[2017] **JMSC Civ. 156**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02010

BETWEEN	**ADRIAN SAMUDA**	**CLAIMANT**
AND	**JAMES DAVIS**	**1ST DEFENDANT**
AND	**FRANIA SMITH**	**2ND DEFENDANT**

IN CHAMBERS

Mr. H. Christie instructed by Hart Muirhead Fatta Attorneys-at-Law for the Claimant

Miss T. Brown instructed by Bailey Terrelonge Attorney-at-Law for 2nd Defendant

Heard: 25th May, 21st June, 31st July and 26th October, 2017

Extension of time to file defence - Length of delay - Whether good explanation offered for delay - Whether defendant has a good defence - Abandoning part of claim

ANDREA PETTIGREW-COLLINS, J (AG.)

BACKGROUND

[1] The 2nd defendant in this matter is seeking an order to extend time within which to file her defence. The claim form and particulars of claim were filed on the 2nd of April 2015. An acknowledgement of service was filed on behalf of the 2nd defendant on the 5th of June 2015. In that document the 2nd defendant acknowledged that the claim form and particulars of claim were served on her on the 22nd of May 2015. A defence was filed on her behalf on the 13th of July 2015,

about ten days after the defence was due. The Notice of Application for Court Orders (NACO) to extend time to file the defence was filed on the 16th of November 2016.

[2] In the claim which gave rise to this application, the claimant seeks against both defendants damages for negligence, conversion, trespass to property, trespass to goods, defamation and for breaches of his fundamental rights and freedom under the constitution as amended in 2011. Specifically the claimant seeks: Special damages in the sum of 7,810,000.00, general damages, exemplary/or aggravated damages and vindicatory/constitutional damages.

[3] The court commenced hearing the application for extension of time to file the defence on the 25th of May 2017. In presenting the application, Ms. Trishanne Brown relied on two affidavits of Patrick Delano Bailey Attorney at Law, the first of the two having been filed on the 16th of November 2016 along with the application for extension of time. A supplemental affidavit was filed on the 21st of April 2017. Miss Brown posited that though filed out of time, the delay was not inordinate. The claimant takes no issue with this position. Ms. Brown further urged the court to find that there is a good explanation for the delay which was borne out of inadvertence on the part of the 2nd defendant's Attorney at Law. Again, counsel for the claimant did not wish to challenge the application on this ground. Counsel further urged the court to find that there is merit in the defence and that there are triable issues. Counsel for the claimant mounted a vigorous challenge to this position. Ms. Brown further asserted that the granting of the 2nd defendant's application would occasion the claimant no prejudice.

THE RELEVANT LAW – GENERALLY

[4] Rule 10.3(9) of the Civil Procedure Rules (CPR) provides that:

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

Rule 26.1(2) gives the court the power to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court, even if the application for an extension is made after the time for compliance has passed. The 2nd defendant is in breach of Rule 10.3(1) which provides that the time for filing a defence is 42 days after the date of service of the claim form. This position is predicated on the assumption that the particulars of claim were of course filed along with the claim form (as in this case).

[5] Neither Rule 26.1 nor Rule 10.3 speaks to the relevant factors that a court should take into account when considering whether an extension of time should be granted to a defendant to file a defence. One must therefore look to case law for guidance. There is no dearth of authority in this regard.

[6] In **Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockey** [2013] JMCA Civ. 23, Harris JA cited the considerations enumerated in **Strachan v The Gleaner Company** Motion No. 12|1999 delivered on the 6th of December 1999. In the latter case, Panton JA outlined certain factors which should be taken into consideration when a court is exercising its discretion whether or not to grant an extension of time.

The factors include:

I. The length of the delay
II. The reasons for the delay
III. Whether there is an arguable case for an appeal
IV. The degree of prejudice to the other parties if time is extended.

[7] As to whether there is an arguable case for an appeal, this factor bears no direct relevance to the case at bar but the analogous principle relating to whether or not a defendant should be allowed to file a defence out of time is expressed as whether the defendant has a defence with merit.

