



[2025] JMSC Civ 115

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 06642

BETWEEN WILLIE MITCHELL CLAIMANT

AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

IN CHAMBERS

Mr Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant

Ms Karessiann Gray instructed by the Director of State Proceedings for the Defendant

Heard: January 8, February 7 & September 25, 2025

CIVIL PROCEDURE – Application for extension of time – Application does not include affidavit of merit with draft defence exhibited - Delay of nine years without good reason – Defendant filed no evidence of merit from which the court could evaluate the merits of the proposed amended defence - No material before court by which to determine whether proposed amended defence raised triable issues – Good reason not found on evidence - No special circumstances affecting file – Proposed amended defence filed separately – No material before the court upon which to evaluate merit Purported defence is pleading not evidence

WINT-BLAIR J

Background

[1] The claimant claims damages against the defendant for breach of occupier's liability and/or negligence arising out of an incident that occurred on December 12,

2006, when he was working on the grounds of the Registrar General's Department ("RGD"). It is agreed that the claimant was employed on a contract by Manpower & Maintenance Ltd, which in turn was contracted by RGD.

[2] The court heard two applications on the first date of hearing, the first in time is the defendant's Notice of Application for an extension of time to file and serve amended defence.¹ The defendant also seeks an order that its amended defence filed and served on October 13, 2023, stand as filed and that the costs of the application be costs in the claim.

[3] The second was the claimant's Notice of Application to dismiss the Defence for want of prosecution, under rule 26.2 of the Civil Procedure Rules. The claimant seeks orders that:

1. The court fixes a Case Management date
2. The Defence be struck out on the grounds that:
 - i. The Defendant has failed to prosecute its defence in a timely manner;
 - ii. It is an abuse of the process of this Honourable Court and/or is likely to obstruct the just disposal of the proceedings.
3. Pursuant to rule 15.2, that summary judgment be granted in favour of the claimant in respect of liability, and
4. A date be set for assessment of damages, with the costs of the application to be borne by the defendants.

[4] The first application will be decided first, as it will be dispositive of the claim. Ms Jevaughnia Clarke filed affidavits in support on October 13, 2023 and October 8, 2024. These affidavits said that soon after the claimant filed and served the amended claim form and particulars of claim on August 28, 2014, counsel with

¹ Filed October 13, 2023

conduct of the file left the defendant's chambers. 'A process was initiated for her files to be reassigned within the Litigation division.' This file was reassigned to Deirdre Pinnock in or around September 2014, who took steps to review and seek further instructions to prepare, file and serve the amended defence. It was deposed that until November 2015, Ms Pinnock sought but was unable to obtain instructions from the Registrar General's Department.

- [5]** Ms Pinnock died shortly thereafter, and a process to reassign her files was initiated. The files were placed in boxes; however, the reassignment was delayed due to a flood that disrupted the chambers' operations. The office was closed for remedial work. Subsequently, after conducting an air quality assessment, the Ministry of Health closed the Attorney General's chambers until the remedial work was completed.
- [6]** Several departments within the chambers were relocated to various ministries within the Corporate Area, causing further severe challenges to the chambers' operations and significantly hampering the efficient operation of the litigation division, which also faced a significant staff shortage at that time. The chambers were relocated from another temporary location around March 29, 2022, to a new location at 13 Hillcrest Avenue, and the process of reassignment was repeated.
- [7]** This file was reassigned to Ms Karessiann Gray in the latter part of 2022. Although counsel was unable to review the file immediately, she took steps soon thereafter to do so and sought further instructions to prepare the amended defence. The amended defence was filed and served on October 13, 2023.
- [8]** The applicant argues that the delay has been remedied, and the defendant has a defence with a realistic prospect of success. The claimant has also not sought to apply for default judgment and, as such, is not prejudiced by the application and orders sought, and an award of costs can remedy any prejudice suffered by the claimant.

