



[2023] JMSC Civ 108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 06261

BETWEEN	HENRY WEBSTER	CLAIMANT
AND	ROHAN MONTIQUE	DEFENDANT

IN CHAMBERS

Ms. Jamila Maitland instructed by Campbell McDermott for the Claimant

Ms. Althea Wilkins instructed by Dunbar and Co for the Defendant

Heard: May 10, 2023 and June 15, 2023

APPLICATION FOR PERMISSION TO FILE DEFENCE AND ACKNOWLEDGEMENT OF SERVICE OUT OF TIME-APPLICATION FILED WITH DEFENCE-APPLICATION NOT FILED AT THE SAME TIME AS AFFIDAVIT OF MERIT-FACTORS TO BE CONSIDERED BY COURT IN DECIDING WHETHER TO GRANT AN EXTENSION OF TIME FOR FILING DEFENCE- Rule 10.3(9), 26. (1)(2)(c), 1.1(1) (2) and 1.2 of the Civil Procedure Rules

MASTER L. JACKSON (AG)

INTRODUCTION

[1] The Claimant Mr. Webster filed a claim against the Defendant, Mr. Rohan Montique on the 29th of December 2014 as it relates to an accident that allegedly occurred on the 25th June 2010 along Barnett Road in the parish of St. James.

[2] By way of Application for Court Orders, on the 1st of July 2015, Master Ms. R Harris granted the Claimant permission for the Claim Form and Particulars of Claim, to be served on the Defendant by leaving the documents at the head office of the Advantage General Insurance Company limited at 4-6 Trafalgar

Road Kingston 5. It was also ordered that the Acknowledgment of Service is to be filed within 28 days and the Defence within 42 days of the date of service.

- [3] On the 14th of July 2016 the Claim Form, Particulars of Claim, Acknowledgment of Service Form and Defence Form were served on Advantage General Insurance Company pursuant to the orders granted by the Court.
- [4] The Defendant did not file an Acknowledgment of Service nor a Defence and as result, the Claimant, on the 13th of September 2016, filed a Request for Default Judgment on the basis that the time had expired for the Defendant to file an Acknowledgment of Service and a Defence.
- [5] Advantage General Insurance Company on the 8th November 2017 filed an Acknowledgment of Service indicating that they were served with the Claim Form and Particulars on the 14th of July 2016 and that they intended to challenge the order, as the Defendant cannot be located.
- [6] Subsequent to this, another Acknowledgment of Service was filed on the 27th of March 2018 where they indicated that the Defendant was now located in or about the month of March 2018 and they intended to defend the claim.
- [7] In addition to filing another Acknowledgment of Service, a Defence was also filed on the 27th of March 2018 and served on the Claimant's Attorney on the 4th of April 2018. On the 10th of October 2018, a Notice of Application for Court Orders was filed. This application sought among other things, permission for the Defence and Acknowledgment of Service both filed on the 27th of March 2018 and served on the 4th of April 2018 to stand. On the 10th of June 2019, the Affidavit of Mr. Rohan Montique, in support of the application to file Defence out of time was filed.
- [8] Almost 4 years after filing their Application for Permission to file Defence out of time, on the 5TH of May 2023, counsel for the Defendant filed submissions in support of their application. Counsel for the Claimant as a result of the late filing of submissions was given an opportunity to respond. I have considered the submissions and authorities cited by both of them.

[9] It does not appear from the file, that the Application for Default Judgment that was filed on the 16th of September 2016, which is prior to the application for permission to file the Defence and Acknowledgment of Service out of time, was ever addressed. It is evident that the outcome of the Defendant's Application for extension of time to file Defence and Acknowledgement of Service out of time, would also determine the Application for Default Judgment against the Defendant. The analysis of the issues will, however, focus on the Defendant's application.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[10] The Defendant's written submissions essentially are that the delay in making the application was not excessive or unreasonable and that the Defendant has shown that there is a good Defence. Counsel argued that as soon as instructions were received from the defendant, the application for permission to file Defence out of time was filed on the 10th of October 2018. Based on the authorities on the area, even where a Defendant does not apply to regularize his Defence, at the point of judgment being entered and assessment of damages, the Court found favour with permitting the Defence to stand and judgment set aside.

