

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

COMMONWEALTH OF DOMINICA

Claim No. DOMHCV2019/0216

BETWEEN:

HENRY DYER

Claimant

-and-

[1] ANTHONY ASTAPHAN

**[2] DOMINICA BROADCASTING CORPORATION
LIMITED**

Defendants

Before Master Alvin S. Pariagsingh

Appearances: Gina Dyer -Munro holding papers for Henry Dyer, the Claimant; and
Lennox Lawrence and Jodie J. Luke for the Defendants.

2022: July 19;
October 03.

DECISION

*Claimant's application for adjournment/ Claimant's application for default judgment/
Claimant's application to deem fixed date claim form regular claim form/ Defendant's
application to strike out/ Defendant's application for summary judgment.*

[1] **PARIAGSINGH, M.:** - Before the Court are three applications of the Claimant and one of the Defendants. The Claimant's first application is an application for default judgment. The Second application is to deem his Fixed Date Claim Form a regular Claim Form. The third Application is an application for an adjournment which was refused at the hearing.

[2] The Defendants have one application in which they seek an order striking out this claim or alternatively, summary judgment.¹

Refusal of adjournment:

[3] At the commencement of the hearing of these applications I refused a request from Counsel for the Claimant for a further adjournment of this matter.

[4] Adjournments are an exercise of discretion of the Court. They are granted for compelling reasons having regard to all the circumstances and having regard to the overriding objective. There is no entitlement to an adjournment because it is requested.

[5] In **Fitzroy Robinson Limited v Mentmore Towers Limited**² the Court listed the following factors to be considered in eleventh – hour applications to adjourn. These are:

1. The parties' conduct and the reason for any delays;
2. The extent to which consequences of delay can be overcome before trial;
3. The extent to which a fair trial may be prejudiced by the delays;
4. Specific matters affecting the trial such as illness of a crucial witness; and
5. The consequences of an adjournment for the parties and the court.

[6] This matter has a long projected and meandering history of delay. This claim was commenced in 2019 and just short of three years later when the applications were fully case managed and adjourned to be heard on seven (7) occasions I was not of the view that it was in furtherance of the overriding objective to again adjourn. A brief summary of the last 10 hearings of these applications for context is as follows:

¹The First Defendant also filed an application to deem his defence filed on 23rd July 23, 2020 properly filed. A previous Master did however order that the application to strike out be heard first as per the Order dated December 02, 2020

²[2009] EWHC 3070

1. October 26, 2020 – The Claimant was present. The application filed on August 17, 2020 was listed for hearing on December 02, 2020;
2. December 02, 2020 – The Second Defendant filed application and time was given to the Claimant to respond and applications listed for hearing;
3. March 23, 2021 – The Claimant appeared through Counsel. Matter listed for hearing of applications. Hearing vacated and time given for Claimant to file submission. Unless order made in relation to the Claimant's non-compliance;
4. April 20, 2021 – Hearing of the application to strike out. Hearing vacated – Claimant to pay the costs of the discontinued proceedings 288/2013;
5. June 15, 2021 – Costs was paid but parties did not attend as they got late notice of the hearing;
6. October 19, 2021 – Applications again listed for hearing. Court raised the issue of jurisdiction as the claim was commenced as Fixed Date Claim Form, Claimant to file application. Matter adjourned
7. December 16, 2021 – Matter listed for hearing of applications. Matter adjourned for Defendants to respond to the Claimant's application to deem the Fixed Date Claim Form an Ordinary Claim Form;
8. January 18, 2022 – Applications listed for hearing. Claimant absent but represented by Counsel, adjourned to February 14, 2022;
9. February 14, 2022 – Rescheduled and Counsel's chambers exposed to Covid19;

10. May 26, 2022 – Claimant absent, represented by Counsel fixed to proceed on July 19, 2022.

[7] At the hearing I was told that the Claimant, who is himself an Attorney and who insisted on representing himself, was not well and could not attend. This was not the first time this reason was advanced for an adjournment of this matter nor was it the second time this reason was advanced.

