



take no steps in default without first contacting them but this was responded to by the claimant's attorneys indicating that they had written instructions to proceed "as at February 1, 2015..."

[5] No request for judgment was or so far has been filed by the claimant.

[6] Further correspondence passed between the attorneys for the parties and it appears that on April 27, 2015 the defendant wrote to Counsel for the claimant...and the attorneys engaged in conversation subsequently and as a result the defendant wrote on June 1, 2015 indicating that they were proceeding with the application for the lost title etc. On November 6, 2015 the attorneys for the defendant again wrote to the claimant's attorneys seeking their consent to file a Defence Out of Time and in response on November 11, 2015 they indicated that they would have to seek their client's consent.

[7] On November 13, 2015 a Defence and Particulars of Ancillary Claim was filed by the defendant and on December 9, 2015 the Application for Extension of Time to file Defence was filed, with Affidavit in Support filed on December 15, 2015.

[8] Mr Johnson filed an Affidavit in Response on July 25, 2016 In this affidavit Mr Johnson noted that there were exchange of correspondence between his attorneys and the defendant in which the defendant was claiming that he owed \$1,735,290.00 and he instructed his attorneys to file the claim when the matter could not be resolved "with the exchange of letters". He also acknowledged that there was an issue relating to the title being lost and that he signed documents for the application for Lost Title to be made. He contended that he was not indebted to the defendant and exhibited copies of documents relating to bankruptcy proceedings against him including a letter dated May 31, 1994. (from the bank to the trustee in Bankruptcy indicating that the bank has no further interest in the proceedings against **Leroy Johnson** and is therefore withdrawing their claims...)

Counsel for the applicant cited "**Fiesta**" in which the CA approved dicta of Lightman J in the case of Commr....in relation to the criteria to be adopted in an application to extend time.

Counsel noted that consent was sought.

Counsel pointed out that the claimant will not be prejudiced as no CMC or trial date has been set.

Mr Bishop on behalf of the respondent submitted that the delay was said to be due to lack of instructions but with the information at hand a defence could have been formulated so could have been filed.

He cited the case of **Hoip Gregory**.

He noted that the length of the delay was 11 months

Correspondence passing between the parties show that as at November 26, 2013 the defendant had information in relation to the sum they claimed was outstanding on the mortgage, the principal balance being stated as \$645,450.00, which is in fact the sum claimed in the proposed defence and counterclaim.

Letter dated April 2, 2014 sought confirmation that the claimant's title was with the defendant bank and indicated that the claimant had paid off the amount borrowed from the bank. There was no response and this was followed by letter dated May 2, 2014 seeking an update. There appears to have been no response to these letters and on August 14, 2014 the claim was filed.

Up to the time of the hearing of the application there was no request for judgment to be entered.....CHECK!

There was correspondence between the parties in relation to the defendant's perceived need to apply for a lost title.

**[9]** **Rule 10.3(9)** of the **CPR** allow a defendant to apply for an extension of time to file a defence. **Rule 26.1(2)(c)** under the Court's General Powers of Case Management states that the court may extend time for compliance with ....

**[10]** The rules do not set out the criteria to be followed by the court in the exercise of its discretion to extend time. The court is however guided by decisions such as the

Court of Appeal case of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 where the issue before the court related to the filing of a defence out of time and Harris J in her judgment, referred to **Dictum of Lightman J in Commr of Customs and Excise**.....where he set out the principles as follows.

[11] I am therefore satisfied that in an application such as is before me, the court must exercise its discretion having regard to the overriding objective of ensuring that justice is done.

[12] The defence would have been due on or about December 15, 2014.

[13] The explanation given for the delay was that the defendant was unaware that the mortgage loan was still outstanding and was concentrating on making an application for lost title and no instructions were forthcoming at the time to draft a defence.as the matter was not viewed as contentious at that time.

[14] By **Rule 10.3(5)(6)& (7) CHECK** the parties may agree to extend the period for filing a defence but may not make more than two agreements and the maximum total extension of time that may be agreed is 56 days. I note that consent was sought by letter dated November 6, 2015. That would have been .....(42 plus 56).....The CPR allows.

[15] Guided by the CA in Phillip Hamilton ,.....I believe the relevant starting time for consideration in relation to whether to exercise discretion whether to grant an extension of time is when the defendant is in breach of the rules. In this case the delay would be 11 months . This delay I find to be inordinate. The explanation given for this delay... that the defendant was unaware that mortgage loan was still outstanding ... I find, is not satisfactory as the relevant information was to hand .....BUT ...whether or not the matter is viewed as contentious the defendant had a duty to follow the procedure by filing its defence within the stipulated time

[16] The affidavit in response by Mr Johnson indicates that he has/will/ suffer prejudice as a result of the delay

**[17] Having considered that any prejudice to the claimant can be remedied with costs, and having found that the delay is inordinate, in the interest of justice, and in keeping with the overriding objective, I have considered whether the proposed defence has merit.** The defendant has indicated that there was a request for the return of the title. They were in the process of/or went through the process of applying for the lost title. The Claimant was involved in the making of this application as he had to sign the relevant documents.

The proposed **defence shows a clearly arguable case and therefore the defendant is likely to be prejudiced if it is not allowed to put in its defence.**

**[18] Quoting from the CA in Hoip Gregory:** It is now fairly well established that in considering whether to grant an extension of time in which to file a defence, the court should consider, among other things, the length of the delay, the reason given for the delay, whether the defence has a real prospect of success and the effect of the delay in the context of the overriding objective. With regard to the overriding objective, the court should include in its consideration the principle that time limits established by the CPR should be observed. Authority for these principles may be found in the cases of **Fiesta Jamaica Ltd v National Water Commission [2010] JMCA Civ 4** and **Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Frederick and Gertrude Flemmings [2010] JMCA Civ 19.**

**[19] I accept that each case will turn on its own peculiar facts and the overall impact of a refusal or a grant of the application should be considered and although there is no good reason for the delay, the court is not bound to refuse the application as the overriding objective is that justice must be done.**

Every litigant has a right to have his claim determined by the court and should not be lightly turned away. **The court therefore has a duty to balance the two competing rights to ensure that the litigation is fully pursued.**

**[20] I am persuaded by the words of the learned authors of Blackstone's who in dealing with the overriding objective at paragraph 1.26 said as follows:**

*“The main concept of the overriding objective is that the primary concern of the court is to do justice. Shutting a litigant out through a technical breach of the rules will not often be consistent with this, because the primary purpose of the civil courts is to decide cases on their merits, not reject them for procedural default.”*

[21] I am therefore not prepared to shut the defendant out where it is my view that there is a defence with a realistic prospect of success, there are issues that need to be resolved and the defendant has shown a genuine desire to defend the claim.

As there was ongoing correspondence between the defendant and the claimant’s Counsel including request that no steps be taken in default as well as seeking consent to file the defence out of time and the claimant had taken no steps in default and has still not taken any such steps I believe the overall justice of the case requires that the defendant be allowed to put in its defence so that the issues joined between the parties may be resolved.

**Disposition:**

The application for **Extension of Time** to file defence is granted

The **Defence and Particulars of Ancillary Claim** filed on November 13, 2015 is to stand.

The matter is to proceed to **Mediation** and **Mediation** to be held within.

**Case Management Conference** is set for - if matter is not resolved at mediation

**Costs to the Claimant** to be agreed or taxed

Leave to **Appeal** is refused.