REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 16 of 2002

BETWEEN

MONICA HAMEL-SMITH
(Legal Personal Representative of Anthony Hamel-Smith, deceased)

ANNETTE DE VERTEUIL
(Appointed by Order dated 28th day of September 2001 to represent the estate of Anthony Hamel-Smith, deceased)
(2nd Defendant) Appellant

AND

MOLLY HAMEL-SMITH
1st Defendant

AND

BARBARA JEAN HAMEL-SMITH
(Legal Personal Representative of Kenneth Hamel-Smith, deceased)
3rd Defendant

AND

SUZETTE HAMEL-SMITH
(Legal Personal Representative of Kenneth Hamel-Smith, deceased)
4th Defendant

AND

SUZETTE HAMEL-SMITH
(Legal Personal Representative of Raymond Hamel-Smith, deceased)
5th Defendant

MICHAEL HAMEL-SMITH
Plaintiff/Respondent

PANEL:

L. Jones, J.A.
W.N. Kangaloo, J.A.
S. John, J.A.

APPEARANCES:

Mr. Alvin Fitzpatrick S.C. and Mr. R. Nanga for the Appellant.
Mr. Anand Singh for the Respondent.

DATE DELIVERED: 27th February 2003.

I have read the reasons of Kangaloo J.A. and I agree with them.

L. Jones
Justice of Appeal

I too have read the reasons of Kangaloo J.A and agree with them.

S. John
Justice of Appeal

REASONS

Delivered by Kangaloo, J.A.

On the 17th February 2003 we allowed the appeal and made the order set out in the last paragraph of these reasons. We promised to give our reasons in writing which we now do.

This appeal arises out of an order of Master Sobion on the 30th January 2002. The Master refused an application of the appellant to set aside an order of Master Paray-Durity of the 5th December 2000. In that order Master Paray-Durity extended the validity of a writ of summons in which the appellant was the 2nd defendant for a period of one year commencing the 29th October 2000.

The facts giving rise to the application before the Masters are not very complex and can be shortly stated. On the 29th October 1999 the Respondent issued a generally endorsed writ of summons for declarations of trust and orders for enquiries to be made against several members of his family as defendants. One of the alleged trustees was one Anthony Hamel-Smith. The trust is alleged to have arisen on the 4th November 1966.

By the time of issue of the Writ aforesaid Anthony Hamel-Smith (Anthony) had died and one Monica Hamel-Smith (Monica) was his legal personal representative. Monica was thus sued by the writ of summons as the 2nd defendant to represent the estate of Anthony. By the 31st October 2000 the writ of summons was not served on Monica and the respondent applied ex parte before Master Paray-Durity by way of affidavit sworn on the 31st October 2000 for an order that the validity of the writ be extended. Monica had died on the 7th July 2000. In the affidavit instructing attorney (Mr. Sowley) of the respondent deposed as follows:

7. "The parties to the said action are all members of the same prominent family and the cause of action relates to the personal financial affairs

of the members of the said family. It was hoped at the outset that the matter could have been resolved amicably to avoid any public embarrassment to the said family but this has not proved to be the case. It was also intended that all the Defendants be served at the same time.

8. *Shortly after the issue of the said Writ of Summons I learned that the second-named Defendant, the aunt to the Plaintiff and a woman in her eighties, was seriously ill. The Plaintiff agreed that the Writ of Summons not be served on his aunt until there had been some improvement in her condition. In fact shortly after the Writ of Summons was filed I was approached by Attorneys who indicated and I verily believed that if we insisted that the Writ of Summons be served immediately that they would accept service of the Writ of Summons on behalf of the second-named Defendant, for fear of the effect that personal service of the Writ of Summons would have on her. Unfortunately the second-named Defendant never recovered and died on the 7th July, 2000."*

The affidavit evidence before us revealed that the attorneys who approached Mr. Sowley were Messrs. M. Hamel-Smith and Company (Hamel-Smith and Company) specifically, Mr. Christopher Hamel-Smith of that firm.

In addition, in that affidavit, Mr. Sowley also deposed to his having caused searches to be made in the Probate Registry to ascertain whether any application had been made for representation to the estate of Monica. His searches revealed that no application had been made. Mr. Sowley further deposed that he spoke with Mr. Christopher Hamel-Smith to ascertain who should be substituted to represent the estate of Monica Hamel-Smith but he

received no response. Lastly, Mr. Sowley deposed that attempts to resolve the matter among members of the family were unsuccessful.

This was the state of the evidence before Master Paray-Durity who on the 5th December 2000 made the order to extend the validity of the writ of summons for a year. The appellant obtained conditional leave to enter an appearance and issued a summons to set aside the order of Master Paray-Durity, which was heard by Master Sobion. The grounds of the application by the appellant were as follows:

"(a) No or no good and sufficient reason was provided by the Plaintiff for his failure to serve the said Writ of Summons on the second-named Defendant within the original period of its validity; and/or

(b) The application to extend the validity of the said Writ of Summons was filed after the said Writ of Summons had expired and no reason for the delay in making the said application to extend the validity of the said Writ of Summons was provided by the Plaintiff.

Master Sobion dismissed the summons and the appellant challenges that decision on eight grounds as follows:

"1. The Honourable Master erred in law in holding that the proceedings were abated by reason of the death of the second-named Defendant, contrary to the provisions of Order 15 rule 7 of the Rules of the Supreme Court 1975.

2. The Honourable Master erred in law in holding that time cannot continue to run with respect to the service of the writ when the intervening death of a defendant makes such service impossible, as

pursuant to Order 6 rule 7 a writ is valid in the first instance for 12 months.

3. *The Honourable Master erred in law in holding that the Applicant was not entitled to rely on the expiry of the writ following the death of the second Defendant to set aside proceedings against the estate of the deceased, as pursuant to Order 15 rule 15 the Applicant was appointed to represent the interest of the estate and was served with the said writ making her a part of these proceedings.*

4. *The Honourable Master erred in law in holding that the Applicant ought not to be allowed to challenge the order made on December 5, 2000 extending the validity of the writ, in that the Applicant was directly affected by the said order as it was pursuant to this extension she was served with a valid writ.*

5. *The Honourable Master wrongly exercised her discretion in holding that there was sufficient explanation for not serving the writ on the second Defendant by failing to take into account that service on M. Hamel Smith & Co. was possible and there was no explanation in the application for the extension of the validity of the writ why service by this method was not effected.*

6. *The Honourable Master wrongly exercised her discretion in holding that the delay in making an application to extend the validity of the writ was satisfactorily explained by placing reliance upon affidavits filed subsequent to the making of the order extending the validity of the writ and when there was no evidence*

placed before the Court at the time the original application was made to extend the validity of the writ.

7. *The Honourable Master erred in law in holding that it was not possible to pursue an application to renew the writ in respect of the second Defendant before the order was made appointing the Applicant, as notwithstanding the second Defendant's death, pursuant to Order 15 rule 7 the action was not abated by reason of the said death.*

8. *The Honourable Master erred in law in holding that the delay can be explained in that it was for the Plaintiff to explain the delay at the time the application to extend the validity of the writ was made and it is fatal if no explanation was given and further it is immaterial whether the delay can be explained at a later stage."*

The respondent has conceded in his skeleton arguments that the Honourable Master erred as set out in Grounds 1 to 4 and 7.

The issues which then arise in their appeal are:

1) Whether the Honourable Master wrongly exercised her discretion in coming to the conclusion that there was before Master Paray-Durity a good reason contained in the affidavit before her as to why the writ of summons was not served before it expired; and

2) Whether there was an onus on the respondent to explain why no application was made to extend the validity of the writ before it expired and if there was such an onus, whether on the evidence before Master Paray-Durity, the respondent discharged that onus.

Issue 1

The law on the procedure to be adopted on an application to set aside an order extending the validity of a writ is to be found in the case of **Binning Bros. Ltd v Thomas Eggar Verrall Bowel [1998] 1 ALL ER 409.** In that case the Court of Appeal held:

> *"The requirement that an applicant who sought an extension of the validity of a writ had to show good reason for the extension applied in all cases, including those where at the date of the application the relevant limitation period had not expired, and in most cases a necessary first step was to show that there was good reason for not serving the writ within the initial period."*

In that case it was contended inter alia by the appellant that:

> *"The judge had erred in treating as decisive the question whether there was good reason for not serving the writ during the original period; instead of considering whether there was good reason for extending the validity of the writ."*

At page 412h of his judgment Hutchison LJ says:

> *"It is quite clear from this that the judge never reached the stage of considering whether to exercise his discretion to extend the validity of the writ: his conclusion was that the plaintiff had not shown a good ground for granting an extension, and that the question of discretion did not therefore arise. Mr. Peto, appearing for the appellant in this court, takes issue with that in his first ground of appeal where he*

asserts that the judge erred in that he treated as decisive the question whether it had been shown that there was good reason for not serving the writ during the original period whereas he should have directed himself in accordance with ***The Myrto and Waddon v Whitecroft Scovill Ltd*** *and asked whether there was good reason for extending the validity of the writ. However, in argument Mr. Peto did not press this ground strongly and I consider that he was right not to do so. It is true that the judge's view as expressed in argument was that no good ground for the extension had been shown. However I am quite satisfied that the present was a case in which the establishment of a good ground for failing to serve was a necessary step on the way to establishing a good ground for an extension." (Emphasis mine)*

Hutchison LJ then quoted a passage from **Waddon v Whitecroft Scovill Ltd [1988] 1 WLR 309 at 314** where Lord Brandon of Oakbrook said:

"The second ground of appeal was that what a plaintiff had to show was good reason for an extension of the original period of validity of the writ, and not good reason for failure to serve it during that original period, and that Michael Davies J had wrongly confused these two different matters. While it may be possible to visualise a case in which establishment of the second matter is not a necessary step to establishment of the first, I do not find it easy to do so. In the present case at any rate it seems to me that the two matters are inextricably bound together. That is the approach which Michael Davies J appears to have adopted and I cannot see that he erred in doing so."

And Hutchison LJ agreed that that passage was *"entirely apposite to describe the position in the present case"* and rejected the first ground contended for by the appellant.

Later at pp414-415 Hutchison LJ describes the approach a court should take in an application to extend the validity of the writ as a two-stage approach. The first stage is to ascertain whether a good reason has been advanced for the failure to serve the writ during the life of the writ and the second stage being whether good reason has been shown for such extension. He referred to the case of **Lewis v Harewood (1996) Times** 11 March where Waite LJ while reaffirming the necessity for a two-stage approach said:

> *"That matters relevant at stage two were not irrelevant at stage one; that there was a degree of overlap; and that a judge addressing the inquiry at stage one was entitled and bound to take into account any matters which appeared to him to be relevant to the issues of good reason and satisfactory explanation notwithstanding the same matters would also be relevant, assuming it arose at all, to the exercise of his discretion at stage two."*

At page 415d Hutchison LJ says:

> *"None of this, however, detracts from the requirement that good or potentially good reason for an extension must as the first stage be shown in every case; and that in the ordinary case (of which this is one) a necessary first step in showing good reason for an extension is to show that there was good reason for not serving the writ within the initial period."*

So the question then at the first stage, is whether before Master Paray-Durity any good reason was contained in the evidence before her for not serving the writ during its validity.

I have quoted paragraphs 7 and 8 of Mr. Sowley's affidavit in full because Counsel for the respondent, in his skeleton submission has submitted:

> *"The explanation of why service on M. Hamel-Smith and Company was not effected is* *implicit* *in paragraph 8 of the affidavit of Raymond Sowley sworn to on the 31st October 2000 for the application for the extension of the validity of the writ of summons." (Emphasis mine)*

Mr. Singh contended before us that advantage was not taken of the offer of Mr. Christopher Hamel-Smith to accept service because:

(a) The respondent could not be sure that Mr. Hamel-Smith or his firm had instructions from Monica to accept service; and

(b) If the respondent wrote to Hamel-Smith and Company to produce the instructions, Hamel-Smith and Company would have had to go to Monica to get the instructions, so that the potential damage to Monica which the respondent was trying to avoid, by not serving the writ personally, would have occurred in this event anyway.

