[2020] JMSC Civ 63

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00045

BETWEEN	**KEDEEN GREEN**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN CHAMBERS

Ms Carlene Larmond instructed by Patterson Mair Hamilton Attorneys-at-law for the Claimant

Ms Tamara Dickens instructed by the Director of State Proceedings Attorney-at-law for the Defendant

Heard: **February 20, 2020 and February 27, 2020**

Civil Procedure – Application for permission to file defence out of time – CPR 10.3(9), application to enter default judgment – CPR 12.3(1), CPR 12.3(6)

T. MOTT TULLOCH-REID, MASTER

BACKGROUND

[1] There are two applications before me. The first application is the Defendant's application to file her defence out of time. The application is supported by two affidavits, one sworn to by Carson Hamilton and the other by Carla Thomas, both of whom are attorneys-at-law attached to the Attorney General's Chambers. The second application is the Claimant's application for default judgment to be entered against the Defendant. The application is supported by the Affidavit of Kadeen Green, the Claimant. The Defendant's application is first in time. It was filed on

February 12, 2019. Mr Hamilton's affidavit in support was filed on the same day. Ms Thomas' affidavit in which an attempt is made to set out the merits of the Defendant's case and to which the draft defence was attached was filed on December 11, 2019 some 10 months after the application and initial affidavit were filed. The Claimant's application was filed on October 7, 2019, and according to the submissions made by Ms Larmond, the application was made when several months had passed and they had not heard from the Defendant as to their ability to receive instructions to draft their defence, approximately 8 months after their application to file defence out of time had been filed.

[2] Both counsel agreed that the outcome of the Defendant's application will impact the Claimant's application and that the submissions in both applications would be similar. It was therefore agreed that the Defendant's application would be heard first and that the outcome of that application would determine the outcome of the Claimant's application. The analysis of the issues will therefore focus on the Defendant's application to extend time to file defence.

[3] Part 10.3(9) of the Civil Procedure Rules ("CPR") provides that

> *"The defendant may apply for an order extending time for filing a defence".*

The Rules do not indicate what is to be taken into account by the judge when making that determination as to whether or not to allow that extension of time. Ms Dickens has directed me to the decision of ***The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Senior (his father and next friend) [2013] JMCA Civ 16.*** In that case, the Honourable Mr Justice Brooks at paragraph 14 indicated that although the CPR do not provide any guidelines that should assist the Judge in making that decision, the court is to have regard to the overriding objective, which enables the court to deal with the cases justly.

[4] In the case of ***Fiesta Jamaica Ltd. v National Water Commission [2010] JMCA Civ 4,*** the Court of Appeal adopted the decision of Lightman J in Commissioner of

Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and ors [All England Official Transcripts (1997-2008) delivered 19 January 2000] held that in applications such as this, the Court, in dealing with the case justly, should consider the following:

(a) The length of the delay;

(b) the reason for the failure to comply with the prescribed time;

(c) the prejudice that the Claimant will suffer because of the delay;

(d) the effect of the delay on public administration;

(e) the merits of the appeal (in this case I would say the merits of the defence);

(f) the importance of complying with time limits; and

(g) the resources of the parties.

Although Lightman J highlighted the above noted factors as the factors that should be considered, he also said that

> *"it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice."*

I highlight this aspect of the judgment of Brooks JA because it affects my decision.

Length of the delay

[5] Ms Larmond has submitted that the length of the delay is not to be counted from the date on which the application was made but rather from the date the defence is due to the date of the hearing of the application. I do not agree with Ms Larmond, especially in circumstances, where the applicant has no control over the date that the Registrar of the Supreme Court will schedule the application to be heard. It is my view that the length of the delay would be in relation to the time within which the application was made. I am supported in my view by the case of ***Attorney***

General of Jamaica v Roshane Dixon and Attorney General of Jamaica v Sheldon Dockery [2013] JMCA Civ 23 in which the Court dealt with the same issues that I am asked to deal with in the application before me. In that case Harris JA at paragraph 19 addressed the issue of the length of the delay in making the applications. She said that in the Dixon claim, the appellant made the application one month after the time for filing the defence had expired. She said the delay was not long. In the Dockery case, the application was made more than 7 months after the defence had expired. She said the delay was long. Her reference point was when the application was made *vis a vis* when the defence was due to be filed, not when the application was heard *vis a vis* when the defence was to be filed. It is therefore clear that there was no delay in the making of the application.

Reason for the delay

[6] There was however an approximately ten-month delay between the making of the application and the obtaining of the instructions which led to the filing of the affidavit of merit to which the draft defence was exhibited. I agree with Ms Larmond that this gap was extensive and that the Defendant has not put forward a proper explanation for this extended period to take steps to have the matter properly before the Court. Ms Thomas explained that she had to take instructions from the Ministry of Foreign Affairs and Trade and that that Ministry had to review the employee's record from as far back as 2009 to 2017. The Claimant's claim is for monies due to him for the period November 2015 to March 2017 – a period of less than 2 years. As to why the Ministry of Foreign Affairs thought it necessary to be looking for information from as far back as 2009, is not clear to me. The reason given for the delay in producing to the Court the draft defence and the affidavit of merit is not a good one but that is not the measuring stick. The measuring stick is what was the reason for the delay in making the application and I have already said that there was no delay in making the application. In fact, the application was made before the Defence was even due to be filed and Mr Hamilton explained that he anticipated the delay because despite his early attempts to obtain instructions,

he had not received them and did not anticipate receiving them before the defence was due to be filed.

[7] The Defendant's application was therefore a pre-emptive strike and the Claimant would have always been on notice of the Defendant's application since on Ms Larmond's submissions she was served with the undated application and affidavit in support. She does not say when the application and affidavit in support were served on her but she does say that she received them shortly after obtaining a letter dated March 18, 2019 from the Attorney General's Chambers (paragraphs 7 and 8 of Ms Larmond's speaking notes refers). Ms Thomas' last minute affidavit, sets out the reason for the delay, which in my opinion are not good reasons. Ms Thomas did not state the attempts that she made to obtain the instructions from the Ministry of Foreign Affairs and Trade and/or the Ministry of Finance. It appears that she requested the information but sat on her laurels and did nothing by way of following up to obtain the further information. If she did, I do not know, as her efforts are not documented in her affidavit. I again borrow from the reasoning of Harris JA in the ***Dixon*** and ***Dockery*** **cases** when she said

> *"In both claims, the reasons advanced were stated to be the lack of complete instructions to assess the claim.* ***The bare statement that the delay was due to the inability of the appellant to obtain adequate instructions to assist in complying with the requisite rule is highly unsatisfactory. This cannot be regarded as a proper explanation for the delay. Having received inadequate instructions, it was incumbent upon the appellant to have pursued the request for any additional information needed with due dispatch"****. (emphasis added)*

[8] I would go further to say, that where no instructions are forthcoming in a timely manner, as is the case here, it is for the applicant to pursue the request for information needed with due dispatch. I do not see from the evidence of Mr Hamilton or Ms Thomas that this was done and they seemed to have been content to wait an additional approximately 8 months, without following up with the various ministries, before they obtained the instructions needed to prepare the affidavit of merit and draft defence. The only thing that saves them is the fact that those instructions came in before the application was scheduled to be heard. The

Registrar scheduled the application to be heard on December 12, 2019. If the affidavit of merit with draft defence had not been filed before the date set for the hearing of the application, the Defendant's application would have failed on this ground.

[9] I note that Ms Thomas' affidavit was filed one day before the hearing date. The delay in producing the affidavit of merit to which the draft defence was attached meant the Claimant did not have sufficient notice of the evidence that would be placed before the Court and so when the matter came up for hearing on December 12, 2019, it was adjourned and costs for the adjournment were awarded to the Claimant.

[10] A word of warning is now being offered to the Defendant and the attorneys-at-law who work in her Chambers. The day is fast approaching and perhaps is already at the door when the excuse of not obtaining instructions from the crown servants which make her liable to be sued will not be accepted. Perhaps it is time for the Attorney General to speak with the persons in the various departments to apprise them of the importance of acting in a timely manner in providing instructions failing which the Attorney General may find that default judgments are entered against her or him, as the case may be at any given time, and she or he is left without the ability to call her or his own witnesses at the trial of the matter. The Chief Justice's vision for the judiciary and the justice system (i.e. to be the best in the Caribbean in three years and one of the best in the world in six years) will be achieved and that means delays will not be tolerated. Soon there will be no extended gaps between the making of an application and the hearing of same and if justice is to be achieved for any party, it is very likely that there will be a movement away from applications being made in February of any given year and the hearing date set for 10 months later.

The proposed defence

[11] The Defendant's intended defence is that the Claimant was not paid the sums claimed as overseas allowance because the Ministry of Foreign Affairs and Foreign Trade was conducting a revision of all overseas allowance and so the sums claimed were not due to the Claimant. The Claimant's rebuttal argument is that there was no ongoing review because the letter from the Ministry of Finance dated October 22, 2016 to the Permanent Secretary of the Ministry of Foreign Affairs and Foreign Trade made it clear that the Ministry of Finance had approved an increase in the Claimant's salary with effect from November 1, 2015 and that the funds had been allocated to the Ministry of Foreign Affairs and Foreign Trade's budget to accommodate the expenditure. I note that the Defendant did not specifically indicate the period during which the review was taking place. The proposed defence says merely at paragraph 6 "*at all the material times*". Is it that in 2017, a review was taking place? What of the memorandum 10/428/6 to which Ms Camille Lowe refers? The content of that memorandum was not disclosed to the Court and would have been useful in making a determination as to what exactly was before the Ministry of Finance for consideration and which was the basis of its response in the October 22, 2016 letter.

[12] I also note that the Defendant did not respond to that aspect of the Claimant's affidavit which spoke to the October 22, 2016 letter. On the face of it, it appears that the decision had been taken to increase salaries and that this decision could only be taken after a review had already taken place. However, the document before me is a hearsay document, the content of which may need to be clarified or explained, especially since I am without memorandum 10/428/6, which gave rise to the issuance of the letter. That clarification or explanation should best be done by way of giving evidence in chief and on cross-examination. Unfortunately, that was not done at the hearing of the application and so the only other place at which it can be done is at a trial of the matter unless of course the Claimant makes an application to strike out the Defendant's defence or an application for summary judgment.

[13] It is my view that on the Defendant's application before me, there are triable issues that should be placed before a trial judge for determination. This, together with the fact that

I. there was no delay in making the application;

II. the explanation given for the delay was not excellent but was reasonable;

III. the Claimant does not yet have a judgment in his favour; and

IV. it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice

has led me to the view that the Defendant should be given the opportunity to file her Defence out of time. I therefore order as follows:

(a) The Claimant's application to enter default judgment against the Defendant is refused

(b) The Defendant is to file and serve her Defence to the claim on or before March 4, 2020.

(c) If the Defendant fails to file her Defence to the claim on or before March 4, 2020 the Registrar is to enter judgment in default of Defence in favour of the Claimant and set a date on which an Assessment of Damages is to take place.

(d) The Defendant is to pay the Claimant costs in the application in the amount of $234,500.00

(e) The Claimant's Attorneys-at-law are to file and serve the Formal Order.

(f) The Claimant's application for leave to appeal is granted.