

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2020/0470

BETWEEN:

1. ELIZABETH SMITH
2. STRAHINJA TEODOSIC

Claimants

and

1. IVAN FLOYD
2. LIONEL FRANCIS

Defendants

Appearances:

Ms. Leslie-Ann Brissette, Counsel for the Claimants
Mr. Kemar Roberts, Counsel for the 1st Defendant
Mr. George Looby IV, Counsel for the 2nd Defendant

2023: February 27;
April 13th

DECISION

Introduction

- [1] **MICHEL, M.:** Before the Court is an application by the Claimants pursuant to the Court's case management powers under rule 26.1(6) of **Civil Procedure Rules 2000** ("CPR") to dispense with compliance with the timelines under CPR 8.13 for service of these proceedings on the 1st Defendant.
- [2] The background to the application can be set out briefly. The Claimants commenced this claim against the Defendants on 18th December, 2020 for damages for personal injuries suffered when they were involved in a vehicular accident with the 2nd Defendant, who was at the time driving a vehicle owned by 1st Defendant.
- [3] The claim form and statement of claim were served on the Defendants on 22nd January, 2021 however the E-Litigation Portal Authorisation Codes ("the ELP

Codes”) required to access the proceedings on the Eastern Caribbean Supreme E-Litigation Portal were not served together with the claim form and statement of claim. The Chambers of Counsel for the Claimants subsequently emailed the ELP Codes to a C. Brown on 28th January, 2021¹ and an acknowledgement of service for the 1st Defendant was filed by Counsel for the 1st Defendant’s insurer on 29th January, 2021. The claim form and statement of claim together with the ELP Codes were re-served on the 2nd Defendant on 16th February, 2021. An acknowledgement of service on behalf of the 2nd Defendant indicating service on 16th February, 2021 was filed on 2nd March, 2023. No defence was subsequently filed by either Defendants, and at the request of the Claimants, judgment in default of defence was entered against them on 26th March, 2021.

- [4] The matter came on for case management on 21st June, 2021 and directions for assessment of damages were given. At that case management conference, Counsel for the 1st Defendant’s insurer was present, and separately the 1st Defendant and other Counsel on his behalf (who was not on record for the 1st Defendant). Subsequently, the 1st Defendant’s Counsel came on record and filed an application in November 2021 for the default judgment against the 1st Defendant to be set aside. The default judgment was set aside on 4th May, 2022. The Master hearing the set aside application found that the ELP Codes having not been served on the 1st Defendant together with the claim form and statement of claim as required by rule 13 of the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019** (“ELP Rules”), service of the Claimants’ claim was deemed not to have been effected on the 1st Defendant.
- [5] Following the setting aside of the default judgment against the 1st Defendant, the Claimants are unable to ‘re-serve’ the claim on the 1st Defendant in compliance with rule 13 of the ELP Rules as the validity of the claim form expired in June 2021, 6 months after the claim was issued. Decisions of the Court of Appeal have made it clear that the Claimants are unable to apply for an extension of time to serve the claim under CPR 8.13 as that application must be made within the period of the validity of the claim form and the court is unable to invoke its discretion under CPR 26.1(2)(k) to extend the time for compliance with the rule.² As a result, the Claimants have filed this application pursuant to CPR 26.1(6). The rule provides that in special circumstances, on an application by a party, the court may dispense with the timelines under a rule. The Claimants therefore seek to disapply the timelines under

¹ Affidavit of service filed by the claimants on 2nd April, 2021.

² See JSC VTB Bank v Alexander Katunin BVIHMAP2016/0047 heard together with BVIHMAP2017/0006 (delivered 18th April 2018, unreported) and Flavio Maluf v Durant International Corp et al BVIHMAP2021/0025 (delivered 13th January 2022, unreported).

CPR 8.13 so that time may be extended for service of the claim on the 1st Defendant. The Claimants' application is supported by the affidavit of a legal clerk in the Chambers of Counsel for the Defendants. No affidavit in response was filed by the 1st Defendant.

- [6] For reasons set out below, the Claimants' application is refused. The Court is not satisfied that there are special circumstances in this case which warrant the Court disapplying the timelines under CPR 8.13 and extending the time to serve the claim on the 1st Defendant. Therefore, the Court dismisses the Claimants' application with costs to the 1st Defendant.

The Defendant's Application to dispense with Compliance with Timelines under CPR 8.13

- [7] The Claimants filed this amended application together with the affidavit of Penelope Adams, Legal Clerk in support, for an extension of time to serve the claim form and statement of claim together with the E-Litigation Portal Authorisation codes on the 1st Defendant and for 'relief from the timelines under CPR 8.13(3) pursuant to rule CPR 26.1(6)'.³
- [8] The grounds of the Claimants' application can be summarised as follows: (i) the Court is required to have regard to the overriding objective in applying its discretion in the interpretation of any rule to deal with cases justly and the case meets the overriding objective; (ii) the Court has the power to disapply the timelines under CPR 8.13; (iii) the Claimants have a good prospect of success so the case should be allowed to be heard on its merits; (iv) the Defendant has a case to be argued and tried based on his draft defence; (v) there will be no prejudice occasioned to the 1st Defendant if this application is granted as at all times he was aware of the case before him and a limitation defence will be an abuse of power in that regard; however, the Claimants will be severely prejudiced in their inability to seek redress from the 1st Defendant in respect of the injuries sustained during the accident on an account of a procedural irregularity.
- [9] The written submissions filed by the Parties on this application extensively canvassed the law as it relates to an application for relief from sanctions; however, I do not consider that the provisions under the CPR in relation to relief from sanctions are applicable in the circumstances of this case. First, there is no express sanction under CPR 8.13 for failure to serve a claim within the timelines prescribed

³ See amended notice of application filed on 1st December, 2022.

by the rule. Second, in so far as it may be relevant to this application, Farara JA [Ag.] made it plain in **Flavio Maluf v Durant International Corp et al**,⁴ that the failure to serve a claim form and statement of claim together with the E-Litigation Portal Authorization codes cannot be remedied by an application for relief from sanctions. The way the defective service can be remedied is by re-serving the claim form and statement of claim together with the ELP Codes for the relevant defendant in the prescribed form.

- [10] As already explained, the claim form is no longer valid for service on the 1st Defendant and time cannot be extended retrospectively under CPR 8.13 for service after the validity of the claim form has expired. However, the Court may dispense with the timelines under CPR 8.13 pursuant to its discretionary power under CPR 26.1(6) on an application by a claimant. This was explained by Farara JA [Ag.] in **Maluf** as follows:⁵

“The simple point is that where the time for service of the claim form has lapsed without it being served on the defendant, and without the period for service to be effected being extended by the court upon a prospective application, the claim form is no longer valid and cannot be served, unless the court makes an order retrospectively to disapply the timelines in CPR 8.13 pursuant to its discretionary power under CPR 26.1(6)...the invalidity of the claim form is not incurable. One may apply under CPR 26.1(6), on the basis of special circumstances, to dispense with compliance with the timelines stipulated by rule 8.13(a)(i), that is, to wholly disapply the timelines specified therein within which to apply to obtain an extension of time for service of a claim form.”

- [11] I will therefore focus on the Claimants’ application under CPR 26.1(6). Essentially, the Court must determine whether there are ‘special circumstances’ on the facts of this case to exercise its discretion to dispense with compliance with the timelines under CPR 8.13.

Discussion and Analysis

- [12] In deciding whether there are ‘special circumstances’ on the facts of this case, I am mindful of the helpful guidance provided by the Court of Appeal in **JSC VTB Bank v Alexander Katunin**.⁶ The Court of Appeal made it plain that in approaching the

⁴ BVIHCMAP2021/0025 (delivered 13th January 2022, unreported).

⁵ At para. 107.