[8] Having considered that the Claimant filed full written submissions on three (3) occasions³ I was of the view that Counsel had sufficient opportunity to make arguments or have someone sufficiently briefed to present the application if he was unable to do so. Whilst the Claimant may have had all the best intentions in the world to attend and personally argue his case, the machinery of the Court cannot simply sit and wait until the Claimant has a good day to do his case. Further, whilst the Claimant wanted to appear himself, he has Counsel on record.

[9] The Claimant had sufficient opportunity to brief counsel to present the application. More so, the Claimant has never personally appeared before me on this application for the entirety of 2022 since this matter has been with me. He has always been represented by Counsel.

[10] Whilst the Claimant is entitled to be heard, he is not entitled to be heard at his convenience only. That right has to be balanced with the Court's schedule, the Defendants' Counsel availability, the resources of the Court and the parties, and the overriding objective.

[11] For these reasons, I exercised my discretion to refuse the request to adjourn the matter. Counsel appearing for the Claimant was given the opportunity to make any submissions she wished and she indicated that she did not wish to do so.

³ Submissions filed on November 20, 2022, April 09, 2021 and February 11, 2022

Request of August 17, 2020 for judgment in default:

[12] This is the first outstanding application, it is an application for default judgment. This request can be dispensed with summarily. It is in the wrong form and cannot be granted.

[13] A request for judgment in default of an acknowledgment of service is different from a request for judgment in default of a defence. In addition to the criteria for entry under the two routes being different, the remedy available for both is different. The Court can only enter judgment in default of an acknowledgment of service on a claim for a fixed sum. That means, a fixed sum must be claimed or ascertainable, see **Integral Petroleum SA v Melares Group Limited** per Bannister J (Ag.)⁴.

[14] On an application for judgment in default of a defence, the Court has greater latitude in terms of the type of remedy it can grant. In particular, it can grant remedies in addition to a fixed sum.

[15] A request for judgment in default cannot be granted by making an application for judgment in default of appearance and defence in the same form. These two routes do not co-exist. The criteria for the grant of both are different. The remedy available for both is also different.

[16] Additionally, the Claimant has filed an affidavit in support of his Form 6 request. There is no requirement to file affidavit evidence in support of a Form 6 request. The only evidence required is proof of service. The affidavit in support is a mixture of an affidavit of service and the Claimant's opinion about the merits of his case.

[17] Whilst the Court does have the power to rectify procedural matters, it is not for the Court to elect on what basis the Claimant wishes to proceed, default of acknowledgment of service or defence. The error in form goes to the entitlement to judgment. To rectify this, the Claimant would have to withdraw and re-file a proper request.

⁴ BVIHCOM2015/0087

[18] In the circumstances, the application for judgment in default of an acknowledgement of service and defence filed on August 17, 2020 is dismissed with no order as to costs.

Application to strike out/ summary judgement filed on November 27, 2020:

[19] This application is twofold. On the application to strike out, the Defendants contend that the claim is an abuse of process as:

1. It was filed in the wrong form;
2. It was not served within the life of the claim form;
3. It is an abuse of the process of the Court, the Claimant having instituted previously in DOMHCV2013/0288 and this being filed in 2019 arising out of the same facts.

[20] On the application for summary judgment, the Defendants contend that the claim discloses no grounds for the bringing of the claim as the claim is statute barred.

Striking out:

[21] The first ground is the form of the claim. The form of a claim is determined by whether a rule or practice direction requires the claim to be commenced by a Fixed Date Claim Form as opposed to an ordinary Claim Form. This is a defamation claim. It is an ordinary claim based on the tort of defamation. There is no rule, practice direction or legislation which requires it to be commenced by Fixed Date Claim Form. This breach alone is not sufficient to justify striking out the entire claim. Had the need arose; I would have directed that the claim proceed as if commenced by ordinary Claim Form. Having regard to my other findings below there is no utility in making an order to rectify procedural matters. For the purpose of this decision, I agree with the Claimant on this point.

[22] The second ground raised is that the claim was not served within the time permitted.