[11] Counsel for the Defendant prayed in aid the authority of **Alpine Bulk Transport co Inc v Saudi Eagle Shipping** [The Saudi Eagle] [1986] 2 Lloyd's LR 221 where the Court in that matter stated that "*the purpose of this discretionary power is to avoid injustice which might be caused if judgment followed automatically on default. The primary consideration is whether the Defendant has merits to which the Court should pay heed*". Reliance was also placed on **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy Supreme Court, Jamaica**, Claim no 2008 HCV 05707 judgment delivered 4th April 2011.

[12] As it relates to the issue of prejudice, it was also submitted that there is no prejudice to the Claimant, as the Defence was served and there would still be an opportunity for the Claimant to be heard.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[13] Counsel for the Claimant, did not provide written submissions as ordered by the Court, however, the Court permitted Counsel to submit orally in response to the Defendant's application. She urged the Court not to grant the Defendant's application on the following bases:

- a. the Application to file Defence out of time came after the Claimant filed their request for default judgment and this is prejudicial to the Claimant;
- b. the Affidavit is lacking as the Defendant has not established why the insurers could not locate him. It is not sufficient just to say that his insurers could not get through to him;
- c. while the Court should not embark upon a mini trial, it is not sufficient for the defendant to say that his motor vehicle was not involved in an accident without more;
- d. even if the Court determines that the Defendant has a good prospect of defending the claim, the delay in the application is egregious and should be a great factor. In this regard Counsel relied **on Flexnon v Constantine (Michele)** [2015] JMCA Civ 55 paragraph 27.

THE LAW

[14] Rule 10.3(9) of the CPR allows the Court to extend the time to file a Defence. CPR 26.1(2)(c) enables the Court to extend the time to comply with an order, direction or rule of the Court after the prescribed time for compliance has expired. None of the two rules provide the Court with any guidance in the exercise of its discretion to extend time. However, a number of authorities have provided the necessary guidance on what the Court should consider when determining whether to grant or refuse the application to extend the time to file a Defence.

[15] The principle governing the Court's approach in granting or refusing an application for an extension of time was summarized by Lightman, J in **Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Others** [All England Official Transcripts (1997-2008) delivered 19

January 2000] where he stated that ,*“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.”* The Courts in this jurisdiction have endorsed and adopted these principles, in a number of cases to include the oft cited **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 and **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)** [2013] JMCA Civ 16.

- [16] Most recently, in **Green v Green Et al** [2023] JMCA Civ 5 Dunbar-Green JA at paragraph 81, in examining the established principles from a number of authorities including **Fiesta Jamaica Limited** and **Rashaka Brooks**, in dealing with an application of this nature had this to say:-

“There is no rigid formula and the overriding objective should be paramount in the judge’s exercise of discretion whether to grant the application for extension of time to file a Defence”

She also stated at paragraph 101 that:-

“it is well-established that in considering whether to grant an extension of time in which to file a Defence, the Court should be guided by the overriding objective to deal with cases justly, in the context of settled factors among which are the length of the delay, the explanation for the delay, the merits of the Defence, the prejudice occasioned by the delay to the other party, the effect of the delay on public administration and the importance of compliance with time limits. Dealing with cases justly involves having regard to the appropriate allocation of the Court’s resources, saving expenses and ensuring that cases are dealt with expeditiously and fairly (rule 1 of the CPR). The general rule is that a Defendant who has been dilatory in the filing of a Defence must provide an acceptable explanation for that conduct as well as evidence of a viable challenge to the claim”.

- [17] Notwithstanding the lack of specific guidance in the CPR on the issue, it is clear from the aforementioned authorities, that in dealing with an application of this nature, I must examine the delay in filing the Defence, the explanation for the delay, the merits of the Defence, the importance of complying with time limits, the prejudice to the other party and the delay on public administration. In addition to these principles, the Court will keep in the forefront of its mind the overriding objectives of the CPR, that is, that the Court is to deal with cases

justly by ensuring that it is dealt with expeditiously and fairly. This is critical in light of Rule 1.2 which states clearly that the Court should seek to give effect to the overriding objective, when interpreting the rules or seeking to exercise any powers under these rules.

THE DELAY

- [18] The first issue the Court must address is whether the delay in filing the defence was inordinately long. The Claimant effected service of the Claim and Particulars of Claim on the 14th July 2016 on the Defendant through his insurers, Advantage General Insurance Company. The Acknowledgment of Service was due 14 days and the Defence was due 42 days after the Claim Form and Particulars of Claim were served on them.
- [19] The Acknowledgment of Service was filed by Advantage General Insurance Company on the 8th November 2017, one year and three months after the Claim Form and Particulars of Claim were served on them. They indicated in that Acknowledgment of Service that they intended to challenge the order as the Defendant could not be located. From the file, it appears an application was filed by Advantage General Insurance Company, to set aside the order for substituted service, but this does not appear to have been pursued.
- [20] Subsequently, another Acknowledgment of Service was filed on the 27th of March 2018 wherein, Advantage General indicated they had now located the Defendant and notified him in or around March 2018 and they intended to defend the claim. Simultaneously, they filed a Defence on the same date.
- [21] The Notice of Application for permission to file Defence out of time was filed on the 10th of October 2018, that is eight months after the Defence was filed. The Affidavit from Mr. Rohan Montique in support of this application was filed on the 10th of June 2019; that is, over a year after the Defence was filed and nine months after the application for permission was filed. Then the submissions in support of the application were filed on the 5th of May 2023 almost 4 years after the Affidavit in Support by Mr. Rohan Montique was filed.
- [22] In **Hoip Gregory v Vincent Armstrong [2013] JMCA civ 36**, the Court stated that “... *the Court should include in its consideration the principle that time limits*

established by the CPR should be observed". I find that the Defendant (through his insurers) in this matter has failed in many respects to comply with the timelines established by the CPR. The first delay concerns the filing of the Acknowledgment of Service. This was due 14 days after they were served with the documents, it was filed one year and 3 months after wherein they stated they could not locate the Defendant and they intended to challenge the order.

[23] The second delay concerns the Defence filed by the Defendant. The Defence was due 42 days after the Claim Form and Particulars of Claim were served on them. They were served with the Claim Form and Particulars of Claim Form on the 16th of July 2016 yet, the Defence was filed on the 27th of March 2018. This would be about one year and 6 months after they were served with the documents clearly in contravention of the timelines established under the CPR. Interestingly too, is the point that from the Affidavit of Mr. Montique, his insurers located him January 2018, yet the Defence was filed March 2018.

[24] The third delay concerns the Application for Permission to file the Defence out of time. This application was filed on the 10th of October 2018, almost eight months after the Defence was filed. The Affidavit of Mr. Rohan Montique in support of the application was filed on the 10th of June 2019, which would be about nine months after the application was filed.

[25] In this matter, it is clear that the Defendant has failed to abide by the various timelines established by the CPR and even in seeking to make this application for permission to file the Defence out of time, has not shown this Court that they have the tendency to not be timely. The Court cannot ignore the extensive/excessive delays on the part of the Defendant that started with the late filing of the Acknowledgment of Service, and the Defence, then the Application to file the Defence out of time, the Affidavit in Support that all cumulated with the submissions in support of the application which were filed about four years after the application was made.

[26] I am constrained to find that the various delays by the Defendant cannot be viewed as minimal. Cumulatively, the filing of the Defence one year and six months after the Defendant insurers were served with the documents and the

Notice of Application to extend time being filed almost eight months after the Defence was filed are without a doubt inordinately and egregiously long. Even if one were to examine the issue of delay from the other point of view, that is, that Mr. Montique's insurers located him in January 2018, and that is when the various documents were filed, the delay is still long.