⁶ BVIHCMAP2016/0047 heard together with BVIHCMAP2017/0006 (delivered 18th April 2018, unreported).

issue of special circumstances, the Court should avoid placing qualifiers or creating categories of special circumstances and should not raise or elevate the bar of what constitutes special circumstances. At paragraph 25 of the Court's decision, Gonsalves JA first gave the ordinary dictionary meaning of "special" as "better, greater, or otherwise different from what is usual". His Lordship then went on to explain at paragraph 26 of the Court's judgment that:

"In CPR 26.1(6) the phrase used was "special circumstances." It was intentionally left unqualified, open and undefined. It permits applications to be dealt with on a case by case basis. Seeking to further define the term "special circumstances" is likely to be unhelpful. The simple question for a court to ask itself is whether, in all the factual circumstances of a particular case before it, special circumstances are made out. The application of the facts by the judge is then an evaluative process, with which appellate courts are traditionally reluctant to interfere.

- [13] I also note the dicta of Farara JA [Ag.] in **Maluf** as it relates to the Court's approach to finding special circumstance under CPR 26.1(6) to disapply the limitations under CPR 8.13. At Paragraph 111 of the judgment in **Maluf** Farara JA stated:

"In my view, the provisions of CPR 8.13, limiting applications to prospective ones and providing for the invalidity of a claim form whose time for service has expired, is more stringent than the English CPR 7.6(3), which permits of retrospective applications to extend the validity of a claim form. The stringency of the limitation provisions in CPR 8.13 must be taken into account by a court when exercising its discretionary powers under CPR 26.1(6) to disapply those limitations in special circumstances."

- [14] This statement was made by Farara JA [Ag.] in relation to a discussion on the principles in **Godwin v Swindon Borough Council**⁷ which placed a restriction on the exercise of the discretion in the English CPR to dispense with service of a claim form, in circumstances where the claimant would not meet the test for extension of time for serving the claim under the English CPR 7.6(3). Farara JA formed the view that:

"the limitation on the exercise of discretion set out in **Godwin v Swindon** to dispense with service in circumstances where the validity of the claim form has expired, is of even greater force and significance to the court's

⁷ [2001] EWCA Civ 1478.

exercise of discretion under CPR 26.1(6) where special circumstances must be shown to disapply those timelines in CPR 8.13.”

- [15] When application is made within the period of the validity of the claim form for an extension of time to serve the claim form, CPR 8.13(2) provides that the court may extend the time if the claimant has taken all reasonable steps to (i) trace the defendant and (ii) serve the claim form, but has been unable to do so; or there is some other special reason for extending the period. Accordingly, what I understand Farara JA [Ag.] to be saying in **Maluf** is that the Court must be mindful of the strictures of CPR 8.13 in deciding that special circumstances exist to disapply the timelines for service of the claim form.
- [16] I remain mindful however of the clear guidance on the application of CPR 26.1(6) provided in **Katunin**. In interrogating the circumstances of the case, the Court will ‘start from the premise that all that is required is that the circumstances are “special”⁸ to warrant disapplying the timelines under the relevant rule.
- [17] Having considered the circumstances of this case, for the five overarching reasons set out below, I am unable to form the view that there are special circumstances which warrant the Court exercising its discretion to disapply the timelines under CPR 8.13.

Claimants Failed to Serve Claim in Compliance with ELP Rules

- [18] First, to effect service of the claim on the 1st Defendant, the Claimants were required to serve the claim form and statement of claim on the 1st Defendant and at the same time serve him with the authorisation codes. The Claimants failed to do so and have given no explanation for this failure. There is nothing before the Court to show that circumstances existed that would have prevented the Claimants from effecting proper service on the 1st Defendant in accordance with the ELP Rules within the period of validity of the claim form.

Claimants were aware of Defective Service before Claim Form Expired

- [19] Second, when one looks at the affidavit filed in support of the Claimants’ application, it is apparent that the Claimants realized that there was an error in effecting proper service on the 1st Defendant **before the validity of the claim form expired** in June

⁸ At paragraph 45.

2021. At paragraph 6 to 7 of the affidavit filed in support of the Claimants' amended affidavit the affiant states:

"6. It was not until late in the proceedings and after the default judgment was set aside that it was confirmed by Court Order on May 4 2020 [sic] that service of the authorization code was not served in an acceptable form which rendered service of the claim invalid and by then the time to extend the life of the claim form expired.

7. That at all times, and once the error of the authorization code was brought to the Claimants attention, the Claimant sought to remedy the issue by emailing the authorization code to the purported Counsel Charlesworth Browne and subsequently in April and June 2021 served the First Defendant personally with the authorization code." (Emphasis added).

[20] Further, it is also apparent that the Claimants sought to remedy the error by attempting to serve the ELP Codes on the Defendant after he was served with the claim form and statement of claim on 22nd January, 2021. However, each subsequent attempt to provide the 1st Defendant with the authorisation codes would not have satisfied the requirements of the ELP Rules for service to be deemed effected on him. Service would only have been remedied if the Claimants had re-served the claim form and statement together with the E-Litigation Portal authorization codes on the Defendants. Again, the Claimants failed to do so and have provided no explanation for the failure.

[21] To my mind, the Claimants' inability to effect proper service of the claim form and statement of claim on the 1st Defendant was caused by their own failure to comply with rule 13 of the ELP rules. In such circumstances, it would be difficult for the Court to find special circumstances to dispense with compliance with the timelines for service of the claim form where the inability to serve the claim form on the 1st Defendant was by their own fault and in circumstances where otherwise no reason has been shown for failure to serve the 1st Defendant.

[22] Although not expressly stated by the Claimants in their application, I believe it would be reasonable to infer based on the course of conduct in effecting service on the 1st Defendant that there was a misunderstanding of the law or mistake of the law on the part of Counsel for the Claimants regarding effective service of initiating documents on a party. However, it has long been held by our courts that misunderstanding of the law or mistake of the law is not a good explanation for

failure to comply with a rule or order. In **Ahlene Higgins v Steadroy Williams et al**,⁹ Thomas, M [Ag.] in considering a similar application under CPR 26.1(6) opined that administrative deficiencies have been held by our courts to not amount to a good explanation for failure to comply with a rule or order. The learned Master found that in such circumstances, administrative deficiencies could hardly amount to special circumstances to dispense with compliance with a rule. Carefully considering the circumstances of this case, I am of the similar view that if misunderstanding or mistake of the law is not a good explanation for failure to comply with a rule, then such an occurrence, without more cannot be said to be 'better or greater or otherwise different from what usual' so as to amount to special circumstances to disapply the timelines under CPR 8.13.

Service on Legal Practitioner for the Insurance Company was Not Authorized

[23] Third, the Claimants in their written submissions invite the Court to look past their noncompliance and nonetheless disapply the timelines under CPR 8.13. Learned Counsel for the Claimants pointed out that the affidavit evidence filed on behalf of the Claimants indicates that the Claimants did not appreciate that the acknowledgment of service filed by the 1st Defendant did not operate as an unconditional entry of appearance and that the Attorney-at-Law who purported to act on behalf of the 1st Defendant was not instructed to do so. Had the claim been properly served on the 1st Defendant, I may have found some favour in this position; however, the fact remains that the Claimants failed to effect proper service on the 1st Defendant.

[24] It should be noted that service on the legal practitioner for the 1st Defendant's insurance company would not have been effective service on the 1st Defendant. This is so for two reasons. Firstly, the E-Litigation Portal authorisation codes were not served on Counsel together with the statement of claim and claim form for service to be deemed effected pursuant to the ELP rules. Secondly, in any event, there is no evidence before the Court that 'C. Brown' was authorised to accept service on behalf of the 1st Defendant or in what capacity C. Browne received the ELP Codes. CPR 5.6 requires a legal practitioner to notify a claimant in writing that he or she is authorised to accept service of the claim; in which case service must be effected on that legal practitioner. There is no evidence before the Court that the Claimants received such written notification.

⁹ ANUHCv2019/0502 (delivered 18th March 2021, unreported).

[25] Further, it would be strange if the Claimants were satisfied that an acknowledgment of service was duly filed on behalf of the 1st Defendant in January 2021 that they would then continue to attempt to serve the ELP Codes on the 1st Defendant in April 2021 and June 2021. Had the Claimants been satisfied that the 1st Defendant had been properly served and was duly represented by counsel, there would have been no need to further attempt to serve him personally with the ELP Codes. The only conclusion I can reach is that up to the case management conference in June 2021, the Claimants remained alive to the fact that service on the 1st Defendant was not properly effected.