The general rule is that a claim must be served within the life of the claim form. For service of claims within the jurisdiction, the time is six months from the date of its issue. When time has expired, the Court has no jurisdiction to extend the time to serve the claim. Once the life of a Claim Form has expired, the Court has no jurisdiction. The Defendants rely on the decision of this Court in **Edmund Estaphane v Richard Frederick et al**.⁵ This case was not premised on the law of limitation. It was premised on the law of prescription. They are both separate and distinct concepts.

[23] The Court does have the power to extend the time for service of a claim. This application however, has to be made within the lifespan of the Claim Form. This is provided in Part 8 Rule 8.13 (3) CPR. This was not done by the Claimant. No application was made by the Claimant to extend the life of the Claim Form and consequently no such order was made. The validity of the Claim Form therefore expired before it was served.

[24] A similar position to this was adopted by Donaldson- Honeywell J in **The Trinidad and Tobago Housing Development Corporation et al v Jearlean John et al**⁶. In this case the Court set aside two previous orders made granting permission to serve the claim after the time provided in the rules ex parte. When the Defendants were served, they applied to set aside the orders made in their absence. The Court acknowledged that its power to grant an order extending the time to serve a claim form was triggered as the application was made within the time limited for the service of the claim. At paragraph 1 the Court stated:

‘The subsection applied because the applications were made within the four (4) period allowed under CPR 8.13 to serve the claim”⁷

[25] The service itself by newspaper advertisement was done pursuant to an order of a Master made on May 13, 2020. This order was made some seven (7) months after the claim was filed and one month after the life of the claim expired.

⁵ SLUHCV2021/0220

⁶ Claim Number CV2016-03836 (Trinidad and Tobago unreported)

⁷ In this jurisdiction the applicable rule is 8.13 (3)(a)(i) CPR (EC) which is in similar terms to 8.14 (2) CPR (T&T)

[26] It is my view that service was effected pursuant to an order made in the absence of the Defendants. The Order of May 13, 2020 remains a valid order until it is set aside. It was open to the Defendants to apply for an order setting aside the order granting permission to serve the claim by newspaper advertisement. They did not do so.

[27] The Claimant submitted that the order from the application for substituted service which filed on February 11, 2020 and heard on May 13, 2020 was only perfected on June 11, 2020. This to my mind is a nonstarter. Perfection of an order is not a concept known under the Civil Proceedings Rules. That is a concept of the old Rules of the Supreme Court. Orders are no longer effective from when they are perfected or entered. They are effective on the day they are made.⁸

[28] At the time the claim was served, there was no valid and subsisting claim to be served. Service was accordingly ineffectual.

[29] This is the end of the matter. The claim must be struck out. For completeness and in the event that I am wrong I will consider the other limbs of the application.

[30] Thirdly the Defendants contend that the claim itself is an abuse of process. They contend that the 2013 claim not having been discontinued or determined, the Claimant could not have simply re-filed his claim in 2019.

[31] The Court's process is not meant to be used in a manner as to secure any tactical advantage or surpass any challenges existing in a claim already before the Court.

[32] For the Claimant's action to not be abusive, barring the hurdle of limitation, he would have not only had to withdraw the 2013 claim but also pay any outstanding costs that arose from this withdrawal. The Claimant says that this was done.

⁸ See Rule 42.8 CPR.

[33] The first claim was not determined on the merits. It is my view that re-filing it is necessarily abusive in itself. Chief Justice Pereira in **Dr. Martin Didier et al –v- Royal Caribbean Cruises Limited**⁹ stated:

[28] Therefore, for the strike out procedure, the pleadings alone are examined and if the court finds that they are untenable as a matter of law a party may have his/her claim or defence struck out. **This does not preclude that party however, from remedying the faults of their claim or defence and bringing further legal proceedings in relation to the same dispute. They are perfectly entitled to do so.** The situation is different, however, with the summary judgment procedure since this procedure gives a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court.'

[34] There may be costs implications as well as the possibility of a breach of the rule in **Henderson v Henderson**¹⁰ in relation to not bringing all causes in relation to the same facts in one action before the Court. The Claimant contends that this claim has new or additional facts and reference is made to paragraphs 11 to 14 of the Statement of Claim. For the purpose of this claim it is not clear that the re-filed claim is abusive. Certainly not clear enough to strike it out on this basis. I would not uphold this ground of the application.