- [9]** The defendant is sued in a representative capacity and has no personal knowledge of the circumstances and allegations contained in the claim, and was unable to put forward its amended defence until adequate instructions were received. Further, the claimant's filing of an amended claim and particulars of claim contributed to the defendant being unable to present its case within the prescribed time or shortly thereafter. Any failure on the part of the defendant is not intentional.
- [10]** The amended defence could not have been filed as the claimant contributed to the delay by his failure to comply with the orders of George, J. The claim was inadequate, and a defence could not have been filed until the claim was regularised. The award of costs can remedy any prejudice suffered by the claimant, particularly in circumstances where he contributed to the delay.
- [11]** Ms Gray contended that the claimant has not sued his employer; rather, he has sued RGD, who did not employ him, and to whom he made no report when he was injured in December 2005. The RGD did not become aware of the injury until this claim was received. His contract was for two years commencing in September 2005. His contract contains a clause directing the court to workers' compensation or employer's liability. The injury occurred during the course of his employment, and his recourse was outlined in Clause 24 of the contract. RGD is therefore not liable. The claimant contributed to his own injury by negligently performing his duties.
- [12]** In response, Mr Kinghorn contended that the delay in this claim is inordinate. The orders of George, J, were made on April 30, 2014. The amended claim was filed on June 20, 2014, and the defence, which ought to have been filed within 42 days of the service of the amended claim, was filed nine years later on October 13, 2023, rather than in August 2014.
- [13]** No good reason has been advanced; the displacements in the defendant's chambers are classified as administrative inefficiency, which cannot be elevated to a good reason. The claimant acknowledges the tragedy in the chambers.

[14] The defendant now raises a defence under the Limitation of Actions Act, which the claimant will have to surmount. The late defence has led to irreparable prejudice as it raises new matters. The claimant now has to meet a defence being raised more than ten years after his claim was filed. The delay itself is inherently prejudicial, but the late-stage amendment exacerbates the issue even further.

[15] The Civil Procedure Rules below address this application:

“The Defendant –filing Defence and the consequences of not doing so

10.2 (1) A Defendant who wishes to defend all or part of a Claim must file a Defence (which may be in form 5)

(5) Where a Defendant fails to file a Defence within the period for filing a Defence, judgment for failure to defend may be entered against that Defendant if Part 12 allows it.

The period for filing Defence

10.3 (1) The general Rule is that the period for filing a Defence is the period of 42 days after the date of service of the Claim form...

(9) The Defendant may apply for an order extending the time for filing a Defence.

Conditions to be satisfied - judgment for failure to defend

12.5 The registry must enter judgment at the request of the Claimant against a Defendant for failure to defend if –

(a) the Claimant proves service of the Claim form and particulars of Claim on that Defendant; or

(b) an acknowledgement of service has been filed by the Defendant against whom judgment is sought; and

(c) the period for filing a Defence and any extension agreed by the parties or ordered by the court has expired;

(d) that Defendant has not –

(i) filed a Defence within time to the Claim or any part of it (or such Defence has been struck out or is deemed to have been struck out under Rule 22.2(6));

(ii) where the only Claim is for a specified sum of money, filed or served on the Claimant an admission of liability to pay all of the money Claimed, together with a request for time to pay it; or

(iii) satisfied the Claim on which the Claimant seeks judgment; and 7

(e) there is no pending application for an extension of time to file the Defence”

Discussion

[16] The timeline regarding the claim is as follows:

- 1) The claimant commenced this claim on October 25, 2011.
- 2) The defendant was served with the claim form and particulars of claim on November 8, 2011.
- 3) The acknowledgement of service of the claim was filed on December 1, 2011 and served on December 9, 2011.
- 4) An application to enter judgment in default of defence on April 9, 2012.
- 5) An unless order for the filing of a defence was made on November 28, 2012.
- 6) The defence was filed on December 11, 2012, with the permission of the court and served on the claimant's attorney on December 12, 2012.
- 7) Referral to mediation on July 10, 2013.
- 8) Mediation was fixed for September 25, 2013.
- 9) A request for a case management conference date was made on October 16, 2013.
- 10) On April 24, 2012, a case management conference was conducted by George, J, who ordered that the claimant file and serve an amended particulars of claim within 21 days of the hearing date. The defendant was permitted to file and serve an amended defence within 42 days of receipt of the amended particulars of claim.
- 11) Case management conference fixed for April 30, 2014.

- 12) The amended claim form and particulars of claim filed on June 20, 2014.
- 13) The defendant filed its acknowledgement of service of the amended claim form on June 24, 2014.
- 14) The proposed amended defence was filed on October 13, 2023, not as an exhibit to the application to extend time but separately.
- 15) The application to extend time to file a defence was filed on October 13, 2023.
- 16) The claimant filed and served a further amended claim form and amended particulars of claim on August 28, 2014.

[17] Rule 10.3(1) of the CPR states that, as a general rule, the defence should be filed within 42 days of service of the claim form. By rule 10.3(9), a party that fails to file a defence within the prescribed time can apply for an order extending the time for filing the defence. Rule 26.1(2)(c) provides, among other things, that the court may extend or shorten the time for compliance with any rule even if the application for an extension is made after the time for compliance has passed. The court has a discretion to enlarge the time within which the defence could be filed. Rules 10.3(9) or rule 26.1(2) do not set out the factors to be considered in exercising that discretion. Therefore, the court is required to have regard to the overriding objective of dealing with the case justly in the context of all relevant factors, set out in the cases such as **Fiesta Jamaica Limited v National Water Commission**² cited by Ms Gray among others.

[18] In **Fiesta Jamaica Limited v National Water Commission**, the learned judge considered an application for an extension of time to file a defence, supported by an affidavit with a draft defence attached. It was based on the contents of the said affidavit that a determination was made regarding the strength of the defence,

² [2010] JMCA Civ 4

which was refused by the learned judge at first instance, and summary judgment was granted.

- [19] On appeal, the court considered whether the affidavit supporting the application “contained material that was sufficiently meritorious” to have warranted the order sought. Harris JA said:

“16. The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant had given good reasons for its failure to have filed its defence in the time prescribed by Rule 10.3(1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit.”

- [20] The court agreed with the learned trial judge's decision not to extend time for filing the defence, as the proposed defence lacked merit. It did not raise any genuine issues for trial or provide an arguable defence to the claim. Additionally, no good reason or plausible excuse was given for missing the filing deadline ordered by the court. The Court of Appeal affirmed the order granting summary judgment and ordered the case to proceed to an assessment of damages.
- [21] The factors to be considered on this application are the length of the delay, the explanation for the delay, the prejudice caused by the delay, the merits of the claim, the effect of the delay on public administration, the importance of adhering to time limits (especially when prejudice is claimed), and the resources of the parties.
- [22] In the case 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)**,³ also cited by Ms Gray, there was only an affidavit from counsel explaining the delay in the filing of a defence to the claim and outlining the

³ [2013] JMCA Civ 16

party's efforts in securing instructions for the defence. There was no evidence of merit, nor was a draft defence filed.

- [23] Brooks JA (as he then was) stated, at para. [10], that the learned master had correctly applied the principle from cases such as **Fiesta Jamaica Limited**, that an application for an extension of time within which to file a defence must be supported by evidence; not only outlining the reason for failure to comply with the prescribed time, but also demonstrating that there is merit in the defence.
- [24] At para. [15], the learned judge of appeal expressly adopted the factors from the dictum of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors**⁴ as applied in **Fiesta Jamaica Limited** and analysed "merit" as used by Lightman J, to mean, avoiding the use of a rigid formula for deciding whether to grant the application, as each case should be decided on its own facts.
- [25] On that premise, Brooks, JA explained, in para. [17], that where a draft defence is not available due to lack of instructions at the time when the defence is due, it does not mean that the defendant has lost all hope of advancing a successful defence. What the court should consider is whether there were special circumstances in which such an application could succeed. These included whether the application was made within a reasonable time; there were good reasons for the delay; there was a good reason why the extension should be granted; and whether there would be any undue prejudice to the claimant.
- [26] At para. [21], Brooks JA concluded: "... *it is our view that it is only in special circumstances that such an application should succeed. A defendant who has not produced evidence of merit should only be successful if he were able to convince*

⁴ All England Official Transcripts (1997-2008) (delivered 18 January 2000)]

*the court that it would be just to extend the time. The decision should lie within the discretion of the judicial officer hearing the application. Without laying down any mandatory criteria, such an application should address the issues identified by Lightman J and **explain to the satisfaction of the court the efforts made to secure the evidence concerning the element of merit and the reason for its absence.***" (Emphasis added).