[26] Having proper regard to the above circumstances, I am unable to conclude that the Claimants' misapprehension about the 1st Defendant's legal representation is a special circumstance.

A Dispute between the Parties Subsisted When Claim was Filed

[27] Fourth, learned Counsel for the Claimants also invited the Court to consider as a special circumstance that liability was not an issue and the Parties were readily proceeding on the Claimants' claim in relation to quantum. However, in my view, this is not a special circumstance. There is nothing unusual about Parties having discussions to settle a dispute in the hopes of avoiding the filing of a claim or resolving some aspects of a claim and commencing proceedings in respect of the unsettled aspects. Offers to settle, without more are to my mind, not indicative of the acceptance of liability or the strength of any parties' case.¹⁰ A party may simply want to avoid or settle litigation by taking steps to settle the matter. However, in the present case, the fact is that the matter was not settled to the satisfaction of the Claimants, and the Claimants subsequently commenced proceedings against the Defendants. In those circumstances, there remained a dispute between the Parties – whether about liability, quantum or both. There is nothing better, greater, or otherwise unusual about these circumstances.

The 1st Defendant would be Deprived of a Potential Limitation Defence

[28] Fifth, there is a further issue in this application in relation to the limitation period. One of the grounds of the Claimant's application is that there will be no prejudice occasioned to the 1st Defendant if this application is granted as he was aware of the

¹⁰ See *Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd* ANUHCv2016/0004 (delivered 7th April 2017, unreported).

case before him and a limitation defence will be an abuse of power. Further, in her submissions, learned Counsel for the Claimants seemed to suggest that where the limitation period has expired, this should be considered in favour of the Claimants to do justice between the Parties.

- [29] It is the case that the date of the accident giving rise to these proceedings was 1st January, 2018 and the claim was filed on 18th December, 2020. Section 13 of the **Limitation Act**¹¹ provides a three-year limitation period for personal injuries matters. This would therefore raise the possibility of the 1st Defendant relying on a limitation defence if new proceedings were brought against him. However, the authorities suggest that the expiration of the limitation period would be a factor against a claimant when seeking to enlarge time to serve a claim on a defendant.¹² However, were limitation not in issue, it would be a factor favouring the finding of special circumstances. This had been considered by the Court of Appeal in **Katunin**. In that case, in discussing the judge's treatment of the limitation period issue on a CPR 26.1(6) application, Gonsalves JA [Ag.] opined:

"I believe it was simply as a general statement that the court is to look at matter dispassionately, and if certain rules when properly applied result in the termination of a claim form, then so be it. So here it would not have been the role of the court to seek to characterize any circumstances as special circumstances in order to achieve any desired purpose of saving a claim form."

- [30] It would therefore be improper for the Court to seek to find special circumstances on the facts of this case, to simply, as it were, save the Claimants' claim. The Claimants clearly ran a risk by commencing these proceedings within weeks of the claim possibly being statute barred. Unfortunately, the Claimants bear the consequences flowing from taking this risk.

Conclusion

- [31] In considering the overriding objective to deal with cases justly, the Court does not consider the justice to only one side, the Court must consider the justice to both Parties. I have borne this in mind in considering the application of CPR 26.1(6) to the circumstances of this case. Standing back and looking at the circumstances of this case dispassionately, for the reasons given above, I do not consider that there are special circumstances – whether individually, or collectively – warranting the

¹¹ Act no. 8 of 1997.

¹² See *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478.

exercise of the Court's discretion to dispense with compliance of the timelines for service of the claim on the 1st Defendant.

Disposition

[32] In light of the foregoing, I make the following orders:

1. The Claimants' amended application filed on 1st December, 2022 is refused.
2. The Claimants shall pay the Defendant's costs on the application to be summarily assessed if not agreed within 21 days of the date of this Order.
3. The matter shall be set down for further case management on a date to be fixed by the Registrar of the High Court.

[33] I wish to thank learned Counsel on both sides for their helpful submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar