



[2020] JMSC Civ 85

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV04504

BETWEEN	PAUL OXFORD	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
	THE SOUTH EAST REGIONAL HEALTH AUTHORITY	2ND DEFENDANT

IN CHAMBERS

Ms Carla Thomas instructed by the Director of State Proceedings for the Applicants/Defendants

Mr. Lenroy Stewart instructed by Wilkinson Law for the Respondent/Claimant

Heard: October 10 and December 12, 2019 and April 16, 2020

Application for Extension of Time to File Defence – Whether delay is inordinate – Is there a good reason for the delay – Whether there is an arguable case – Rules 10.3(a) and 26.1(2)(c) of the Civil Procedure Rules (CPR) 2006 (as amended).

MASTER MASON

Background

[1] The Claimant Paul Oxford is the Executor of the estate of Karl Oxford, deceased. On November 15, 2018 he filed a Claim Form and Particulars of Claim. He is claiming damages for negligence for the benefit of the estate of Karl Oxford deceased, by virtue of the Law Reform (Miscellaneous Provisions) Act and the

Fatal Accidents Act arising out of an incident which occurred on November 16, 2015. The deceased Karl Oxford was a patient under the care and control of the 2nd Defendant at the Kingston Public Hospital (KPH) where it is alleged, he sustained injuries resulting from the negligence of the servants and agents of the 2nd Defendant. The facts are that on Friday November 13, 2015, the deceased Mr. Karl Oxford was transferred to the KPH from Medical Associates Hospital. Upon his admission to the KPH, various medical providers, nurses and medical staff were aware of the deceased's high calcium levels/special conditions and that he must be restrained as part of the proper administration of his medical care. He had no physical injuries to his head on arrival. However, on November 16, 2015 at approximately 12:10a.m., the deceased was found on the floor of KPH with a gash to his head lying in a pool of blood. He was pronounced dead at 1:50p.m. by Dr Paul Jones. As a result of Mr Karl Oxford's death, his estate, dependants and near relations, it is alleged, have suffered loss, damage and expenses.

[2] The Applicants/Defendants in their submissions relied on the guidance of Brooks JA in the case of **The Attorney General and Western Regional Health Authority v Rashaka Brooks** [2013] JMCA Civ. 15 where he states that the Court is guided by the overriding objective when interpreting rule 10(3)(9) of the CPR. The Defendants also rely on the principles outlined in **Peter Haddad v Silvera** in considering an application for an extension of time. The Defendants submitted that the **Rashaka Brooks case** established the following principles:

- (a) That once there is an arguable defence, the Court is not bound to reject an application for extension where there is no good ground;
- (b) That a Defendant who is unable to file his Defence in the prescribed time should not be shut out from being able to apply successfully for an Extension of Time; and

(c) Recognise that the Defendants' delay in filing its Defence is hinged on the fact that it represents many state entities. As far as prejudice to the Claimant is concerned if the application is granted the Defendants maintain that the Claimant is concerned if the application is granted the Defendants maintain that the Claimant is not required to travel for this application and that any later travel he has to make in relation to the matter would be compensated adequately with costs. The case of **Finnegan v Parkside Health Authority** [1998] 1 All ER was relied on to reinforce the point that the application ought not to be refused on this basis.

Submissions

[3] The Claimant in his submissions extracted the guiding principles for the Court's determination as set out in the case of **Leyman Strachan** to be:

- (a) whether the delay in filing a Defence by the Defendants is inordinate and whether they have a good reason for the delay,
- (b) whether the Defendants have a good defence,
- (c) whether the Claimant would be prejudiced if the extension is granted and whether costs can alleviate any prejudice caused. The Claimant contends that the delay was inordinate and the reasons proffered for the delay is unmeritorious as many pertinent particulars to assist the Court in its deliberations are not forthcoming such as, when the instructions were originally requested and when the Claim Form was served on the 2nd Defendant and by what method further instructions were requested and if they were received, whether any further instructions would assist them in drafting a proposed Defence. The Claimant relies on the cases of **The Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockery** [2013] JMCA Civ. 23 to support his position that lack of instructions is not a good reason for a delay. He also relies on **Peter Haddad**

v Donald Silvera SCCA No. 31/2003 to support the position that in the absence of a draft Defence the Court's discretion should not be exercised. Further on the issue of prejudice he relies on the decision in **Haddad v Silvera and Roshane Dixon** cases to make the point that costs does not relieve prejudice.

The Issue

[4] **Whether the Court should grant the Defendants an extension of time within which to file their Defence.**

The Law

[5] Rule 10.(3) (a) of the CPR reads:

"The Defendant may apply for an Order extending the time for filing a Defence."

Rule 26.1 (2) (c) of the CPR reads:

"Except where the rules provide otherwise, the Court may – extend or shorten the time for compliance with any rule, practice direction of the Court even if the application for an extension is made after the time for an extension is made after the time for compliance."

[6] It is noted that the above rules are absent of any explicit/clear cut criteria to be used by the Court in exercising its discretionary power to enlarge time. In the absence of specific guidance reliance is placed on the overriding objective and case law. Sykes J (as he then was) in the case of **Premium Investment Limited v Jamaica Redevelopment Inc** 2007HCV03632 (unreported) delivered 11th June 2008 ruled that:

"These rules do not set out any criteria that govern the exercise of the power to enlarge time."

But His Lordship accepted in the end that it is the overriding objective which must guide the exercising of the discretion.

[7] Rule 1.1(1) of the CPR imposes an obligation on the Court whereby the Court must ensure that cases are dealt with justly. Rule 1.1(2)(a) goes further to express that when dealing with cases justly the Court must ensure, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position, among other things.

[8] However, there are approved guidelines which influence the Court's approach to enlarge time and they are found in case law. In the case of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4, a case involving the issue of filing a Defence out of time, Harris JA adopted and applied the principles laid down by Lightman J in the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** [2001] EWHC Ch 456 where Lightman J stated:

"It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account. In particular, regard must be given to the length of the delay; secondly, the explanation for the delay; thirdly the prejudice occasioned by the delay to the other party; fourthly the merit of the appeal, fifthly the effect of the delay on public administration; sixthly, the importance of compliance with time limits bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties."

[9] It is established that the Court has a discretionary power to grant an extension of time to an applicant in which to file a Defence provided there is sufficient material at its disposal to do so.

[10] Brooks J A at paragraph 17 of his decision in the case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jr. (a minor) by Rashaka Brooks Snr. (His father and next friend)** [2013] JMCA Civ. 16 expressed that:

"If, however, a draft defence is not available because the Defendant's attorneys-at-law are not seised with the requisite instructions by the time the Defence is due, does it mean that the Defendant has no hope of

pursuing a successful application to extend time until he is able to file a draft defence? It would seem to me, on the application of the overriding objective, that in certain special circumstances, such a Defendant, as long as he can satisfy the Court that:

- (a) the application is made within a reasonable time;
- (b) there are good reasons for the delay;
- (c) there is a good reason why the extension should be granted; and
- (d) there would be no undue prejudice to the Claimant should be able to secure an extension of time.”

[11] It is therefore well established that provided the criteria is met as outlined in case law, an extension of time is left to the discretion of the Court.

[12] In the case of **The Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ. 23, the Court had this to say about an application for an extension of time to file a Defence. Harris J A reasoned:

“the Court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing that justice has to be done.”

Analysis

[13] **Was the application to extend time to file a Defence made within a reasonable time?**

The Claim Form and Particulars of Claim were filed on November 15, 2018 and served on the Defendants on the same day. The Defendants filed an Acknowledgment of Service on November 30, 2018. The Defendants filed an Application for an extension of time to file Defence on December 19, 2018, some eight (8) days before the Defence was due to be filed on December 27, 2018. I find that the application for an extension of time was filed in a timely manner.

Is there a good reason for the delay?

[14] According to paragraph 5 of the Affidavit of Andre Moulton filed on December 19, 2018 In Support of an Application for Extension of Time to file Defence:

“he was advised by Counsel with conduct of the instant claim that instructions were received by way of letter dated December 5, 2018, however, these instructions were not sufficient to enable her to make an assessment as to the merits of the proposed Defence. Further instructions were requested which have not yet been received and it is unlikely that those instructions will be received in sufficient time to allow for the drafting and filing of the Defence prior to the expiry of the deadline for filing same.”

[15] The Claimant contends in his submissions that the reason proffered to explain the delay is unmeritorious because there is no explanation forthcoming from the Defendants to indicate when the instructions were originally requested, when further instructions were requested, whether any further instructions were received that would be sufficient to allow counsel with conduct of the matter to make a determination of the merits of the proposed defence. It would appear that the Defendants were not in a position to shed any light on those questions as they had not been able to draft a Defence notwithstanding having made a request and receiving some instructions. The Claimant further asserts that the Defendants could have filed a holding defence. Even if this was considered by the Defendants, an examination of paragraph 5 of Andre Moulton’s Affidavit is necessary where he contends that:

“These instructions were not sufficient to enable the attorney with conduct of the matter to make an assessment as to the merit of the proposed defence.”

[16] In the case of the **Attorney General of Jamaica v Rashaka Brooks** [Supra] Brooks JA at paragraph 18 speaks to the difficulty the 1st Defendant encounters when requesting instructions from any of its many and varied state agencies as follows:

“The number of reasons for a Defendant not being able to file a Defence on time must be myriad. They are also most likely to arise where one is dealing with large corporations with many departments or, as in the instant case, with state entities. Indeed, it is in recognition of this principle that Claimants with claims against the Crown obliged to seek the court’s

permission in order to enter judgment against the Crown rule 12.3(1) of the CPR.”

[17] The Claimant in his submissions expressed the view that the Defendants reason for the delay is not good as they should have ensured that the instructions were promptly received in order to prepare a Defence against the claims. It must be borne in mind that the Attorney General is a creature of instructions and as such, is duty bound to request instructions from State Agencies it represents, like the 2nd Defendant. Great reliance is placed on it in receiving sufficient instructions before a Defence can be drafted. Hence Brooks J A continued at paragraph 19 to state:

“In our view, it is only just that a Defendant who expects to be able to file a Defence but anticipates that he will not be able to file it within the time prescribed, or realises that the time prescribed has passed should not be shut out as of course from being able to apply successfully for an extension of time.”

[18] Therefore, I accept the principles set out in the **Attorney General v Rashaka Brooks** [Supra] and am guided by them, also, I accept the explanation proffered by the Defendants as a reasonable one for their delay in filing a Defence.

Is there a good reason why the extension should be granted to the Defendants?

Is there an arguable case?

[19] In order to decipher whether there is good reason for an extension in which to file a Defence out of time, it is necessary to examine the proposed Defence along with the Affidavit filed in support of the Application.

[20] On October 10, 2019 the Defendants filed a Supplemental Affidavit in Support of Application for Extension of Time. At paragraph 3 Mr Carlton Hamilton an Attorney-at-Law attached to the Attorney General’s Department depones that he was informed that there is a good defence to the claim in that:

“The treatment of the deceased’s medical condition was in accordance with the practice accepted as proper by a responsible body of medical practitioners in that area of medicine, that the medical care of the deceased was in accordance with the practice accepted as proper by a

reasonable body of medical practitioners that his medication was administered to him as prescribed and ordered, that he was frequently monitored by medical staff and that he occupied a bed with a mechanism to ensure his reasonable safety up until the time of his death.”

- [21] The proposed Defence is attached to the Supplemental Affidavit filed on October 10, 2019. At paragraph 6 of the Defence the referral letter from Dr Garfield Forbes the attending doctor of the deceased while he was a patient at Medical Associates Hospital sets out the medical history of the deceased, his diagnosis, the type of care he received up until the time he left the Medical Associates Hospital. Paragraph 7 of the Defence outlined his treatment plan and that he was closely monitored up until the time of his death.
- [22] Paragraph 12 of the Defence denies any act of negligence on the part of the Defendants and reinforce the position that the deceased received proper medical treatment and attention according to his medical condition and in accordance with the practice accepted as proper by a responsible body of medical practitioners skilled in this area of medicine.
- [23] I view the propose Defence in the matter at bar not to be made up of bare denials and admissions, the Defendants have set out an arguable case that is fit for ventilation at trial. The Defendants have accepted that the deceased died, but they are denying that there is negligence on the part of the medical staff at the Kingston Public Hospital (KPH). Further, it is their contention that the deceased received proper medical care and that he was constantly monitored as a patient. In their view, the doctrine of Res Ipsa Loquitar is not applicable and the death could have occurred without the negligence of the medical staff.
- [24] I am of the view that the circumstances surrounding the cause of death of the deceased is of material fact that ought to be pleaded and ventilated at a trial as they are questions to be answered. In the interest of justice since the Defendants have set out an arguable case and a Defence that is meritorious, it is only fitting that they be allowed to file their Defence out of time as I find that the Defendants have a real prospect of defending this claim.

[25] In the case of **Three Rivers District Council v Governor and Company of the Bank of England** [2001] UK H.L. Lord Hutton spoke to the applicable test which was also adopted and approved in **Fiesta Jamaica Limited v National Water Commission** [Supra] by Harris J A who said:

“The important question is whether there is material demonstrated that shows there are issues to be investigated at trial.”

[26] To my mind there are issues in this matter to be investigated at trial. As such, I find that there is an arguable case in this matter.

Would the Claimant be prejudiced if the Defendants are granted permission to file their Defence out of Time?

[27] The Claimant at paragraph 6 of his Affidavit filed on October 7, 2019 contends that he would be prejudiced if the Defendants are granted an extension of time to file a defence because the 2nd Defendant was aware of the matter concerning the passing of the deceased before the commencement of the proceedings and should have been adequately able to mount a defence. He further states at paragraph 7 of his Affidavit that he has had to travel from overseas where he lives on several occasions and will have to continue to do so if the extension is granted.

[28] I am of the view that the Claimant is not required to travel for this application, and any prior claim for costs for travel before the commencement of the proceedings would not be entertained. But any travel the Claimant makes in relation to the trial thereafter is likely to be adequately compensated with costs. It would be unjust and inequitable to deny the Defendants an extension to file a Defence in this matter. Case Law dictates that provided there are grounds to merit a Defence, the Court ought to exercise its discretion in the Defendant's favour. I am of the view that the Defendant would suffer undue prejudice if not allowed to file a Defence, especially where costs can alleviate for any prejudice caused. In that regard the Court adopts the decision in **Finnegan v Parkside Health Authority** [1998] I W L R 411 where it was stated inter alia, that:

“save in special cases or exceptional circumstances, it can rarely be appropriate, an overall assessment of what justice requires, to deny the Plaintiff an extension where the denial will stifle his action because of a procedural default which even if unjustifiable, has caused the Appellant no prejudice for which he cannot be compensated by an award of costs.”

[29] These principles also hold true for a Defendant in the circumstances as the one at bar.

Conclusion

[30] Based on the foregoing I am of the view that the Court ought to exercise its discretion in favour of the Defendants as I find that the Defendants application fall within the guideline of cases that govern the exercise of the Court’s discretion to enlarge time in which to file a Defence.

Accordingly, I make the following orders:

1. The Defendants are permitted an extension of time to file and serve their Defence within 14 days of this Order,
2. The parties are to attend mediation on or before September 25, 2020,
3. Case Management Conference is fixed for December 10, 2020 at 2:00p.m. for ½ hr.,
4. Costs of this application to be costs in the claim,
5. The Applicants/Defendant’s attorney-at-law to prepare file and serve this Order.