My position that these delays should be described as such, is confirmed when one examines the decision of Dunbar-Green JA in the matter of **Green v Green Et al**. In examining the facts in that case she had this to say:-

"...That apart, the delay of 25 days in filing the proposed Defence, though unacceptable, would not, in my opinion, amount to an inordinate delay in the circumstances. But, the position is quite different as regards the length of the delay in filing the application to enlarge time (approximately 11 months). That was both inordinately lengthy and egregious."

THE EXPLANATION FOR THE DELAY

[27] In **Peter Hadadd v Donald Silvera** unreported SCCA No 31/2003 delivered on July 31, 2007 the Court said that *"in order to justify a Court in extending time during which to carry out a procedural step, there must be some material on which the Court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules."*

[28] Rule 11.9(2) of the CPR requires all notices of application for Court orders to be supported by Affidavit evidence unless a rule, order or practice direction provides otherwise. Master Orr (as she then was), in the matter of **Wright v AG [2022] JMSC Civ 25** in examining this rule in relation to an Application to Extend time to file Defence stated that, *"Applications to extend the time to file a Defence have a further requirement that the supporting Affidavit must include evidence outlining the Defence to satisfy the requirement of a Defence of merit and exhibit the draft Defence. The Affidavit must also explain any delay. While the required evidence need not be in one Affidavit, all of the evidence must be before the Court for the application to be properly before the Court for the application to be heard."*

- [29] From the cases on the point, it is clear that there must be “sufficient material which could provide a good reason for the delay in failing to comply with rule 10.3(1) of the CPR” (see **Philip Hamilton v Frederick Flemmings and Gertude Flemmings** [2010] JMCA Civ 19). See also **Thamboo Ratnam v Thamboo Cumarasamy** [1965] 1 WLR 8, at page 12, and the exceptional case, **Rashaka Brooks**. It is imperative that the party that wishes the Court to exercise its discretion, must explain the reason for the delay. The explanation must be acceptable and reasonable in the circumstances. In **Rashaka Brooks**, often cited as an exception to the rule, the explanation for the delay in filing a Defence to the Claim was that it was awaiting a scientific report that was germane to the issues in the case. The deponent for the Attorney General’s Department had also explained to the Court’s satisfaction, “*the efforts made to secure the evidence concerning the elements of merit and the reason for its absence*”.
- [30] In **Attorney General of Jamaica v Roshane Dixon & Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ23, Harris JA stated that “*the Court in Fiesta, and Haddad v Silvera, pronounced that some reason for the tardiness must be given, even if it is insufficient. The proposition that the inadequacy of a reason does not in itself prevent the Court from assisting a tardy applicant does not mean that the Court will look with favour upon such an applicant in all cases. Failure to act within the requisite period is a highly material criterion, as Smith JA stated in Haddad v Silvera. The weaker the excuse, the less likely the Court will be inclined to countenance a tardy applicant who seeks the Court’s aid to extend time*”.
- [31] In **Green v Green Et al**, the Court of Appeal stated that the explanation of an administrative oversight in the Attorney’s office is questionable and noticeably absent from the Affidavit of the Attorney Mrs. Brown, was any established protocol in her office that was breached by the then associate.
- [32] The first explanation from the insurers for the Defendant in this matter at hand is contained in the Acknowledgment of Service dated the 27th of March 2018. It reads “...the Defendant was located in or around March 2018”. It is also observed that Counsel in her written submissions stated that it took some time

for his insurers to locate him to inform him of the suit against him. This is not acceptable as an explanation, as it does not meet the requirements as stated in rule 11.9 (2) of the CPR and established by the cases for the explanation to be in Affidavit form.

[33] The sole Affidavit in support of the application is from Mr. Rohan Montique with his draft Defence attached. It states that in or around January 2018, he was contacted by Dunbar and Co. and gave full instructions March 2018. His explanation for the delay in filing his defence is that his insurers had to process the documents and verify the validity of the policy and then locate him. He went on further to say that he was informed by Dunbar and Co that it took them and the insurers quite some time to find him and that he has not been insured with Advantage General Insurance Company. He did not state how long he ceased to be insured with them.