- [27] The Court of Appeal has since held that **Rashaka Brooks** is an exception to the general rule, as the applicant, although not filing an affidavit with evidence of merit, demonstrated evidence of special circumstances that justified allowing the defence and proceeding to trial. The principle that an application to extend the time to file a defence can succeed without evidence of merit, therefore, applies to only a narrow set of cases in which there is evidence of special circumstances.
- [28] The authorities have demonstrated that the question is whether, based on the evidence relied upon by the applicant, the court is able to, "at the very least, form a preliminary view on the likely outcome of the case," and possesses "sufficient material that could constitute a substantive reason for the delay in failing to comply with rule 10.3(1) of the CPR."⁵
- [29] The affidavit from Ms Clarke does not contain any evidence dealing with the merits of the proposed amended defence. There were assertions that it has a realistic prospect of success, but it does not disclose a real prospect of successfully defending the claim or show a "sufficiently meritorious case" for the court to consider. Further, there was nothing in the affidavit to indicate any exceptional circumstances that would justify granting the orders sought in the absence of evidence of merit. The proof of the operational issues with the building and the

⁵ **Philip Hamilton v Frederick Flemmings and Gertude Flemmings** [2010] JMCA Civ 19. See also **Thamboo Ratnam v Thamboo Cumarasamy** [1965] 1 WLR 8

department was not particularised, such that the court could be satisfied how those issues affected this case. In other words, the files from Ms Pinnock's office were placed in boxes. What became of them? Did those boxes go into storage, were they moved to an inaccessible location, and was there an inventory of her files within the context of all the many files being handled by the litigation department? There has to be more. This means that there is no evidence challenging the claimant's claim for the court to consider.

- [30] The purported amended defence was filed separately and not as an exhibit to an affidavit of merit. It cannot be relied upon to demonstrate its merit to the court. The court could not accept the proposed defence, which the defendant seeks to regularise through this application without its contents being part of the evidence before the court. In these circumstances, there is no material on which this court can exercise a discretion. The proposed defence as a pleading cannot meet the requirement for "evidence" nor justify the need to show to the satisfaction of the court what the triable issues are.

Length of delay

- [31] The period under review is without question, extraordinarily and inordinately well outside of the customary period of delay seen in this court. The application cannot be said to have been made within a reasonable time. No authority with such a long period has been cited. In **Philip Hamilton v Frederick Flemmings and Gertrude Flemmings**⁶ Phillips, JA, said that a defaulting party does not have an unqualified right to an extension of time.

⁶ [2010] JMCA Civ 19

- [32] I bear in mind the authorities from the Court of Appeal, which hold that delay, by itself, is not determinative of the application for extension of time (see, **David Wong Ken v National Investment Bank of Jamaica Limited and Ors**).⁷ The oversight of the attorney-at-law should not be held against the litigant (see **Merlene Murray-Brown v Dunstan Harper et al**).⁸ Also, a litigant should not ordinarily be prejudiced by the mistake or failings of his attorney-at-law (see **Jamaica International Insurance Company Limited v The Administrator General for Jamaica (Administrator Of The Estate Of Rohan Wiggins, Also Called Rhoad Wiggins, (Deceased))**).⁹ Further, even in a case where no good reason is offered for the delay, in the interests of justice, the defence should be assessed where the circumstances warrant it (see **Philip Hamilton v Frederick Flemmings and Gertrude Flemmings**).
- [33] However, none of these authorities diminishes the combined effect of the late filing of the proposed defence and the excessive delay in requesting an extension of time. The prejudice to the claimant is evident and immediate. As long as it took for the defendant to attempt to regularise the breach of the orders of George, J, this case was at a standstill.
- [34] The issue of delay in a case like this cannot be dismissed as a matter of costs, as it is the duty of the court to aim for the prompt and fair resolution of cases by strictly enforcing time limits, unless there are good reasons for delays. Failure to comply with the rules cannot be justified without good reason, and awarding costs is not an adequate remedy for the prejudice suffered by a claimant who has not had his day in court in cases such as these.

