics of Anguilla, 'A legal practitioner may not appear as a witness for his client with respect to matters other than those that are merely formal matter or where the appearance is essential to the ends of justice.'

[14] The Court finds the affidavit in support to be bare and lacking in several regards. The affidavit makes vague unexplained statements about attempts being made to locate the First to Fourth Defendants. No particulars were condiscended to. In particular:

1. Paragraph 3 of the affidavit does not say when the Claimants became aware that the three of the Defendants (First to Fourth Defendants) were no longer employed with the Fifth Defendant. It is not stated how or when the Claimants' Counsel came to this knowledge.
2. Paragraph 4 of the affidavit states that the Claimants' Counsel advised the deponent that the Claimants have been able to locate the Third Defendant who is understood to still be employed with the Fifth Defendant. No evidence of this fact is given.
3. Paragraph 5 of the affidavit refers to efforts to locate the First Defendant revealed that the First Defendant is resident in the United Kingdom. Again, no particulars of how or when this information came to the attention of the Claimants is given. Even further, the fact that these efforts revealed that the First Defendant was resident abroad ought to have prompted an application for service out. That application was not made until December 16, 2022 after the applications to set aside were made. In any event, this fact ought to have triggered a more concentrated application to extend the life of the claim form which excluded the First Defendant as the life span as it related to him would be different. If the First Defendant was resident in the United Kingdom, there was no need to extend the validity of the claim form in relation to him as the validity had not expired.
4. Paragraphs 6 and 7 of the affidavit assert the Second Defendant was resident in St. Kitts. No evidence of what steps were taken to trace him or serve him during the validity of the claim form was given.

5. Paragraph 8 of the affidavit raised the issue of a live tangential matter with similar issues. Apart from the fact that this deponent is not competent to give that evidence, no particulars of when this knowledge came to the attention of the Claimants' Counsel is given.
6. Paragraph 9 of the affidavit raised the issue of Counsel advising the deponent that the legal issues are complex, important to the Claimants and the value of the claim is high. None of these assertions are elaborated upon except for these bare statements. The nexus between these statements and the challenges to appointing counsel is unexplained.
7. Paragraph 10 of the affidavit raised the issue of Counsel's schedule. Apart from this excuse being in conflict with an Attorney's duty under the Code of Ethics not to accept work unless they can treat with the work in the manner required, the excuse itself is poor. It is not good far less a special reason.
8. Paragraph 11 of the affidavit raised the issue that if the extension was refused, the claim would proceed without parties who played a central role in the affairs of the Ninth and Tenth Defendants thereby prejudicing the Claimants. Again, no facts are stated to support this statement or explain why this fact is asserted is given.

[15] In relation to special reason for extending time, the Court agrees and accepts the statement of Bannister J in the **Rondex Finance** case. At paragraph 10 the judge accepted the submission of counsel that this gateway applies to an extension being granted in cases other than cases of inability to effect service following the taking of reasonable steps to trace and serve the Defendant. In essence, the Court will only have a special reason to extend time if the Claimant has previously been precluded or refrained from effecting service in circumstances which make it unjust not to extend time.

[16] The special reasons advanced by the Claimants can be summarized as: (1) there was tangential connected proceedings; (2) difficulty in securing the services of

senior counsel to review; and (3) complexity of the case, the importance of the case to the Claimant and the value of the claim.

- [17] There was a clear decision by Counsel for the Claimants not to serve the claim as a litigation decision due to a tangential case. This in my view is not a special reason to extend time to serve the claim. The **Rondex Finance** case dealt with whether a litigation decision not to serve was a good or special reason to extend the life of a claim form. Bannister J said:

“What cannot, in my judgment, be a special reason for extending the time within which a claim form may be served is, as here, a unilateral decision on the part of the claimant not to comply with the rules, however admirable might be his motives. There can be no injustice in refusing an extension in such a case. If the Defendants had been unwilling to agree, following service, to defer the hearing of any challenge to the grant of permission to serve out until after the jurisdictional point had been resolved in the Swiss courts, then I accept that it might turn out that costs would have been wasted, but that is in the nature of the beast.”