[35] Fourthly, the Defendants contend that service on the Second Defendant in any event was irregular and not proper as it was served on an Accountant of the Company who is not an officer of the company.

[36] In **Edmund Estaphane v Richard Frederick et al.**¹¹ the Court held that service can be effected at the place of business of a company but it must be effected on a secretary or clerk/ officer of the company. An Accountant is not an "officer" of the company. **Section 25 (2)(d) of the Interpretation Act of Dominica**¹² states:

⁹ Civil Appeal No. SLUHCVP2014/0024

¹⁰ (1843) 3 Hare 100

¹¹ SLUHCVP2021/0220

¹² Chap 3:01

“(d) in the case of a company or any association of persons including a partnership, by delivering to or service by post at the principal place of business or registered office in Dominica or by delivering it to the secretary or clerk of the company or association at the registered or principal office of such body or association”

[37] Rule 5.7(d) CPR also provides for several persons who occupy certain positions in a company to be served. None of these persons are an accountant. There is no evidence that the Accountant served was acting as a liquidator or held any of the positions contemplated by the rule. Further, there is no evidence that the Accountant served was the Secretary or Clerk of the Company.

[38] In my view therefore, service on the Second Defendant was irregular as it was improper.

Summary judgment:

[39] The thrust of the application for summary judgment is the limitation defence. Limitation in some instances is clear whilst in others it is not that clear. Counsel for the Defendants relies on the case of **National Bank of Dominica v Purple Turtle Development**¹³. The Claimant counters this with the argument that the limitation period applicable to defamation claims does not apply to claims of breach of confidence or infringement of privacy. Reliance is placed on the decisions in **Hannon and Defour v News Group Newspaper**¹⁴ and **Fisher v Brook**¹⁵ and several cases which follow the principles stated in these cases.

[40] The limitation argument raised by the Defendants is not as simple or clear as submitted. A different position to the decision referred to by the Defendants has been taken in at least two cases, one from the Court of Appeal namely; **Panacom International Incorporated v Sunset Investments Limited et al**¹⁶ and **Paul Thomas v John**

¹³ DOMHCV2013/0180

¹⁴ [2014] EWHC 1580

¹⁵ [2009] 1WLA 1764.

¹⁶ Civil Appeal No. 14 of 1992.

Liverpool¹⁷ which is a decision of Stephenson J. The involvement of the limitation point in this matter bears striking resemblance to the limitation issue raised in **Dr. Martin Didier et al v Royal Caribbean Cruises Limited**¹⁸ where the Court of Appeal expressed the view that such an involved argument alone should have sounded horns to the Master that the matter was unsuitable to deal with summarily.

[41] On the basis of the arguability of the limitation point in this case, I would not have granted summary judgment in this matter.

Claimant's application to deem fixed date claim form a regular claim form:

[42] The Claimant has also applied for an order that his Fixed Date Claim Form filed herein be treated as an ordinary Claim Form¹⁹. There is no doubt that the Court has the jurisdiction to grant such an order. In the circumstances of this case, had the claim been valid and subsisting, I would have granted the order sought. Given my decision however, this application is otiose. It is accordingly dismissed with no order as to costs.

Costs:

[43] Costs are always at the discretion of the Court. The general rule is that costs follow the event. As I have decided, the claim was effectively stuck out before it was served. There was no valid and subsisting claim to invoke the Court's jurisdiction. Jurisdiction cannot be conferred where there is none even with the consent of the parties. This is one such claim.

[44] Both parties have incurred considerable costs in bringing and defending the claim and the applications. The work done on both sides are proportionate. In the circumstances, I exercise my discretion and order each party to bear their own costs of this claim.

¹⁷ Dominica Civil Claim No. 256 of 1987.

¹⁸ Civil Appeal No. SLUHCVAP2014/0024

¹⁹ Filed on December 17, 2021

Order:

[45] It is hereby ordered that:

1. The Claimant's application for default judgment filed on August 17, 2020 is dismissed with no order as to costs;
2. The Claimant's application filed on December 17, 2021 is dismissed with no order as to costs;
3. The Claimant's claim is struck out; and
4. Each party to bear their own costs of this claim.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar