[2020] JMSC Civ 258

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 01475

BETWEEN	**WALLY BARRETT**	**CLAIMANT/ RESPONDENT**
AND	**LOU LIVINGSTON CONSTRUCTION & INDUSTRIAL SERVICES COMPANY LIMITED**	**1ST DEFENDANT**
AND	**T. GEDDES GRANT (DIST.) LIMITED**	**2ND DEFENDANT/ APPLICANT**

IN CHAMBERS

Ms. Tamiko Smith instructed by Ramsay Smith for the Claimant.

Mr. Rowan Mullings for the 2nd defendant.

HEARD: October 20, 22, & December 18, 2020.

APPLICATION TO STRIKE OUT CLAIMANT'S STATEMENT OF CASE- WHETHER THERE WAS REASONABLE GROUND FOR BRINGING THE CLAIM - APPLICATION FOR EXTENSION OF TIME TO FILE DEFENCE- WHETHER GOOD EXPLANATION FOR DELAY- WHETHER DEFENCE ARGUABLE- CIVIL PROCEDURE RULES- RULES 26.3(1)(C) AND 10.3(9)

HENRY-MCKENZIE, J

THE CLAIM

[1] On April 11, 2018, the claimant commenced the matter by filing a Claim Form seeking to recover jointly or severally from the defendants, redundancy payments of $1,743,243.24 for work done and services rendered by the claimant as a Fork Lift Operator for the defendants.

[2] The claimant alleges in his Particulars of Claim, that he worked at all material times for the defendants jointly or severally from 1993 to 2018 and was stationed exclusively at the premises of the 2nd defendant. He alleges being firstly employed to the company Mobile Industrial Maintenance Limited in or about 1993, but that their name was later changed to Lou Livingston Construction & Industrial Services Company Limited (1st defendant), under whose employ he was later re-engaged to continue providing the services of a Forklift Operator. Having been re-engaged by the 1st defendant, the claimant states that by a letter dated February 2, 2018, the 1st defendant, whom he considers to be the servant and/or agent of the 2nd defendant, terminated his services. However, his issue is not with the termination of his services, but instead surrounds what he says is the incorrect calculation of his redundancy entitlements as prescribed by The Employment (Termination and Redundancy Payments) Act (ETRPA). The claimant alleges that this was calculated by the 1st defendant to be $80,000.00, instead of $1,743,243,24.

[3] The Claim Form and Particulars of Claim were sent to the 2nd defendant by registered post on April 17th 2018. As such, the deemed date of service was May 9, 2018, but service was acknowledged to be effected on May 8, 2018 in the Acknowledgment of Service. While the Acknowledgment of Service was filed and served within the 14 days' time period, the 2nd defendant did not file a defence within 42 days after service of the Claim Form, as prescribed by the Civil Procedure Rules(CPR). As a result, the claimant sought to have judgment in default of filing a defence entered in his favour on July 25, 2018. Subsequently, the 2nd defendant filed a defence, out of time, without the consent of the claimant or the permission of the court.

THE APPLICATION

[4] By way of a Notice of Application for Court Orders filed October 28, 2019, the 2nd defendant seeks an extension of time to file its defence and an order striking out the statement of case of the claimant. The grounds stated in the application are as follows:

> *(1) The Court has specific jurisdiction under part 10.3(9) of the Civil Procedure Rules 2002 to extend time for the filing of a Defence and the inherent jurisdiction to make all the orders sought herein.*
>
> *Unknown to the Applicant, its Attorney-at-Law who had conduct of the matter herein was disbarred and the Applicant has not for an extended period, before and since the disbarment, been able to make contact with the said Attorney and the applicant was not aware that a Defence had not been filed.*
>
> *Without delay after the Applicant learnt of the disbarment of its Attorney, it retained another and took immediate steps to investigate and regularize the matter herein.*
>
> *The statement of case already filed disclose no reasonable grounds for bringing or maintaining the claim against the Applicant:*
>
> *a. According to paragraph 4 of the Particulars of Claim, the Claimant was at all material times employed to the 1st and/or 2nd Defendants (sic) as a Fork Lift Operator and worked exclusively at the premises of the 2nd Defendant from 1993 to 2018. This is contradicted or incompatible with paragraphs 6 and 7 of the said Particulars of Claim which taken together say that from in or about 1993 to in or about October 1995 the Claimant was employed to Mobile Industrial Maintenance Limited. That company not being the 2nd Defendant or even the 1st Defendant) in that portion of the material time from 1993 to 2018 on the Claimant's own pleadings.*
>
> *b. As an agent or servant acts for and on behalf of his principal or master, the logical option… which would make the 2nd Defendant liable is where the Claimant was employed to the 1st Defendant AND the 1st Defendant was the servant and/or agent of the 2nd Defendant. The Defence of the 1st Defendant plainly denies any*

relationship of servant and/or agency between the 1st and 2nd Defendant at paragraphs 5 and 8 thereto. The same position holds true in the Defence of the 2nd Defendant.