- [18] On the contrary, not serving the claim within the life of the claim form deprived the Defendants from agreeing to stay this claim until the determination of the tangential claim. Further, the Claimants has proffered no reason for not serving the claim and seeking direction from the Court in relation to the other Defendants who the Claimants were unable to serve. Likewise, no reason is given why the Defendants within the jurisdiction were not served. From the evidence the obvious conclusion is that there was a calculated decision not to do anything after the claim was filed. It seems only on the eve of the life of the claim form expiring, Counsel moved with alacrity to obtain the impugned order.

- [19] The reason put forward about the difficulty in securing the service of counsel before the issue of the claim only needs to be restated to be put to rest. This reason in my view is irrelevant. The Claimants contend that they had difficulty securing counsel before the claim was issued. The Court finds it difficult to follow how this is a special reason to extend the time to serve the claim. The Claimant again took the litigation

decision not to serve the claim. At all times the Claimants had the option to serve the claim and seek to amend it.

- [20] On the evidence before the Court as of August 18, 2022 when the impugned order was made, having exercised the discretion afresh, the Court is not minded to grant the application. The evidence in support of same does not satisfy any of the two gateways to entitle the Claimants to an extension of the validity of the claim form.

EVIDENCE ADDUCED AFTER THE DETERMINATION OF THE APPLICATION ON AUGUST 18, 2022.

- [21] As the Court is exercising its discretion afresh it must also consider evidence adduced by the Claimants after August 18, 2022. Three affidavits were filed on behalf of the Claimants since then.¹³ Each affidavit would be considered in turn.

JANUARY 13, 2023 AFFIDAVIT:

- [22] This affidavit raises the question of whether had the claim been served on the Defendants within the jurisdiction or without the jurisdiction the claim would have run on 'two tracks'.¹⁴ The Court finds that argument difficult to follow. It is commonplace to have claims with multiple Defendants, some of whom are within the jurisdiction and some who are not. The allocation of Court resources and the parties' resources does not favour deliberately disregarding the rules. The Court finds this not a good reason far less a special reason for extending the validity of the claim form.
- [23] The Claimants also rely on the following reasons for failing to serve within the specified time: (1) the general tenor of the affidavit in support of the original

¹³ January 13, 202, Affidavit in opposition to the applications to set aside order dated August 18, 2022 of David Bardfield (on behalf of the 7th to 18th Claimants), February 06, 2023 Affidavit in opposition to application to set aside order dated August 18, 2022 of Tomaž Slivnik (on behalf of the First and Second Claimants); and February 24, 2023 Affidavit in opposition of Tomaž Slivnik.

¹⁴ Paragraph 9 of the affidavit of David Bardfield filed on January 13, 2023 (the Bardfield affidavit)

application was that there were difficulties in locating the Defendants; and (2) there were funding issues between the Claimants.

[24] The Court finds neither of these two reasons to be good or special. It is not the function of the Court to make inferences from vague evidence. It is the obligation of the Claimants to lead cogent evidence in support of their application. Funding issues between the Claimants is not a special reason. Even if it was, the Claimants could have approached the Court and sought a stay of the claim within the validity of the claim form. They did not. Instead, they did nothing, from the evidence available, until the twilight of the validity of the claim form. That is not in furtherance of the overriding objective.

[25] The third reason raised was that extending the validity of the claim form was a cost and time saving device.¹⁵ I also find no merit in this argument. It simply cannot be that disregarding the Court rules without more can be a cost and time saving device. If the Claimants wanted to file the claim to preserve their right to sue, they ought to have sought the consent of the Defendants to stay any such claim pending the hearing and determination of the connected proceedings or approached the Court for a stay.

[26] The fourth issue advanced is that the Court exercising its discretion afresh ought to consider the difficulty in locating the Defendants outside this jurisdiction. This point thought attractive suffers from a starvation of evidence. Till now, the Claimants still have not put forward any evidence of what were the difficulties in tracing, what attempts were made, when the attempts were made or any evidence of the sought. In the absence of such evidence this point too has no merit.

[27] The fifth point raised is the issue of the limitation defence. The Claimants contend that limitation period cannot be ignored.¹⁶ The Claimants assert that there was a continuous course of conduct between August 12, 2013 and April 24, 2016. In this

¹⁵ Paragraph 12 of the Bardfield affidavit.

¹⁶ Paragraph 14 of the Bardfield affidavit

affidavit this point was not fully developed. The Court has however resolved this point later in this judgment.

- [28] Having considered this additional evidence and the evidence filed in support of the application originally, the Court is still not minded to grant the application.

AFFIDAVIT OF FEBRUARY 06, 2023:

- [29] For the first time in this affidavit was any evidence given about what steps were taken to trace the Defendants. Regrettably, the evidence is not specific to ascertain if the attempts to trace were reasonable. Whilst the First Claimant deposes that the first step was to search the Defendants on professional databases, no evidence of when that was done is given. Further, the deponent gives evidence about consultation of a number of databases and online tracing but again no indication of when that was done is given.
- [30] The deponent goes on to indicate that a report about the First Defendant was purchased in 2014 and then again in 2022. No indication of when in 2022 this second report was purchased was given. Such evidence would have enabled the Court to determine if this second report was purchased before or after the application of August 16, 2022 and to determine the reasonableness of the attempts made to trace. This evidence was not forthcoming.
- [31] The deponent also gives evidence that the First Defendant's LinkedIn profile 'as of 2022' indicates that he was resident in the United Kingdom. No evidence of when in 2022 this was discovered was given.
- [32] The deponent says that the Claimants were only able to determine an address for the First Defendant in December 2022. This is ten (10) months after the claim was filed and four (4) months after the impugned order. This coincides with when the application was made for permission to serve out of the jurisdiction. This application is resolved later in this judgment.

- [33] In relation to the Second and Third Defendants this deponent states that their LinkedIn profiles indicate that they are resident in St. Kitts. St. Kitts is not out of the jurisdiction of this Court. That means that the claim form was valid for six months from its issue against these Defendants. The evidence in this affidavit still does not address what steps were taken to trace and serve these Defendants during the life of the claim form. Further, the evidence still does not disclose any special reason to extend the life of the claim form in relation to these Defendants. Whilst the deponent states that the Claimants acted reasonably in relying on their Solicitors in tracing and serving these Defendants, that does not assist them in this application. If there is some issue between the Claimants and their former legal practitioners over what they believe ought to have been done that is a matter for another forum. That issue is not for this Court.
- [34] In relation to the Fourth Defendant being an employee or former employee of the Fifth Defendant and the Fifth Defendant not assisting in providing information to the Claimants, the Court finds this argument to be contrary to the position advanced by the Claimants. If this factual situation did exist, the Claimants had open to them the option of serving the Fifth Defendant and making certain applications to compel disclosure of information. That was not done.
- [35] In relation to the First Claimant's evidence regarding the financial position, logistics and hardship caused to the Claimants by the alleged actions of the Defendants the Court is guided by the dicta in **Rondex Finance**. The Court is of the view that there must be a nexus between these facts and the inability to serve the claim within its life. There is no such nexus. Whilst general statements are made and an emotive plea is set out regarding the Claimants generally, there is still absent from the evidence any evidence of why no attempts were made to serve the claim during the validity of the claim form or how the facts now put before the Court as special reasons are linked to the Claimants inability to serve the claim.
- [36] The issue of limitation was also raised in this affidavit. The First Claimant deposes that no legal action to try to recover his deposit was available to him prior to April

22, 2016. He relies on the announcement of the banking resolution plan on April 25, 2016 to ground his contention that this is when the damage suffered by him crystalized. This issue is dealt with further in this judgment.

[37] The issue of illness of the Claimants need only be stated to be put to rest. This is an asserted fact with no supporting medical reports or corroborating documents. It also lacks particularity. More so, at all times during the filing and the original application to extend the validity of the claim, the Claimants were represented by Counsel. Even if the Claimants did not know better, they had the benefit of Counsel.

[38] Having considered this additional evidence and the evidence filed in support of the application originally, the Court is still not minded to grant the application.

AFFIDAVIT OF FEBRUARY 24, 2023:

[39] In the third affidavit filed on behalf of the Claimants in addition to reiterating the original issues raised, the Claimants sought to emphasize that their Counsel abruptly stood down from representing them on January 10, 2023 leaving them (the First Claimant on behalf of the others) to read and prepare his own affidavit in less than a week. Four material facts were canvased in this affidavit. They were, (1) non-severability of the claim, (2) the limitation date, (3) the need for review by KC and (4) tracing the Defendants. The Court proposes to deal with each in turn.

NON – SEVERABILITY:

[40] This issue was not initially raised by the Claimants. This issue was raised by the Attorney General, the Seventh Defendant who has made no application to set aside the impugned order. Although the Attorney General premised his ‘Notice of Disposition’¹⁷ by saying he had no definitive position on the application, a position on the severability of the claim was in fact taken. At paragraphs 7 and 8 of the documents the following points were made:

¹⁷Filed on January 13, 2023

- '7. There is community of interest, in that, all Defendants/Applicants are joined in the disposition of the present Applications.
8. Since the Defendants/ Applicants are joint in a community of interest in relation to the cause of action alleged against them in the Claim, the extension of the validity of the claim could not be bifurcated; so that, it may properly be extended in relation to some Defendants/ Applicants and not the others, as all defendants are alleged joint tortfeasors relative to the same facts.'

[41] In the Attorney General's submissions¹⁸ no such position on non-severability was addressed. At the hearing when the Court raised the issue of non-severability, the Honourable Attorney General sought to correct the Court by indicating that this was not an issue raised by the Attorney General. Having reviewed the documents the Court is of the view that this issue was raised for the first time by the Attorney General. It was however not addressed or pursued in the submissions (titled 'note') subsequently filed.

[42] The First Claimant in this third affidavit filed on behalf of the Claimants agrees and commends the position of the Attorney General on the non-severability of the claim against the Defendants. The First Claimant contends that the First and Fourth Defendants were the nexus of the conspiracy and set out several reasons to support this allegation. Whilst this may be so, it raises issues tangential to what the Court has to decide. That is, whether there were reasonable attempts to trace or serve the Defendants before the expiry of the life of the claim form or whether there are special reasons to extend the validity of the claim.

[43] The Claimants, in their submissions in reply¹⁹ contend that without suing the First and Fourth Defendants, this claim is fundamentally flawed. The Court has difficulty in following this argument as the issue of the correct parties is not an issue engaging the Court. Both the First and Fourth Defendants were sued. The issue engaging

¹⁸ Filed on February 15, 2023

¹⁹ Filed on February 24, 2023

the Court is why they were not served during the life of the claim or whether there are special reasons to extend the validity of the claim form.

[44] The Claimants also submitted that the Defendants are not severable from each other. They submit that it is either the life of the claim form is extended or it is not. The Court disagrees. There is no such qualification in the rule that an order extending the validity of a claim form with joint Defendants operates to extend the validity of the claim form against all the Defendants. Such an interpretation is not supported by there being different validity periods for the service within and out of the jurisdiction.

[45] The Court agrees with Counsel for the Twelfth Defendant on this issue. The validity of the claim form can be extended in relation to all or any of the Defendants. It is not a blanket application. Evidence would have to be adduced to show that one of the gateways applies to all or any of the Defendants. If the Claimants were of the view that serving some of the Defendants and not the main players in the conspiracy may have prejudiced their claim in bringing knowledge of the claim to any of the Defendants and increasing difficulty in serving any or the main persons in the alleged conspiracy, orders could have been sought and made to seal the file or make a ring fencing order to ensure that the case file and access to documents were restricted.

[46] The Claimants, in their submissions, also relied on the proposition that despite having taken all reasonable steps to trace them, prior to the 21st August 2022 the Claimants did not know the service addresses for the First and Fourth Defendants.²⁰ This in my view conflates two issues. A fact and evidence of a fact. Whilst it is stated as a fact that all reasonable steps were taken to trace them (the First and Fourth Defendants), there is no evidence of that fact. That is where the Claimants submission loses force. This has already been addressed above.

²⁰ Paragraph 3.1 (b) of the Claimants submissions filed on February 24, 2023.

LIMITATION DATE:

- [47] The Claimants adverted the Court's attention to the case of **Herbert v Spencer**²¹ which they asserted was similar to and ought to be considered by the Court as similar to the case at bar. In the preceding case, the Claimant issued proceedings 8 days before the limitation period. During the validity of the claim form, the Claimant applied for and obtained an order extending the validity of the claim form. Once served, the Defendant applied to set aside the order extending time to serve the claim. The Court found that the Claimant had satisfied both gateways in Rule 8.13 CPR. The Court agrees with the submission of Counsel for the Twelfth Defendant. The potential loss of a limitation defence weighs against the exercising of the directions to grant the extension.²²
- [48] The evidence provided is in relation to efforts of the First Claimant only. Assuming that he was acting with the consent, knowledge and approval of all the other Claimants, the Court still would not resolve this fact in favour of the Defendants. The principle extracted from the authorities is that once the limitation defence may be available to the Defendants, the Court must consider that fact against granting the application. It is not for the Court to resolve whether limitation has passed at this stage. Suffice to say the involved dispute as to when the limitation period is or was is sufficient to resolve this issue against the Claimants in granting any extension.
- [49] Having considered the authorities, this Court is unable to pay any or any considerable regard to the limitation defence being removed from the Defendants' arsenal in this case. In exercising any discretion, the Court has to balance the fairness of granting the application and the effect of removing the limitation defence from the Defendants. In my view the interplay of the limitation defence makes the burden higher on the Claimants to demonstrate through cogent evidence that proactive and reasonable steps were taken to trace and serve the Defendants within

²¹ ANUHCv2014/0391

²² Steinberg v Swisstor & Co, HCVAP2011/012 (Un reported)

the validity period of the claim form. More so, it makes the quality of a special reason higher when the effect would be to remove the limitation defence from the Defendants reach. This evidential threshold simply is not there to ground such a submission. Accordingly, the Court is unable to agree with the Claimants on this point.

KC REVIEW:

- [50] King's Counsel (KC) review of a pleadings was hardly a good far less special reason for extend the validity of a claim form. If this principle does need the support of an authority, support is found in the case of **Cecil v Bayat**²³ where the Court therein made it clear that a desire to take advice from counsel does not provide a special reason to delay serving a claim form.

TRACING THE DEFENDANTS:

- [51] The First Claimant gave evidence about the steps he took to trace the Defendants. He said that he was only able to trace the First Defendant in December 2022. Evidence was also given about paying a private investigative firm to locate the First Defendant is given but no date is given when this was done. The same can be said in relation to the Fourth and Fifth Defendants. No evidence was given about what steps, if any, were taken to trace or serve the other Defendants.
- [52] Furthermore, the evidence given by the First Claimant largely concerned attempts to meet with the First Defendant in February 2014. This was 8 years before the claim was filed. This is not evidence of tracing.
- [53] The First Claimant in this affidavit shifted blame for alleged inactivity on the part of his former solicitors. He said at paragraph 44 of this affidavit that instructions were given to the former solicitors to serve the amended statement of claim only. This he said would have been procedurally more efficient, cheaper, more convenient for all

²³ [2011] EWCA Civ 135.

concerned and would have allowed the case to progress faster. He continued by saying that there was nothing improper about the Claimants trying to keep costs to a minimum. He contended that this was in furtherance of the overriding objective.

- [54] While the Court agrees that costs saving is a factor to be taken into account in conducting litigation, doing so at the expense of not complying with the rules cannot be a casualty of saving costs. The means of breaching the rules does not justify the end of saving costs.