⁷ [2013] JMCA App 14

⁸ [2010] JMCA App 1

⁹ [2013] JMCA App 2

Whether there are good reasons for the delay

- [35] The affidavits do not set out the reasons for the delay. They set out why the chambers experienced difficulty in its operations. There is nothing to indicate, after the untimely passing of Ms Pinnock, what became of the file until the chambers found its new home. The inference can be drawn that it had not been reassigned as it was not until 2022 that Ms Gray had conduct of the file.
- [36] In **Attorney General of Jamaica v Roshane Dixon and The Attorney General v Sheldon Dockery**¹⁰ cited by Mr Kinghorn, Harris JA observed, at para. [32], that *“[i]n keeping with its duty to regulate the pace of litigation, the court has adopted a strict approach in giving consideration to an application for an extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay in complying with the rules”*.
- [37] The explanation for the late application to regularise the filing of the defence is categorised as administrative oversight in the defendant’s chambers. Ms Clarke deposed that, up to November 2015, Ms Pinnock could not obtain instructions from the RGD, and after Ms Pinnock’s passing, the file was not immediately reassigned. Absent from Ms Clarke’s affidavit in respect of the process she referred to for assigning files within the chambers was the date Ms Pinnock passed.
- [38] Other than stating that Ms Pinnock’s files were “boxed up”, the relevant dates are unknown. Ms Clarke deposed that the file for this claim was not immediately reassigned, and there is no evidence of what took place after the file was placed in a box, up to the disruption in operations of the chambers, which did not occur until October 7, 2021. This is an unexplained period of approximately six years. There is no explanation for how the process of reassigning Ms Pinnock’s files was

¹⁰ [2013] JMCA Civ 23

affected by the disruptions from October 7, 2021, to the latter part of 2022, when Ms Gray took over the file.

- [39] There was also no evidence regarding the reasons for the delay in filing the proposed defence once the file was re-assigned, as it took approximately twelve months to file both this application and the proposed defence.
- [40] There had previously been one application for judgment in default. The fact that the claimant did not file a second such application cannot be grounds to state that the claimant contributed to the delay.

Whether there is a good reason for the application for extension to be granted

- [41] There is no reason in the affidavit evidence why this application could not have been filed, suggesting there were operational difficulties in the chambers that made compliance unlikely. Before the court is a statement of the circumstances without an explanation of how that state of affairs led to this current state of affairs. In other words, why did the fact that the chambers were split into different ministries matter in the grand scheme of things? Was there no office to operate from, no furniture, no support staff? What is more curious is that COVID-19 had already become a fact of life, and remote hearings were also a fact. There is no material before the court that constitutes a good reason for the delay.
- [42] The issue of prejudice is live, and it must be acknowledged that witnesses may no longer be readily available. The claimant is elderly; this was a personal injury matter, and the nature of the claim is such that he would be suffering unnecessarily.

Overriding objective

- [43] The defendant contends that the claimant should have filed a claim against his employer. However, no motion was made to dismiss the claim or for summary judgment, which could have disposed of the case if successful. Rather, a new defence was introduced at this late stage. To justify this, evidence of a meritorious

defence is necessary, as the court must assess whether the defence has a realistic prospect of success to apply the overriding objective of resolving cases efficiently and fairly. Justice dictates that weak defences should be dismissed early to save costs and allow the court to focus on cases requiring trial.

[44] The overriding objective requires that the court consider factors such as the reasons for the delay, prejudice and other effects of the delay, as well as the court's role in saving costs and managing resources. It was therefore necessary to identify and assess considerations arising from any reason given for the proposed amended defence not being filed within the prescribed time, and whether, regardless of the delay, the case should proceed to trial in the interest of justice.

[45] In this case, both this application and the proposed amended defence were filed on the same date. In **Rashaka Brooks**, the affidavit filed by the Attorney General explained to the court's satisfaction, "the efforts made to secure the evidence concerning the elements of merit and the reason for its absence."

[46] In the present case, it was incumbent upon the defendant to produce evidence of a meritorious defence or evidence that would persuade the court that extending the time would be just. Not only was there no evidence of merit, but there is also no indication whether any effort had been made to obtain this evidence, nor is there any explanation for its absence. Therefore, **Rashaka Brooks** does not assist the defendant.

[47] The defendant has failed to provide any evidence of merit from which the court could evaluate the strength of the proposed amended defence. In the absence of such evidence, there was nothing before the court to establish that the defence raised triable issues.

[48] The evidence supporting the application revealed no special circumstances that would justify a departure from the general principle that evidence of merit is a requirement in applications for an extension of time. The purported amended defence filed carries no weight, as there is no evidence to support the defendant's

pleadings. Pleadings are not evidence, and therefore, no weight can be accorded to them. In my view, when this is coupled with the excessively lengthy and egregious delay, which lacks a valid justification, the defendant's application cannot succeed.

[49] In light of the foregoing, there is no defence properly before the court and the claimant is entitled to apply for judgment in default under rule 12.5(1)(d)(i).

[50] Orders

1. The application of the defendant for an extension of time is refused.
2. Costs of the application to the claimant to be agreed or taxed.
3. The defendant's attorneys-at-law shall prepare, file and serve the orders made herein.

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Wint-Blair J