c. …

d. There being no relationship of agent and servant in fact or in law between the 1st Defendant and the 2nd Defendant and the Claimant not being an employee of the 2nd Defendant in the meaning and implications of the Employment (Termination and Redundancy Payments) Act, the 2nd Defendant is not a proper party to this claim.

(2) A grant of the orders sought will prevent steps being taken that would render judicial proceedings inefficacious, this with particular reference to the pending Request for Default Judgment against the 2nd Defendant filed May 15, 2018.

(3) The Applicant will suffer undue loss and prejudice if the orders sought herein are not granted.

(4) In the interest of the overriding objective and proper administration of justice the orders sought herein are to be granted.

[5] The court heard the applications on the 20th and 22nd of October 2020. In presenting the applications, Mr. Mullings relied on two affidavits of Dianne Hanson, the first filed on October 28, 2019 and the second on September 17, 2020. In opposition to the 2nd defendant's applications, the claimant relied on his affidavit in response to the applications filed on July 9 2020.

APPLICATION TO STRIKE OUT CLAIM

[6] Rule 26.3(1) empowers the court to strike out a claim or a part thereof if it appears:

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bring or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not compile with the requirement of Parts 8 or 10.

[7] Striking out a claim is a discretionary power that should only be ordered by a court in plain and obvious cases, where the case is clear beyond doubt, where the cause of action or the defence is on the face of it unsustainable or unarguable. It is a remedy of last resort that must be exercised with extreme caution given the probable implications of striking out. ***See: Three Rivers District Council v Bank of England (No. 3)*** *[2003] 2 AC 1, see pages 96 and 97.*

[8] In the case ***Trillian Douglas v Commissioner of Police [2017] JMSC Civ 183,*** the court in discussing its power to strike out a statement of case, made reference to the case of ***Yat Tung Investment Co. Ltd. v Dao Heng Bank [1975] AC 581 at 590,*** where Lord Kilbrandon noted that in such an application to strike out, the court has a duty not to deny a litigant his or her right to bring a claim before the court *'without scrupulous examination of all the circumstances'*.

[9] I will take the same approach in my consideration of the submissions and ultimately my consideration of the application before me. I will now turn my attention to the submissions and will focus on the salient aspects of those submissions.

SUBMISSIONS FOR THE 2ND DEFENDANT

[10] Mr. Mullings contends that the statement of case against the 2nd defendant is unsustainable, incomprehensible, inconsistent and does not disclose any reasonable grounds in fact or law for bringing the claim against the 2nd defendant. He noted that the claimant is alleging in one sense that he is the employee of the 1st defendant and the 2nd defendant (conjunctive case) and in

another that he is the employee of solely the 1st defendant or the 2nd defendant (alternative case)

[11] Mr. Mullings submits that the claimant has made an attempt to capture every scenario perceivable to pull the 2nd defendant within one, resulting in *"permutations and combinations unfathomable by and inconsistent with current jurisprudence"*.

[12] As it concerns the alleged employment relationship of the claimant with the defendants, Mr. Mullings submits that the claimant did not do the particularizing necessary to reveal the respective obligations of the defendants to the claimant, if he was employed to them as independent entities or to the 2nd defendant solely.

[13] Counsel indicates that the claimant has not disclosed the means/circumstances by which he claims to be an employee of the 2nd defendant within the meaning of the ETRPA nor has he disclosed the times and hours which he worked with the 2nd defendant, whilst employed to the 1st defendant. Counsel further points out that no contract of employment between the claimant and 2nd defendant was shown to indicate when such employment began, nor was a payslip produced to show that the claimant received normal wages from the 2nd defendant. Additionally, there was no particularizing of the apportionment of his claim in relation to the 2nd defendant, neither has it been shown how he came to the determination of the amount of $1,743.243.24, which he claims in redundancy payments.