[8] Harris JA pointed out in **Roshane Dixon** that “it cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice” and she

warned that the court must, in applying the overriding objective "be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties".(paragraph 19 of the judgment).

THE LENGTH OF DELAY

[9] In this instance, the defence was filed some ten days late. The defendant was served with the claim form and particulars of claim on the 22nd of May 2015 as indicated in the acknowledgement of service of the claim form filed on behalf of the 2nd defendant. The defence was filed on the 13th of July 2015 and served on the 16th of July 2015. One could hardly disagree with counsel for the applicant that there was no inordinate delay in filing the defence if that was all that needed to be done, but the filing of the defence was not enough in the circumstances. The defendant needed to file a Notice of Application for Court Orders requesting an extension of time within which to file the defence. This application is for practical purposes and application for an extension of time as well as an application to have the court sanction as being filed in time, the defence which was in fact filed out of time.

[10] In **Roshane Dixon's** case, Harris JA was of the view that in circumstances where the application for extension of time was filed approximately one month after the time for filing the defence had expired, the delay was not inordinate. In the instant case, whereas a defence was filed within ten days of the expiration of the time for filing a defence, the application for the extension of time which was necessary in order to regularize that defence was not made until almost sixteen months after the defence was due. The length of the delay cannot therefore be considered solely within the context of when a defence was filed, as the case could not have progressed precisely because this application had to be dealt with first. Therefore although the claimant took no issue with that matter, the court is of the view that there has been inordinate delay in making the application to extend time to file the defence.

REASONS FOR THE DELAY

[11] Counsel Mr. Bailey in his affidavit offers as the explanation for the delay the fact that he was involved in a long trial matter during the period the defence became due, and that the failure to comply with the timeline fixed by the CPR was not intentional. There are cases which would indicate that a litigant should not suffer because of the mistake of his Attorneys. In the case of **Jamaica International Insurance Company Limited v The Administrator General of Jamaica (administrator of the estate of Rohan Wiggins** [2013] JMCA App.2, several such cases were cited. **Salter Rex and Co. v Ghosh** [1971] 2 All ER 865 being one of them. In that case, Lord Denning MR said at page 866 of judgment:

> *"so the applicant is out of time. His counsel admitted that it was his, counsel's mistake and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. We never like a litigant to suffer by the mistake of his lawyers. I can see no merit in [the applicant's] case. If we extended his time it would only mean that he would be throwing good money after bad. I would therefore refuse to extend the time. I would dismiss the application.*

[12] Ms. Brown also asked the court to direct its mind to Phillips JA admonition in **Marlene Murray-Brown V Dunstan Harper and Winsome Harper [2010] JMCA App 1 (cited in Victor Gayle by Edwards J Ag.)** where she said the following at paragraph 30 of her judgment :

> *"The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorney errors made inadvertently, which the court must review. In the interest of justice and based on the overriding objective, the peculiar facts of a particular case and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed her, although it was not intended."*

[13] There is however, the view to the contrary which is that

> *"normally, it will not assist the party in default to show that noncompliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client."*

Which was stated by McDonald Bishop J.A. in **The Commission of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21 at paragraph 52 of the judgment. McDonald Bishop, J was in that case citing the principles as enumerated in **Barbados Rediffusion Service Limited v Asha Mirchandani and others** (No. 2)(2016) 69 WIR 52) which one ought to consider in an application for striking out.

[14] The Applicant/ 2nd defendant also asked the court to have regard to the case of **Raymond Lewis v Dr Eva Lewis Fuller, Violet Lewis Crutchley Susan Lewis Forbes** Claim 2015HCV00003 which dealt with an oral application on behalf of the defendants for extension of time to file affidavits in support of their defence. Anderson K. J, in considering the matter, paid due regard to the relevant considerations such as the length of the delay, the explanation for the delay, the prejudice occasioned by the delay, the merits of the case of the party applying for the extension of time and the effect of the delay on public administration. With regard to the merits of the case he stated that "no evidence has been provided to this court, in this specific respect." He also found that the delay was in all the circumstances lengthier than could properly be justified, that there was prejudice occasioned to the claimant as a consequence of the delay, that counsel was unable to proffer any explanation for the delay and that the effect of the delay on public administration in the particular case was detrimental. He nevertheless granted an extension of time to the 1st and 2nd defendants to file their affidavit evidence out of time. He cited the Privy Council decision of **The Attorney General v Keron Matthews** [2011] UKPC 38], after noting that each case must be considered on its own merits. There is one obvious distinction between the case of **Raymond Lewis** and the case at bar. In **Raymond Lewis** there was no defence for the Learned Judge to consider.