ALLEGED LAWYER ERRORS:

- [55] The Claimants in their submission have also raised the issue of the alleged errors made by their previous lawyers. It is not for this Court to make any findings on these allegations. This Court is of the view that any errors made by the Claimants' lawyers may, form the basis of a separate action. They do not provide any special reason for extending the validity of the claim form.
- [56] The Claimants rely on the case of **Laudat v Ambo**²⁴ to base their submission that they should not be penalized for the negligence of their former Attorney. The Court in **Laudat** could 'see no answer to an allegation of negligence against the solicitors' and accordingly held that the Claimant was not left without a remedy. The Claimants in this claim submit that, Attorneys in this jurisdiction the effect of bringing a claim against the Solicitors is not practical or effective as solicitors are not required to carry insurance and in any event, there would be other difficulties given the relatively small Bar. Whilst this may be so, the Court declines to consider this a material factor for its consideration. The fact is, the cause of action exists. This is therefore not a special reason for extending the validity of the claim form in the Court's view.
- [57] Having considered the original application and all subsequently filed evidence on behalf of the Claimants the Court is not minded to grant the application.

²⁴ DOMHCVAP2010/016

[58] For these reasons the order made on August 18, 2022 is set aside. Accordingly, the Court makes the following orders:

1. The order made on August 18, 2022 extending the validity of the claim from by six (6) months is set aside;
2. The claim against the Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and Twelfth Defendants are struck out;
3. The parties are to file and exchange their written submissions on the issue of costs within 14 days of today, which would be considered in chambers without a further hearing and a decision delivered 14 days thereafter.

CLAIMANTS' APPLICATION TO AMEND FILED ON NOVEMBER 21, 2022:

[59] This is an application for permission to amend the claim. Given that there is no valid claim form to be served either if the validity period is six or twelve months, there is no utility to consider this application.

[60] Accordingly, on this application it is ordered that:

1. The application filed on November 21, 2022 is dismissed; and
2. There be no order as to costs on this application.

CLAIMANTS' APPLICATION OF DECEMBER 16, 2022

[61] By this application, the Claimants seek leave to serve this claim out of the jurisdiction on the First Defendant. In support of the application is the affidavit of Janelle Brooks. In this affidavit the deponent gives the relevant evidence to establish that the Claimants are entitled to an order for service out. In particular, the Claimants

have satisfied the Court that the subject matter of the claim falls within those contemplated in Rule 7.5 (2), (5) and (6) CPR.

[62] The Court notes that from the evidence, the First Defendant is resident out of the jurisdiction. The time for the service of the claim on him would have been twelve months. This expired on February 21, 2023.

[63] The Court notes however, that prior to the expiry of the life of the claim form, the Claimants made no application for an extension of the validity of the claim form. In the absence of such an application any order granted to serve out would be nugatory as there is now no valid claim to serve.

[64] Accordingly, on this application it is ordered that:

1. The application filed on December 16, 2022 is dismissed;
2. The claim against the First Defendant is struck out; and
3. There shall be no order as to costs on this application.

CLAIMANTS' APPLICATION OF DECEMBER 21, 2022

[65] By this application the Claimants seek an order to substitute personal service on the Fourth Claimant. This evidence falls by the wayside as the validity of the claim form has not been extended.

[66] Accordingly, it is ordered that:

1. The Claimants' application filed on December 21, 2022 is dismissed;
2. The claim against the Fourth Defendant is struck out; and
3. There be no order as to costs on this application.

OUTSTANDING COSTS ISSUES:

[67] The following issues of costs fall to be determined:

1. Liability of the Third, Fourth, Fifth and Sixth Claimants for Costs of the Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and Twelfth Defendants up to the time of the filing of their Discontinuance:
2. The costs of the Twelfth Defendant consequent upon the discontinuance of this claim against them by the Nineteenth and Twentieth Claimants.

[68] The court will give the parties fourteen (14) days to file and exchange submissions on the above two (2) issues and a decision will be rendered within 14 days thereafter following a consideration of the submissions without a hearing.

Alvin Shiva Pariagsingh
Master

By the Court

Registrar