[14] He submits further, that the claimant in seeking to establish liability on the part of the 2nd defendant, was under an obligation to particularize in his pleadings, whether the claimant was in fact employed by the 2nd defendant independently of his employment with the 1st defendant. This not being done, he argues, there is no support for the assertion that the claimant was directly employed to the 2nd defendant alone, or at the same time as he was employed to the 1st defendant. He also argues that the overwhelming evidence is that the claimant was a

licensee on the 2nd defendant's premises, and was issued an identification for security and ease of access purposes.

[15] With respect to the issue of agency and/or servantship, counsel submits that these assertions are unsupported by the claimant's pleadings or contradicted by them. He points out that to make the defendant liable, the claimant would have to show that he was employed to the 2nd defendant and the 1st defendant was the servant and/or agent of the 2nd defendant. He submits that on the pleadings there is no employer/employee relationship between the claimant/1st defendant and the 2nd defendant, nor is there any basis to support the assertion that the 1st defendant was the agent of the 2nd defendant, as there is nothing to show that the 1st defendant had actual or ostensible authority to act for the 2nd defendant.

[16] Counsel further submits, that there is no accuracy and consistency in the pleadings as to who the claimant's employer was at different points in time. He made reference to paragraph 4 of the Particulars of Claim, where the claimant indicated that he was a Forklift Operator between 1993 to 2018, employed to the 1st and/or 2nd defendant and that he worked exclusively at the 2nd defendant's premises during this period. Counsel argues that this is contradicted by paragraphs 6 and 7 of the Particulars of Claim, which state that the claimant was employed to Mobile Industrial Maintenance Limited in or about 1993 to, in or about October 1995, and argues further, that is neither the 1st nor the 2nd defendant.

[17] Mr. Mullings also asks the court to take note of the date of incorporation of Mobile Industrial Maintenance Limited and that of the 1st defendant, gathered at the Companies Office from the company registration number provided by the claimant in his Particulars of Claim. He states that this shows further evidence of the claimant's inconsistencies in his pleadings, as Mobile was incorporated on October 31, 1995 and the 1st defendant in 2015. This brings into question the assertions that the claimant was employed to either company in 1993.This would be prior to their existence, and so this begs the question whether the 1st defendant was the agent or servant of the 2nd defendant, at the time when the

claimant said he was contracted. There is even no further evidence, according to counsel, to say when the 2nd defendant entered into an employment contract with the claimant.

[18] Accordingly, counsel argues, the claimant having failed on the face of the pleadings to prove reasonable grounds for bringing the claim, the claimant's case ought properly to be struck out against the 2nd defendant.

SUBMISSIONS FOR THE CLAIMANT

[19] Ms Smith on behalf of the claimant argues that it is well understood that the courts should not be overly hasty in exercising its power to strike out a claim or defence. It is a power that should be sparingly exercised, as it deprives a party of having his day in court.

[20] She highlights that the claimant has joined the 2nd defendant in this claim as throughout the term of his employment, he was uncertain as to who his true employer was, as he received instructions from both the 1st and 2nd defendants. He used the equipment of the 2nd defendant to carry out his assigned tasks and further, it was the employee of the 2nd defendant who informed him that his services were terminated.

[21] In relation to whether there are reasonable grounds for bringing the claim, Ms. Smith argues that the claim for redundancy payments requires the claimant to address two main issues in order to make out his case. The first is to bring himself within the definition of an employee and the second is to bring his termination within section 5 of the ETRPA.

[22] Ms. Smith draws reference to sections 2 and 5 of the ETRPA in support of her submissions. Section 2 states:

> *"employee" means an individual who has entered into or works (or, in the case of a contract which has been terminated, worked) under a contract with an employer, whether the contract be for manual*

labour, clerical work or otherwise, be express or implied, oral or in writing, but does not include-

(a) any person employed by the Government; or

(b) any person employed in the service of the Council of the Kingston and St. Andrew Corporation or in the service of any Parish Council, and "employer" and any reference to employment shall be construed accordingly;

Section 5 states:

1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed.

(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to-

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or

(c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment.

[23] In relation to whether the claimant was an employee, counsel admits that the claimant does not fall strictly within the circumstances set out in the Act, but contends that in comparing the prevailing state of affairs with factors enunciated in Halsbury's laws of England, 2020, Vol 99, para 253, the claimant will be able to establish the true nature of their working relationship as employer/employee.

[24] Halsbury's Laws outlined the relevant factors to consider in determining whether a contract of service exist. It has been condensed to the following:

i. Where the individual is providing work and skill in the performance of service for a master;
ii. Where the master has control;
iii. Where the individual was properly regarded as part and parcel of the employer's organisation at the relevant time;
iv. Whether the worker was carrying on business on their own account, or carrying on that of the employer;
v. Whether the employee used their own capitol or tools;
vi. What are the parties' own view of the relationship;
vii. What the structure of the employee's profession is and what arrangements are in it;
viii. Whether the arrangement is more consistent with a contract of service than with a contract for services;
ix. What the parties intended; and
x. What is the ability to provide or secure a substitute

[25] Counsel then sought to explain how the claimant's interaction with the 2nd defendant fit into these factors. However, I remind myself, at this juncture, that I am not required to conduct a mini-trial, so I have to be careful not delve into these issues in any great detail, as the matter is not at the trial stage.

[26] With respect to the second issue raised by the 2nd defendant with respect to whether there are reasonable grounds for bringing the claim, counsel submits that the claimant's termination falls within section 5 of ETRPA. She relies on the

letter of termination dated February 2, 2018 mentioned in the Particulars of Claim, to substantiate the cause of action. She submits that the reasons provided in the letter constitutes termination by reason of redundancy.

[27] In relation to the calculation of the redundancy payments, she contends that the claimant was first engaged at the 2nd defendant's premises in 1993 by Mobile Industrial Services Limited, and then re-engaged by the 1st defendant about 2015 when Mobile Industrial Services Limited changed its name to Lou Livingston Construction & Industrial Services Company Limited. She contends further, that there was no break in the employment, and the claimant's total number of years of service must be calculated from his first engagement in determining his redundancy entitlements.

[28] With that in mind, Ms. Smith submits that this is not a plain and obvious case for the purposes of striking out and it should not be prematurely disposed of. She further submits, that there are reasonable grounds for bringing the claim and that it would not be fair and equitable to extinguish the claimant's right to a trial in the circumstances.

DISCUSSION

[29] *In* ***S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance*** SCCA 112/04 delivered 31st July, 2007, Harris JA explained the considerations the court must take into account when dealing with applications to strike out. She stated at page 29:

> *"A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out."*

[30] The claimant's statement of case is very brief and perhaps deficient in certain respects, but what is apparent, is that the claimant is seeking to recover redundancy payments from his employer(s). It is therefore necessary for the

claimant's pleadings to speak to the identity of the employer as well as termination by that employer by reason of redundancy, so as to recover under the ETRPA.

[31] From the pleadings, there is no doubt that the claimant was terminated by way of a letter from the 1st defendant. However, the identity of the employer, whether it be the 1st and/or the 2nd defendant, is unclear and somewhat difficult to determine. At paragraph 4 of the Particulars of Claim, the claimant has mentioned that he was employed to the 1st and/or 2nd defendant. At the same time, he also pleaded that the 1st defendant was the servant and/or agent of the 2nd defendant.

[32] This construction gives rise to numerous possible arrangements that may have existed between the parties. As explained by the 2nd defendant, the claimant's pleadings as it relates to whom he was employed, may be interpreted in several ways.

[33] There are complexities present in the construction of the relationship between the parties which require ventilation at a full hearing of the issues. There are live issues to be decided that go to the crux of the claim which can only be decided on the merits with all the information before the court.

[34] In ***Victor Hyde v E. Phil & Sons and the AG of Jamaica*** *[2015] JMSC Civ 150, K. Anderson J* discussed circumstances where it would not be appropriate to strike out a statement of case. He indicated at paragraph 11:

> ***"As long as the 2nd defendant's case herein, is therefore, one which raises some question fit to be tried by this court, then, striking out of their case, would neither be appropriate in law****, nor warranted. See:* ***Chan U Seek v Alvis Vehicles Ltd.*** *– [2003] EWHC 1238. The test is one as to whether as far as the 2nd defendant's defence is concerned, that defence is not one which, as a matter of law, can properly constitute a defence to the claim instituted by the claimant against the 2nd defendant. Even if the*

> *2nd defendant's case were to be perceived by this court, as being one which is, '**fraught with difficulty,' nonetheless, the 2nd defendant's statement of case should not be struck out,** on that basis. See: **Smith v Chief Constable of Sussex** – [2008] EWCA Civ 39. As such, the apparent implausibility of a case on paper, is not in itself, a sufficient basis to justify striking out that case. See: **Merelie v Newcastle Primary Care Trust** – [2004] EWHC 2554. **Also, it would be improper for this court to strike out a claim in circumstances wherein the central issues are in dispute**. See: **King v Telegraph Group Ltd.** [2003] EWHC 1312." [**emphasis mine**]*

[35] In relation to the submission by the 2nd defendant for the need of the claimant to particularize the means/circumstances by which he claims to be an employee of the 2nd defendant within the meaning of the ETRPA, further, the times and hours which were worked with the 2nd defendant whilst employed to the 1st defendant, I will adopt the reasoning of the Board in ***Williams v. Wilcox*** *(1838) 8 AD and El 314 at 331* where Lord Denman, C.J. stated:

> *"It is an elementary rule in pleading, that when a state of fact is relied on, it is enough to allege it simply without setting out the subordinate fact which are the means of producing it, or the evidence sustaining the allegation... the certainty or particularity of pleadings is directed not to the disclosure of the case of the party, but to the informing of the court, the jury and the opponent, of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from the stating all the steps which leads up to that point."*

[36] Having examined the Particulars of Claim and having given careful consideration to the submissions of both counsel, I find that the claimant's statement of case discloses reasonable grounds for bringing the claim. There is need for the court to determine to whom the claimant was employed and to determine whether he is entitled to the redundancy payment which he now seeks.

APPLICATION FOR EXTENSION OF TIME TO FILE DEFENCE

[37] Rule 10.3(9) of the CPR allows a defendant to make an application for an order extending the time for filing a defence. Additionally, Rule 26.1(2)(c) also gives the court the power to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court, even if the application for an extension is made after the time for compliance has passed. The court, therefore has wide discretionary powers to grant an extension of time. However, it is noted that neither rules 10.3(9) nor 26.1(2)(c) of the CPR speaks to the relevant factors that should be considered by the court in exercising its discretion. Guidance must therefore be sought from case law.

[38] In the case of ***Paulette Richards v Orville Appleby*** *[2016] JMCA App 20*, F. Williams JA reaffirmed that the guiding principles for the court's consideration when exercising its discretion on an application for an extension of time, are those outlined by Panton JA (as he then was) in ***Strachan v The Gleaner Company Limited and Dudley Stokes,*** *Motion No. 12/1999*, delivered on the 6th December, 1999. In **Strachan**, the then learned Judge of Appeal enunciated at page 20 as follows:

> *"(1) Rules of court providing a time-table for the conduct of litigation, must, prima facie, be obeyed.*
>
> *(2) Where there has been a non-compliance with a time table, the Court has a discretion to extend time.*
>
> *(3) In exercising its discretion, the Court will consider-*
>
> > *(i) the length of the delay;*
> >
> > *(ii) the reasons for the delay;*
> >
> > *(iii) whether there is an arguable case for an appeal and;*
> >
> > *(iv) the degree of prejudice to the other parties if time is extended.*
>
> *(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."*

[39] As to whether there is an arguable case for an appeal, the analogous principle for the purpose of this application, is whether the defendant has a defence with merit. The submissions and the evidence will be considered in application of these principles.

THE LENGTH OF THE DELAY

[40] In the instant case, as previously explained, the accepted date of service of the Claim Form and the Particulars of Claim is May 8, 2018. The defence was not filed until September 27, 2019. Upon my calculation, the 42 days for the filing of the defence would have expired on June 20, 2018. The defence was therefore filed approximately sixteen months late. One could hardly disagree that there was inordinate delay in filing the defence.

[41] The delay in filing of the application for an extension of time is also an important consideration. In calculating the length of the delay, this period would start from the June 20, 2018. The application for extension was filed on October 28, 2019. The delay in filing the application was seventeen months, which was also lengthy.

[42] The length of delay is therefore a consideration that strongly militates against granting the application for an extension of time. The court has recognized that delay can be inimical to the granting of an application of this nature. However, the court is cognizant that delay by itself is not determinative of the application, and that it is obliged to consider other factors including the reasons for the delay, whether there is merit in the defence and the likely prejudice to the parties.

THE REASONS FOR THE DELAY

[43] Harris JA in the case of ***Carlton Williams v Veda Miller*** [2012] JMCA App 39 opined at paragraph 32 that: -

> *"The reason for the failure of the applicant to comply within the requisite time is highly material. Some reason for the delay must be advanced. Even in the absence of a good reason, the court may nonetheless grant an extension, if the interests of justice so requires."*

[44] The explanation proffered for the delay is borne out of the omission or failure on the part of the 2nd defendant's previous attorney to file the relevant documents in response to the claim, in order to comply with the CPR. The affidavit of Ms. Hanson indicates that they had entrusted the matter to their then attorney-at-law who seemed to have failed to keep abreast of the deadline. Ms. Hanson explains further, that it was not until around May 2019 after the attorney was persistently absent from office, that she made attempts to contact her, which proved futile. She later learnt that the attorney was ill. However, on August 25, 2019, it came to her attention that there was a publication in the Jamaica Observer newspaper bringing awareness to the 2nd defendant, that the attorney was struck from the Roll of Attorneys entitled to practice in Jamaica. She subsequently renewed her attempts to get in touch with this attorney to recover their files, but these attempts again failed. She then as a last resort, directed the secretary to do a search of the office and review the files. It was at this point the secretary found the instant claim in a box, in what Ms. Hanson describes as, *"outside of the established filing/ archiving system"*. Immediately thereafter steps were taken to retain another attorney-at-law on behalf of the 2nd defendant. In the week following, a new attorney was retained.

[45] Counsel Mr. Mullings in his submissions, asks the court to direct its mind to two cases: ***Salter Rex and Co. v Ghosh*** [1971] 2 All ER 865 and ***Hubert Samuels v Pauline Karenga*** *[2019] JMCA App 10*. In ***Saltex*** Lord Denning MR said at page 866 of the judgment:

> *"If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. We never like a litigant to suffer by the mistake of his lawyers**."***

Sinclair-Haynes JA in ***Hubert Samuels*** adopted the same approach. She states at paragraph 70:

> *"Although the reasons advanced by counsel for the delay are feeble, this court, in its quest to deal justly with matters, is loath to have a litigant with a meritorious case suffer because of counsel…*
>
> *In the court's endeavour to deal justly with the matter, an examination of the applicant's prospect of succeeding is therefore necessary."*

These cases clearly and consistently show that the courts' approach has been that a litigant should not suffer because of the conduct of his attorney.

[46] Counsel Ms. Smith for the claimant, contends that the explanation provided by the 2nd defendant for the delay, does not constitute a good reason. She argues that the 2nd defendant failed to explain why it made no concrete attempts between May 8, 2018 and October 28, 2019, to itself ascertain the status of the claim. Counsel submits that the onus is not on the attorney to ensure that the defence is filed, but rather rests primarily on the 2nd defendant. This she submits, the 2nd defendant failed to do. She states that there was no indication of instructions given by the 2nd defendant to its previous attorney to defend the claim and that there was further no indication of a defence being drafted and dispatched for signature, nor was there any indication of enquiries made when no document was sent for their consideration. In the circumstances, counsel submits, there had been no genuine attempts by the 2nd defendant to put itself in a position to defend the claim. Further, sufficient reason has not been advanced by the 2nd defendant for the failure to file the defence in time, or for the delay in applying for extension and as such, she insists that the extension should not be granted.

[47] I have considered the submissions of both counsel. I do not agree that the 2nd defendant failed to present any evidence that instructions were given to their previous attorney to defend the claim. By the very fact that an acknowledgement of service was filed and served, indicating the intention to defend the claim, shows that such instructions were given. However, I find that the 2nd defendant by and large left the matter up to their then attorney who failed to ensure that the necessary steps were taken to adhere to the deadlines for the filing of

documents. Ms. Hanson indicates that that the attorney was employed to the 2nd defendant for over ten years and was at all times fully responsible for the management of claims and that she worked autonomously. This however does not absolve the 2nd defendant of the responsibility of ensuring that its legal matters were dealt with in a timely manner. I am satisfied however, that the 2nd defendant took reasonable steps to defend the claim after being alerted to the failure or omission of their previous attorney-at-law.

[48] I wholeheartedly adopt the position posited by Philips JA in ***Murray-Brown V Dunstan Harper and Winsome Harper*** [2010] JMCA App 1 where she said at paragraph 30 of her judgment:

> *"The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorney errors made inadvertently, which the court must review. In the interest of justice and based on the overriding objective, the peculiar facts of a particular case and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed her, although it was not intended."*

In all the circumstances of this case, although the explanation given by the 2nd defendant for the delay is one which this court does not consider a good reason, I will adopt the position that the 2nd defendant should not be made to suffer because of the conduct of their attorney and therefore in the interest of justice and having regard to the overriding objective, I will not deny the application for extension of time for the lack of a good explanation for the delay. However, I must go on to consider whether there is any merit in the defence proposed, in order to determine whether I should grant the application for extension of time.

WHETHER THERE IS AN ARGUABLE DEFENCE

[49] In ***Phillips Hamilton v Frederick Flemmings & another*** *[2010] JMCA Civ 19* Phillips JA expressed at paragraph 41:

> *"Additionally, I accept the views stated in the **Finnegan v Parkside Health Authority** case, that a procedural default even if unjustifiable, and particularly where no prejudice has been deponed to or claimed, the litigant ought not to be denied access to justice…. [43] However, even if there was no good reason for the delay, in the interest of justice the proposed defence would have to be examined in order to ascertain if there is any merit in the same."*

[50] The merit of the defence is therefore an important consideration in determining the success of this application. Mr. Mullings contends that the defence shows a real prospect of success as the claim had no legal or factual basis against the 2nd defendant. To determine this, it is necessary to consider the contents of the affidavits of Ms. Hanson as it relates to the defence put forward by the 2nd defendant, as well as the contents of the document entitled, 'Amended Defence' filed on May 5, 2020. The content of these documents must be viewed against the contents of the Particulars of Claim. In Ms. Hanson's first affidavit, at paragraphs 21 to 23 she adumbrates that the claimant was at no time on the payroll of the 2nd defendant or even an employee. She states that the claimant was instead an employee of the 1st defendant and that the 1st defendant was an independent contractor of the 2nd defendant from around April 2017 to around February 2018.She claims that it was by virtue of that relationship that the claimant came to be on the 2nd defendant's property as a Forklift Operator. She further denies that there was any relationship of agent/ servant and master subsisting between the 1st defendant and the 2nd defendant.

[51] Ms. Hanson elaborates further on the parties' relationship or lack thereof, in her Affidavit in Reply. She exhibits two identification badges to illustrate the difference between badges belonging to employees and those belonging to licensees. This was in response to the claimant's assertion that he was issued with an identification badge by the 2nd defendant as an employee. She goes on to further state that these badges were issued to everyone coming onto the premises of the company for security purposes and convenience and she emphasizes that the fact that the claimant had a badge was only by virtue of him being a licensee.

[52] In its defence, the 2nd defendant has consistently denied that the claimant was an employee of the 2nd defendant and that the 1st defendant was an agent or servant of the 2nd defendant. The 2nd defendant has put before the court more than mere denials of the claimant's allegations, but has presented in its defence, cogent reasons for the court to consider an alternative version to the claimant's assertions of the parties' relationship. In my view, the defence as set out in the affidavit of Ms. Hanson combined with the Amended Defence, shows an arguable case and one in line with the requirements of rule 10.5 of the CPR.

THE DEGREE OF PREJUDICE TO THE PARTIES

[53] It goes without saying, that the issue of prejudice would affect both the claimant and the defendant. Though the claimant has made no mention of any prejudice that might affect him if the extension is granted, I am mindful that the late filing of the defence would cause some degree of prejudice to him as it would result in significant delay in having his matter heard and determined. The prejudice to the 2nd defendant if the extension is refused, however, is greater. The 2nd defendant would not only be denied the opportunity to put forward its defence, but also the claim would come to a premature end against the 2nd defendant, without a decision on the merits. In all the circumstances, given the factors mentioned above, I am prepared to grant the extension of time to file the defence.

CONCLUSION

[54] In view of the foregoing, I find that it would be unjust in all the circumstances to strike out the claimant's statement of case on the grounds that it discloses no reasonable cause for bringing the claim and find that it is just and reasonable to extend time for the filing of the 2nd defendant's defence, so that the matter can be fully ventilated. I therefore make the following orders:

ORDERS:

1. 2nd defendant's application to strike out of the claimant's statement of case is dismissed.

2. 2nd defendant's application for extension of time to file defence is granted.

3. The Amended Defence filed on May 5,2020 is to stand.

4. Costs of the Application to the claimant to be taxed if not agreed.

5. 2nd defendant's attorney-at-law is to prepare file and serve orders herein.

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Hon. G. Henry-McKenzie