[2013] JMSC Civ. 152

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 00511

BETWEEN	**JOHN ROSS RICKETTS**	**CLAIMANT**
A N D	**DAVID WILLIAMS**	**1ST DEFENDANT**
A N D	**KARLOS BARTLEY**	**2ND DEFENDANT**

Seyon Hanson for second defendant/applicant
Debayo Adedipe instructed by Keith Smith & Co for claimant/respondent

HEARD: **13th December 2012, 14th February 2013, 18thApril 2013 and 23rd October 2013**

APPLICATION TO EXTEND TIME TO FILE DEFENCE - DEFECT ON THE FACE OF DOCUMENTS SERVED - PRINCIPLES TO BE APPLIED WHETHER DEFENCE ALLOWED SHOULD BE LIMITED TO ISSUES DISPUTE

BERTRAM-LINTON
MASTER-IN-CHAMBERS (AG.)

[1] It is Karlos Bartley the 2nd defendant who seeks to move the court favourably to his position.

[2] He complains that when he was served with the documents in January 2012 they were defective on their face and so he was mislead as to their validity. He exhibits the document served and it shows the second page of the claim form in the section headed **"NOTICE TO THE DEFENDANT"** has in **typed** print.

> *"This claim form has no validity if it is not served within six (6) months of the date below unless it is accompanied by an Order extending the same. See Rule 8.14 (1)"*

The word 'six' is then crossed out and the word 'twelve' written over it. He sought advice from his attorney who attempted to speak with the claimant's attorney on the issue but was unsuccessful in doing so.

[3] The attorney then called the Registry of the Supreme Court and was advised that no handwritten changes could be made to court documents in the way it was done unless it had been so ordered by a court. Both himself and his previous attorney were then of the settled view that the documents served were invalid having been issued in February 2011 and took no further steps in relation to them. The attorney apparently did not check Rule 8.14 (1) as the document advised, which clearly reads,

> *"8.14 (1) The general Rule is that a claim form must be served within 12 months after the date when the claim was issued or the claim form ceases to be valid."*

[4] Sometime in October 2012 the claimant's attorney made direct contact with the 2nd defendant. It seems that as a result of their exchange, the 2nd defendant sought the advice of Mr. Hanson who makes this application for his client to be allowed to file his defence albeit belatedly based on the misunderstanding and confusion which he says was brought about by the misleading documents.

[5] Counsel Mr. Hanson though is not relying on this ground only but says that there is good and sufficient reason to swing wide the doors of justice as his client has a reasonable prospect of successfully defending the claim brought against him and attaches a draft defence in support of this.

[6] He posits that having realized that the claim form was valid for 12 months the 2nd defendant moved with alacrity to file this application, which also took into account that there was no application before the court for default judgment to be entered against him, as was the case with the 1st defendant.

THE DRAFT DEFENCE

[7] One of the major limbs of the applicants' case is the prospect of success of their defence. The applicant's counsel, Mr. Hanson, says he was not the one responsible for the accident and if he had any level of responsibility, the claimant contributed in a significant way with the events as they unfolded and which may have resulted in any injuries he the claimant sustained.

[8] Counsel Mr. Hanson commends to the court principles as laid down in **Rv KERRON MATTHEWS and PREMIUM INVESTMENTS v JAMAICA REDEVELOPMENT FOUNDATION**

THE RESPONDENT'S CASE

[9] Mr. Adedipe stoutly opposed the application both on the ground that the proposed defence was weak and that the non-compliance with the time limitation for filing the defence was supported by a spurious excuse at best.
He highlights:

a) The lack of merit in the defence which at best he suggests if the court is swayed by it, should account for some limiting of the basis on which the defence should be allowed in, that is, based on contributory negligence.
b) The delay was inexcusable as the correction to the document as served is what the law says 'twelve months' and any reasonable inspection of the law could have shown that it was the correct position.

He took issue with the fact that the enquiry to the Supreme Court was not supported by an affidavit and as such was an unreliable bit of information.

[10] He relied on the principles laid down in Jamaican Court of Appeal case of **PHILLIP HAMILTON EXECUTOR in the ESTATE OF ARTHUR ROY HUTCHINSON, DECEASED, TESTATE v FREDERICK FLEMMINGS & GERTRUDE FLEMMINGS SCCA No. 53/2009 delivered 18th May 2010** where the court enunciated the principles to be applied in a determination as to where an extension of time to file a defence should be granted.

THE LAW

[11] CPR Rules 10.2(1) and 10.3 (1) says that a defendant who desires to defend all or part of a claim is required to file a defence. The general rule is that this must be done within 42 days of service of the claim.

[12] Pursuant to Rule 10.3(9) the defendant can apply to extend the time for filing the defence. There is also Rule 26.1(2)(c) which outlines the court's a general powers of

management and says that the court can extend the time for compliance with any rule, practice direction, order or direction of the court, even if the relevant application is made after the period for compliance has gone.

[13] The Rules however do not lay down the specific criteria to be used when the discretion to enlarge time is to be exercised. It is to case law that one must turn for the approved guidelines.

[14] In the case of **FEISTA JAMAICA LIMITED v NATIONAL WATER COMMISSION [2010] JMCA Civ 4,** a case where there was the issue of filing defence out of time **HARRIS JA** adopted and applied the principles laid out by **LIGHTMAN J** in **COMMISSIONER OF CUSTOMS and EXCISE v EASTWOOD CARE HOMES (ILKESTON) LIMITED and others [2001] EWHC ch 456.**

> *"In deciding whether an application for extension of time was to succeed under rule 3.1 (1) 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."*
>
> *Among the factors which had to be taken into account were the length of the delay, the explanation of the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might in particular be relevant to the question of prejudice."*

The Phillip Hamilton case also adopted the principles laid out by Lightman and approved in **FIESTA JAMAICA LIMITED v NATIONAL WATER COMMISSION.**

[15] The main questions here then are whether there is enough material before me to justify the delay in compliance with Rule 10.3 (1) and also is there merit in the defence. The latter would mean I need to pay special attention to information contained in the application and affidavit of Karlos Bartley.

THE DELAY

[16] In the instant case the claim form and particulars were served on the 2nd defendant on the 16th January 2012. Pursuant to Rule 10.3 (1) the defence was due with 42 days of the date of service, that is on or about the 27th February 2012.

[17] The application to extend time to file the defence was made on 8th November 2012 nine (9) months after the defence was due but interestingly enough within a month after contact had been made by the Claimant's attorney with the 2nd defendant in October 2012. In my view the relevant starting time for consideration in this case is October 2012 when the clarification about the validity of the documents came and counsel was instructed.

[18] The delay was not inordinate in these circumstances and I accept that the handmade correction on the document may well have caused confusion to the litigant, the less than informed attorney-at-law and in keeping with the advice from the call made to the Supreme Court.

THE MERITS

[19] However even if the reason for the delay is considered was dubious the over-riding objectives draft defence must be looked at and an assessment done as to its merits.

[20] The defence as disclosed says that the claimant was either the author of his own demise or contributed to it in large measure as he was engaged in lighting a marijuana spliff which the 2nd defendant sought to prevent him from doing when the collision took place.

[21] The defence is clearly arguable and as such it would be inequitable to shut out the 2nd defendant; who suggests he was upholding the law in the circumstances that existed. There is indeed a real prospect of success. I adopt the reasoning **IN SWAIN v HILLMAN [2001] ALL ER 91, 92** where Lord Woolf says,

> "*The word 'real' distinguishes fanciful prospect of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."*

[22] Again in **THREE RIVERS DISTRICT COUNCIL v GOVERNOR and COMPANY of the BANK OF ENGLAND [2001] UK HL** Lord Hutton speaks to the applicable test which was also adopted and approved in **FIESTA JAMAICA LIMITED v NATIONAL WATER COMMISSION by Harris JA** who says,

> *"The important question is whether there is material demonstrated that shows there are issues to be investigated at trial".*

[23] The negligence as pleaded by the claimant and as countered by the 2nd defendant in his draft defence stands to be analysed in full and certainly as Mr. Adedipe puts it issues of foreseeability may well be raised as relevant for argument.

SHOULD THE 2ND DEFENDANT BE RESTRICTED IN HIS DEFENCE

[24] Mr. Adedipe suggests that if the 2nd defendant's defence is allowed he should, based on the assertions in it, be restricted to issues of contributory negligence. Mr. Hanson disagrees and would wish for the case to be fully put and the tribunal then makes a decision on the alternatives as to liability.

[25] I am of the view in this regard that there is no prejudice to be suffered by the claimant in allowing the defence as drafted to be argued. It would however not be to the benefit of the 2nd defendant in those circumstances to be so restricted. The limitation would then restrict a trial judge as to a finding on causation. In the draft defence no admission is made as to liability and in my view the restriction would only be appropriate where there was clear or even partial admission of culpability. The restriction would give the claimant a clear inequitable advantage.

[26] Additionally I accept the learning in **FINNEGAN v PARKSIDE HEALTH AUTHORITY,** that where no prejudice has been deponed to or claimed, the applicant should not be denied full access to justice and especially bearing in mind that no default judgment was applied for against the 2nd defendant.

[27] In light of all I have said then the 2nd defendant's application is granted. The time for filing the defence by the 2nd defendant is extended and the 2nd defendant is permitted to file his defence within 14 days of this order.

Costs for this application is awarded to the applicant to be agreed or taxed.

The Applicant is to prepare, file and serve a formal order in this matter.