[15] Neither Ms. Brown who appeared at the hearing nor Mr. Bailey in his affidavit or supplemental affidavit put forward any reason for the delay in filing the Notice of Application for extension of time to file the defence. The focus was on the reason for the short delay in filing the defence.

[16] It is my view that the reason proffered is not an acceptable one particularly in circumstances where it is clear that counsel is not a sole practitioner. The affidavit was sworn to by Mr. Bailey. The application for the extension of time was made by Miss Brown. It seems clear that insufficient attention was being paid to the matter. In any event, my finding that the reason offered for the delay is not a sufficient one is not dispositive of the case.

MERITS OF THE DEFENCE

THE CONTENTS OF THE DEFENCE FILED

[17] It is necessary to set out in some detail the contents of Mr. Bailey's affidavits as it relates to the defence put forward by the 2nd defendant as well as the contents of the document titled 'defence' that was filed on the 13th of July 2015. The contents of these documents must be viewed against the contents of the Particulars of Claim as set out in the document so titled. Mr. Bailey's first affidavit was filed on the 16th of November 2016 along with the Notice of Application for Court Orders. In paragraph seven of this affidavit, Mr. Bailey simply adumbrated that "I believe the 2nd defendant has a good defence on the merits of the claimant's claim" and thereafter he stated that he craves leave to pursue same. Paragraph eight stated that the claimant could not properly claim constitutional damages, however this assertion was acknowledged to be inaccurate by counsel at the hearing. Paragraph nine of that same affidavit stated that, as it relates to the claimant's claim for damages arising as a consequence of property allegedly being held by the 2nd defendant, he Mr. Bailey had been advised and verily believe that properties belonging to the claimant have been returned.

[18] In paragraph four of his further affidavit, Mr. Bailey exhibited the copy of the defence of the 2nd defendant (which was filed out of time). He went on in paragraph five to state that "the allegation of defamation is a very serious one which can have a long lasting effect on the 2nd defendant's life if liability is pronounced upon her without a fair adjudication of the issues."

[19] Paragraph one of the defence states that "save for the claimant's name, paragraph one of the particulars of claim is denied". In paragraph one of the particulars, the claimant had stated his name and had given his address as 18 West Street Old Harbour in the parish of St. Catherine and had stated that he is a highly respected businessman in the community of Old Harbour. The 2nd paragraph of the particulars asserted that the 1st defendant was the landlord of the claimant in respect of shops 8A and 8B Glendon Court Plaza in Old Harbour. To this assertion, the 2nd defendant stated that she made no admission. She however admitted that she was the 1st defendant's agent in relation to shops 8A and 8B referred to above. The 2nd defendant stated that she neither admitted nor denied the contents of paragraphs four to six of the particulars which were to the effect that there was an agreement between the claimant and the 1st defendant for the claimant to renovate shops 8A and 8B, pay a monthly rental of twenty-nine thousand dollars in relation to both shops and then be allowed to recoup his expenditure which was stated to be over two and a half million dollars before he could be made to cease occupation of the shops. The 2nd defendant admitted paragraph seven of the Particulars of Claim which speaks to the commencement of the agency relationship between the 1st and 2nd defendants in relation to shops 8A and 8B.

[20] In relation to the claimant's assertion that the 2nd defendant sought to increase the rent by a percentage impermissible in law, the defendant stated that she made no admission. She admitted issuing a notice to the claimant for him to quit possession of the premises in June 2015 but denied that the notice was subsequently withdrawn. The 2nd defendant denied making defamatory statements against the claimant and also denied instructing men to forcibly evict the claimant from the shop. Paragraph nineteen of the claimant's particulars asserted that during the night of the 4th of January 2015, the 2nd defendant in her capacity as the servant, agent and/or employee of the 1st defendant along with other persons broke the locks of shops 8A and 8B, forcibly entered the shops and removed some of the claimant's property. These assertions were denied by the 2nd defendant. I feel it necessary to quote paragraph twelve of the defence

which is the response to these assertions. It states "paragraph nineteen of the particulars of claim is denied as at no time did the 2nd defendant break the locks and forcibly enter the shop and remove items as alleged or at all".

THE APPLICANT'S SUBMISSIONS

[21] In advancing the position that the 2nd defendant has a good defence, Ms. Brown asked the court to consider the contents of Mr. Bailey's affidavit as well as the defence of the 2nd defendant which was exhibited to Mr. Bailey's affidavit filed on the 21st of April 2017.

[22] Ms. Brown asked the court to consider the case of **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** Claim No. 2008 HCV 05707, a decision of Edwards J Ag. (as she was at the time of the judgment). The case dealt with an application to set aside a default judgment. Counsel specifically directed the court's attention to paragraph 14 of that judgment. In paragraph 14, Edwards J (Ag.) quoted Lord Brown in a Privy Council decision **Dupcon Engineering Services Ltd. v Bowen** (2004) No. 79 of 2002, delivered April 1, 2004 an appeal from the Court of Appeal of Grenada. The following is the quotation:

> *"Of course the merits of the proposed defence are of importance. Often perhaps of decisive importance upon any application to set aside a default judgment, but it should not be thought that it is only the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them… will also be material. That is not to say that there must necessarily be a reasonable explanation for this, important too, will be any delay in applying to set aside the default judgment and any explanation for this also."*

THE RESPONDENT'S SUBMISSIONS

[23] Counsel for the claimant took issue with the fact that the defence of the 2nd defendant was not set out in the affidavit itself but rather was exhibited to the affidavit. He stated that the law requires that the defence's version of the events should be set out in an affidavit showing that the defendant has a realistic

prospect of successfully defending the claimant's claim. We ran out of time and Mr. Christie agreed at the court's request, to file written submissions. This was done on the 8th of June 2017. He maintained in his written submissions that "the 2nd defendant's defence must be set out in the body of the affidavit supporting her application" and that it is not sufficient that the 2nd defendant's defence has been exhibited to an affidavit. He cites as the authority the Trinidadian case **of Ramkissoon v Olds Discount,** (1961) 4 WIR 73 and pointed out that that case was applied locally in the case of **Shirley Beecham v Fontana Montego Bay** Limited [2014 JMSC Civ119].

THE LAW/ ANALYSIS

[24] In **Ramkissoon**, the plaintiff/respondent had a regularly obtained judgment in default of defence against the defendant/appellant. The defendant made an application to set aside the default judgment which was supported by an affidavit sworn to by the appellant's solicitor and a statement of defence signed by counsel. The application was refused. On appeal, the defendant/appellant contended that the affidavit along with the defence constituted a sufficient disclosure of merit and dispensed with the need for an affidavit from the defendant personally. The solicitor's affidavit did not speak to the facts set out in the defence and the solicitor did not purport to have personal knowledge of the matters advanced to explain the failure to put forward the defence. The court held that the solicitor's affidavit did not amount to an affidavit stating facts showing a substantial ground of defence and since the facts given in the statement of defence were not sworn to by anyone there was no affidavit of merit for the judge or court of appeal to consider.

[25] MC Shine Ag. C.J., in delivering the judgment observed that the solicitor's affidavit did not purport to testify to the facts set out in the defence, neither did he swear of his personal knowledge as to matters constituting the excuse for the failure to follow the rules of procedure and therefore his affidavit could not be considered one stating facts showing a substantial ground of defence.

[26] **Shirley Beecham** like **Ramkissoon,** dealt with an application to set aside a default judgment. In assessing the question of whether the defendant had a realistic prospect of successfully defending the claim, Anderson K.J. in Shirley Beecham observed the following at paragraph 23:

> *"Exhibiting as an attachment to an affidavit, a draft defence, will not and cannot suffice to so satisfy this court. This must not be so since the mere appending of a draft defence to an affidavit is not to be taken as evidence upon which this court could properly act in considering such draft defence as being at the very least, potentially worthy of any credit from this court. The appending of a draft defence to an affidavit, is not even the equivalent of hearsay evidence as to the contents of that draft defence, much less, a clear expression by the deponent to that affidavit evidence, to which said draft defence has been attached. As such, whilst it is the required procedure, as per* ***Rule 13.4 (3) of the CPR*** *for a draft defence to be exhibited to the affidavit evidence in support of the application, the application must be supported by evidence on affidavit. See* ***Rule 13.4 (2) of the CPR.*** *That evidence must, of course, be evidence which this court can give credit to. The mere appending of a draft defence to an affidavit would not and could not achieve the objective enabling the court to give credit to the alleged facts as setout therein. Instead, such alleged facts must always be set out in the body of the affidavit which is being relied on, in support of the application to set aside. Once that has been done then it will be open to this court, to give such credit to such alleged facts, as the court believes that the same deserve".*

[27] Though not cited by any of the parties to this case, of relevance to the discussion at hand is the case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr. (a minor) by Rashaka Brooks Snr. (his father and next friend).** This case touched and concerned a scenario where the Learned Master had determined that in the absence of evidence containing the merits of the defence, the application to extend time to file a defence must of necessity fail. It is distinguishable from the case at bar but nevertheless important because it places focus on applying the overriding objective in dealing with applications like the present one.

[28] The brief facts are that the infant claimant received negligent medical treatment at the Cornwall Regional Hospital. The defendant was late in filing an acknowledgement of service and failed to file a defence even after being served a second time with an application for permission to enter judgment in default of

acknowledgement of service. When the defendant filed the application for extension of time, (after being served with an amended application to enter judgment in default of defence) it was in essence explained in the affidavit in support of the application that the defendant (the Attorney General) had not obtained sufficient instructions that would allow it to file a defence. This was therefore a situation in which the court had no defence to examine in order to make a determination regarding the merits of the defence.

[29] Brooks JA placed heavy reliance on the provision of Rule 1.1(1) of the CPR which states "These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly". He cited Lightman J in the case of **Commissioner of Customs and Excise V Eastwood Care Homes (Ilkeston) Ltd. and others** [all England Official Transcripts 1997-2008 (delivered 18th January 2000). At paragraph 8 of that judgment Lightman J said the following:

> *"The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules.* ***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 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, firstly, 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 merits 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.*

[30] I cite the case of **Rashaka Brooks** as being relevant to demonstrate that a defendant could in fact succeed in an application for extension of time to file a defence even in circumstances where the court is not put in a position to determine whether the defendant has a defence with merits. Even though she did

not specifically say so, this seems to be a part of Ms. Brown's contention based upon her reliance on the case of **Raymond Lewis**

[31] The case of Rashaka Brooks is to my mind very clearly distinguishable from the case at bar. The court was faced with a scenario in that case where the Attorney General a state agency with responsibility thrust upon it by virtue of the Provisions of the Crown Proceedings Act. That agency was depending upon information from another state agency. The functionary from the Attorney General's Department in the form of an Attorney at Law was very highly unlikely to have been in direct contact with the person or persons from whom she needed the information. Her access to the necessary information was circuitous. In this case a defence was put forward. The issue must therefore be whether such defence is viable.

[32] The defendant in this case is not in the unenviable position of the Ag Department and so the consideration in the **Rashaka Brooks** case should not apply. There was obviously opportunity to take clear and detailed instructions. Instructions were evidently taken, albeit perhaps not insufficient detail and/or was not utilized or treated with as it should have been by the 2nd defendant's legal representative/s or the instructions were simply not of such a nature as to allow her legal representatives to formulate a proper defence. Consequently I reject Miss Brown's contention that the principle derived from **Rashaka Brooks** and **Victor Gayle** ought to be applied in this case.

[33] If Mr. Christie is correct then the court cannot have regard to the information contained in the defence filed with the application for extension of time in making a determination as to whether the 2nd defendant has a defence with merits and for all practical purposes, the claimant would be left in position as if no defence at all was disclosed. The decision in **Ramkissoon** is still good law. It was applied in our Court of Appeal in **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1. **Ramkissoon** involved an application to set aside a judgment entered in default of defence. It could be argued that the principles relating to an

application to set aside a default judgment are not the same as in treating with an application to extend time to file a defence. Rule 13.4 which deals with an application to set aside a default judgment stipulates that the application must be supported by evidence on affidavit and that the affidavit must exhibit a draft of the proposed defence. Rule 10.3(9) simply states that "the defendant may apply for an order extending the time for filing a defence", without laying down any strictures as to format. Therefore in this regard Mr. Christie is incorrect; there is no rule specifically stating that the defence must be stated in the affidavit.

[34] The case at bar is clearly distinguishable from **Ramkissoon** in another material particular. In **Ramkissoon**, the defence was signed by the attorney whereas in the instant case we are dealing with a defence signed by the defendant herself. Ramkissoon very clearly did not turn on the absence of a document signed by the defendant but on the absence of a document sworn to which contained a sufficient disclosure of merit. The defence signed by the 2nd defendant is clearly not a document that was sworn, however, I am very clearly of the view that the court is at liberty to examine the defence in order to determine if the defendant has a defence of merit.

[35] Further, even if I am wrong in saying that the principle in **Ramkissoon** is not applicable to the facts of this case I am of the view that in applying the overriding objective of dealing with cases justly, the court should perhaps not ignore completely the existence of relevant information presented because it was not presented strictly speaking in the correct format as required by the procedure. Rule 1.1(2) enumerates matters that are relevant when seeking to deal with a case justly. One is not in my view limited to those considerations only. The fact that the rule says "dealing justly with a case includes" means just what it says "includes" which clearly cannot be interpreted to mean "limited to". I am in no way suggesting however that a wholesale disregard of rules of procedure is in any wise acceptable, I am simply saying that if in an instance such as this the court were to find that material amounting to a good defence is put forward in the draft

defence, but not contained in an affidavit, I would be hard pressed to ignore it for want of procedure.

[36] Stuart Sime in **A Practical Approach to Civil Procedure (18th Edition)** at paragraph **14.30** states the following:

> *"Any denial of an allegation in the particulars of claim must be backed up by reasons in the defence. A defendant who intends to put forward a different version of events from the one advanced by the claimant has to state the alternative version in the defence (r 16.5(2)). A denial must go to the root of the allegation in the particulars of claim, and must not be evasive. An equivocal denial may be taken by the court to be an admission. For example, stating that 'the terms of the arrangement were never definitely agreed upon as alleged' was held to be evasive and to be an admission that an arrangement was made in* ***Thorp v Holdsworth*** *(1876) 3 ChD 637. A denial that follows the wording of the particulars of claim too closely may result in a pregnant negative – a denial pregnant with an unstated affirmative case. For example, in Pinson v Lloyds and National Provincial Foreign Bank Ltd [1941] 2 KB 72 the claimant stated that the defendants had 'effected purchases and sales without having been authorized by the [claimant] to do so'. This was embarrassing, because it could have been a denial that the defendants entered into the transactions at all, or it could have been a denial of lack of authority pregnant with an affirmative case that they had the claimant's authority.*

[37] If the foregoing isn't sufficient, Rule 10.5 of the CPR provide as follows:

> *(1) The defence must set out all the facts on which the defendant relies to dispute the claim.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) In the defence the defendant must say –*
>
> *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;*
>
> *(b) which (if any) are denied; and*
>
> *(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.*
>
> *(4) Where the defendant denies any of the allegations in the claim form or particulars of claim-*
>
> *(a) the defendant must state the reasons for doing so; and*

(b) if the defendant intends to prove a different version of events from that given by the claimant,

The defendant's own version must be set out in the defence.

(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –

(a) admit it; or

(b) Deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence.

(7) A defendant who defends in a representative capacity, must say-

(a) what that capacity is; and

(b) whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12

[38] I will assess the viability of the defence put forward in the defence exhibited to Mr. Bailey's affidavit which is the same as the defence which was filed and which the defendant is seeking to allow to stand as having been filed in time. I agree with Ms. Brown's submission that in considering whether or not to extend the time to file the defence all the circumstances must be considered and that the court should not focus solely on the merits of the defence. This principle is clearly to be distilled from the **Victor Gayle** case. It is a relevant principle although that case concerned an application to set aside a default judgment. The court was quite clear however that the merits of the proposed defence were of importance. His Lordship in Dipcon (quoted in **Gayle's** case) was simply emphasizing the fact that the proposed defence is not the only important consideration.

[39] Certainly as it relates to the merits of the defence, Mr. Bailey did not in his affidavit speak to matters which would tend to show that the 2nd defendant had a defence with merit to the claim. A mere assertion that the 2nd defendant has a good defence on the merits of the claimant's claim and craving leave to pursue her defence, while indicating that a failure to allow this to be done will result in

grave injustice to the 2nd defendant does not in any way speak to the nature of the defence. Looked at in light of the provisions of Rule 10.5, the defence of the 2nd defendant is wholly lacking.

[40] In relation to Mr. Bailey's sworn evidence that he was advised that the claimant's properties which were taken and held by the 2nd defendant were returned, surely the defendant was obliged in a putting forward a defence, to offer an explanation as to the context/scenario/circumstances in which the properties of the claimant were taken and then returned. This would be necessary in order for the court to make a fair if cursory assessment as to whether the 2nd defendant would have any or any good reason for having taken the property in the first place. Clearly the fact of returning property taken, in and of itself, would not afford one a defence without more, to a claim of trespass to the claimant's property. There is nothing in the defence filed or in Mr. Bailey's affidavit which seeks to answer the claimant's claim that he was evicted without a lawful order of the court and that the defendant failed to handle the claimant's property with due care.

[41] I cannot help but agree with Mr. Christie's assertion that what has been advanced is the "old school" defence consisting of mere denials or statements and that certain matters were "not admitted" without the 2nd defendant bothering to offer her own version. The defence filed does not in the remotest sense adhere to the criteria as set out in the authoritative text of Stuart Simes and Rule 10.5 that an alternative version of events should be offered in circumstances where the defendant does not deny the occurrence of an event but has a different account as to how it happened. The defence as set out in the two affidavits of Mr. Bailey, combined with that exhibited to his affidavit is not in my view a defence with merit to any of the causes of action except in relation to defamation but this aspect of the matter will be dealt with shortly. I wish to point out that while the claimant may encounter difficulties establishing certain aspects of his claim, that is not a matter to be dealt with in the application before me.

ABANDONING PART OF CLAIM

[42] Another issue which arose was how the court should treat with an undertaking not to request default judgment in relation to parts of the claim as filed. The issue arose because during the course of the application when the court expressed the view that a statement in the defence of the 2nd defendant denying that certain defamatory assertions were made constituted a sufficient defence for the purpose of stating her defence to that cause of action, counsel for the claimant intimated that the claimant was prepared to abandon his claim for defamation as well as for breaches of his constitutional rights. So that even if the court took the view that prima facie, the 2nd defendant had a defence of merit to the claim for defamation, the court need not concern itself with that matter in considering whether an extension of time should be granted as counsel would give his undertaking not to request a default judgment on that aspect of the claim.

[43] The question of how the undertaking is to be treated with is now moot in the light of the fact that counsel has now filed a "Partial Notice of Discontinuance". It is the effect of this notice that must now be examined. The question arises as to whether this notice now operates to effectively sever the two aspects of the claim from the rest of it leaving intact only those aspects that the claimant wishes to proceed with. Mr. Christie submits that CPR 37.1(2) provides that a claimant who 'abandons' a claim to one or more remedies but continues with the claim for other remedies is not treated as discontinuing part of his claim for the purposes of CPR Part 37.

[44] Mr. Christie further submits that in the present case, the claimant is not 'abandoning' his claim for a remedy, he is discontinuing his causes of action against both defendants for defamation and breaches of his constitutional rights. This distinction is critical- otherwise, one can never truly discontinue a part of his claim as CPR Part 37 seeks to allow. His submissions continue that CPR 37.1(2) allows the Claimant to discontinue these parts of his claim at any time without permission of the court or any other party. Mr. Christie submits even further that

the defendant's argument that an award should not be made for defamation without the defendant being heard on the point and that an award for breaches of the constitution should only be a matter of last resort, has been rendered moot because of the filing of the Notice of Discontinuance.

[45] There is in my view no ban as a matter of law or principle on the defendant exercising the option to discontinue aspects of his claim. As the claimant's Attorney at Law has pointed out, Rule 37 governs this aspect of procedure. The remaining question is whether the procedure as set out in Rule 37.3 has been followed so that it can be said that the claimant has effectively abandoned the two aspects of his claim namely for redress under and by virtue of constitutional provisions and for damages for defamation.

[46] Rule 37.3 states:

> *(1)To discontinue a claim or any part of a claim a claimant must-*
>
> *(a) serve a notice of discontinuance on every other party to the claim;*
>
> *and*
>
> *(b) file a copy of it.*
>
> *(2)The claimant must certify on the filed copy that notice of discontinuance has been served on every other party to the claim.*
>
> *(3) Where the claimant needs the consent of some other party, a copy of the necessary consent must be attached to the filed copy of the notice of discontinuance.*
>
> *(4) Where the claimant needs permission from the court, the notice of discontinuance must contain details of the order by which the court gave permission.*
>
> *(5) Where there is more than one defendant, the notice of discontinuance must specify against which defendant or defendants the claim is discontinued.*
>
> *(6) A notice of discontinuance which does not specify against which defendants it is intended to discontinue is deemed to discontinue the claim or that part of the claim specified in the notice against all defendants.*

[47] There is nothing that has been brought to this court's attention that would make the court aware that the consent of the defendants is required in this case and so I proceed on the assumption/premise that it is not required. On the face of the document filed, it is in compliance with the provisions of Rule 37.3 and is therefore an effective notice of discontinuance.

CONCLUSION

[48] That being said, there is no defence, put forward, whether in any of the two affidavits of Mr. Bailey or in the document titled 'defence' in relation to the remaining aspects of the claim and the extension of time to file defence is therefore refused.

ADDENDUM

[49] This matter commenced on the 25th of May 2017. The time allotted for the hearing of the application was inadequate and therefore both sides were directed to file submissions in relation to a narrow point namely whether counsel for the claimant could properly orally abandon the claim for damages for defamation and for breaches of constitutional rights and then give an undertaking not to include these heads of damages in a request for default judgment.

[50] The matter was adjourned until the 21st of June 2017. Counsel for the claimant filed submissions and the partial notice of discontinuance on the 8th of June 2017. No submissions were filed on behalf of the 2nd defendant. The 2nd defendant was absent and her legal representative was not present on the 21st of June 2017. The time for the defendant to file submissions was extended until the 24th of July 2017 and the matter fixed for continuation on the 31st of July 2017. On the 31st of July 2017 Counsel Ms. Campbell who was not the one with conduct of the defendant's case was present but could not assist the court. The court reiterated then the need for the submissions. The matter was further adjourned until the 25th of October 2017. The time for the defendant to file submissions was extended until September 29th 2017.

[51] Not having received the submissions by the 29th of September 2017, I proceeded to conclude my judgment without the benefit of same. I had specifically sought the defendant's input on the effect of the filing of the notice of discontinuance, having made the observation that there would be no aspect of the claim remaining, in relation to which the 2nd defendant had put forward any material that could amount to a defence. The only aspect of the claim to which I took the view that there was a defence was the claim for damages for defamation. The effect of the discontinuance of that aspect of the claim would in effect completely deprive the defendant of any likelihood of being granted an extension of time. I should add that upon a brief perusal of the submissions that were belatedly filed on the 10th of October 2017, it does not seem to me that the 2nd defendant addressed that issue specifically.

Andrea Pettigrew-Collins
Puisne Judge (Ag.)