Mr. Singh conceded before us that there really was one reason why the Plaintiff did not serve the writ on Monica. The reason being that he did not want to further endanger the health of Monica by making her aware of the existence of these proceedings. I find these contentions difficult to accept. The respondent could not reasonably have refused the offer of Mr. Christopher Hamel-Smith to accept service merely on the assumption that his firm did not have the instructions to accept service.

On the evidence before us, since the 3rd November 1997 Mr. Sowley wrote Monica alleging inter alia, the breach of trust and requesting a full account of all monies paid to her and Anthony in breach of the said trust and

expressing the hope that the matter may be resolved without litigation. Monica responded through attorneys Messrs. Pollonais and Blanc by letter of the 13th November 1997. It may very well have been that she subsequently gave instructions to Hamel-Smith and Company to attend to any litigation which may have arisen. It was not for the respondent to assume that she did not give such instructions. If she did, Hamel-Smith and Company may have been in a position to alleviate any fears that the respondent may have had with respect to the authority to act for Monica.

The second reason for rejecting the contention of Mr. Singh is that if indeed his reason for not serving the writ on Monica, is as he contended before us, then it would have been so easy for Mr. Sowley to so depose in his affidavit expressly rather than leave it to the Court to infer.

I therefore conclude that no good reason has been advanced by the respondent as to why service of the writ was not effected in acceptance with the offer of Mr. Christopher Hamel-Smith.

I therefore conclude that an opportunity existed for service on Monica before the expiry of the writ and no good reason has been shown why advantage was not taken of it. On this aspect all that Master Sobion has said is as follows:

> *"I find that during the period from the issue of the writ to the death of the second Defendant there was good and sufficient reason for not serving her by reason of her advanced age, her illness and the arrangement with the second Defendant's reputed attorneys that if it became necessary they would accept service."*

The Master has therefore not demonstrated her reason for finding that there was good reason why the writ was not served in light of Mr. Christopher

Hamel-Smith's offer to accept service. By failing to do so, it is open to this Court to review the exercise of her discretion.

Subsequent to the death of Monica, apart from lodging a search at the Probate Registry and apparently orally communicating with Hamel-Smith and Company, with respect to whether there was anyone to be substituted for Monica for the continuation of the proceedings, the respondent appears to have done precious little during the period of the remaining validity of the writ.

The final reason advanced in the affidavit of Mr. Sowley is that attempts to resolve the matter amicably were unsuccessful. It is well known and trite that unless there is an agreement between parties to defer service of the writ of summons, the negotiations between them cannot amount to a good reason for non-service of the writ.

In my view the respondent has not succeeded in the first stage of the two-stage approach approved in Binning Bros. above, and there is no need for me to address the second approach. Suffice it to say that realistically speaking (the writ having expired on Saturday 28th of October) the last day for the making of the application during the validity of the writ was Monday 30th October so that the application was made one day late. Notwithstanding that, it was incumbent upon the respondent before Master Paray-Durity to give an explanation for the lateness of the application, I would not go as far as the appellant has gone in his skeleton submissions to say that a lack of such an explanation is fatal to respondent's application.

A writ of summons ought in the ordinary circumstances to be served promptly and when it becomes clear that for some reason it cannot be served during its validity, an application to the Court to extend its life should be

made timeously. The longer the delay in making the application the more difficult is the onus to explain why it was not made before.

For the reasons set out herein the appeal is allowed. The order of Master Sobion is reversed. Consequently, the order of Master Paray-Durity of the 5th December 2000 in so far as it applies to the appellant is set aside. The respondent will pay the costs of the appeal as well as the costs below to the appellant.

W.N. Kangaloo
Justice of Appeal