[34] I am very mindful that Mr. Montique was not personally served in this matter and that it is his insurers that were served. This however, does not absolve Mr. Montique from providing an explanation concerning the delay in filing his defence. It is noted as well that his explanation would only account for the period January 2018 (when he was located) to March 2018 (when the defence was filed). Apart from saying that his insurers took some time to locate him, there is nothing in his Affidavit nor is there an Affidavit to explain the steps that Advantage General Insurance Company took to locate him. His Affidavit does not even indicate from his end, possible reasons why it would in any event take his insurers so long to locate him. Did he relocate from his place of residence that the insurers had on file for him? This is critical since the address on the Claim Form is the same as indicated in his Affidavit in Support of his Application.

[35] Additionally, there is no explanation to account for the delay even after locating him (that is January 2018), in filing the application for extension of time to file Defence (October 10, 2018), and his Affidavit in support of the application to file Defence out of time (June 10, 2019). Any Affidavit in support of the application must state the steps that were taken to locate the Defendant, to obtain from him the instructions and the reasons why his instructions were not forthcoming when they were to be received. In addition, there should be an

explanation for the delay in filing the draft Defence and Affidavit of merit where it is not filed with the Notice of Application.

[36] In order for the Court to properly assess whether the explanation for the delay is reasonable, it is imperative, that where the Defendant has failed to comply with the time standards as established by the CPR, then there must be an explanation for every single failure. As stated earlier, the explanation from Mr. Montique only accounts to the late filing of his Defence. Whilst the Court acknowledges that an explanation has been given, I do not find that it is reasonable or adequate in the circumstances.

[37] The Court of Appeal in **Attorney General of Jamaica v Roshane Dixon & Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ23 stated that, *“the bare statement that the delay was due to the inability of the appellant to obtain adequate instructions to assist in complying with the requisite rule is highly unsatisfactory. This cannot be regarded as a proper explanation for the delay.”*

[38] In a nutshell, it can be said that the explanation from Mr. Montique is simply that I could not have been located and as such my insurers could not get proper instructions. Similar to the stance taken by the Court in **Sheldon Dockery** cited above, I too cannot regard that in this instant case, merely stating that I could not be located without more, can be viewed as a proper or reasonable explanation for the delay.

[39] From the foregoing, I find that the Defendant has not proffered a good or reasonable explanation for the delay.

THE DEFENCE

[40] The authorities have shown that, on an application to enlarge time to file a Defence, the salient issue is whether, on the evidence relied on by the party at fault, the Court can, at the very least, form a preliminary view on the likely outcome of the case.

[41] In Mr. Montique’s Affidavit in support of his application, he denies that his vehicle was involved in any accident on Barnett Street in the parish of St. James

on the 25th of June 2010. He stated that his wife and himself are the only drivers and that his wife too denies being involved in an accident on the date time and place in question. There is a draft Defence attached but I am reminded that the Draft Defence is not evidence and so what is contained in that document cannot be considered evidence before the Court. It is what is intended to be put before the Court. The evidence of merit of the Defendant's case has to be contained in the Affidavit supporting the application. See **Green v Green Et al** and also **Kimaley Prince v Gibson Trading & Automotive Limited** (GTA) [2016] JMSC Civ 147. There, McDonald J placed reliance on **B & J Equipment Rental Limited v Joseph Nanco**, [2013] JMCA Civ 2 where she stated the following at paragraph 22:-

“Having regard to the foregoing, it is apparent that the Affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence...”

[42] Whilst I am also reminded that the Court is not to embark on a mini trial, I observe that the Affidavit in support (i.e. Affidavit of merit) in this matter is sparse. All the Defendant has done is deny being involved in an accident and that his wife who also drives the vehicle denies being involved in an accident on the date in question. Compared to the Particulars of Claim of the Claimant that outlines in details the Defendant's registration plate and that it collided in the rear of the vehicle that she was travelling in, and where exactly it occurred, merely stating that his vehicle was not involved in an accident in light of this is not sufficient. The Defendant has not denied owning the motor vehicle with the registration plate as indicated by the Claimant and thus, he would need to give more details in his Affidavit as to why he is saying that his vehicle was not involved in any accident for the Court to make a proper assessment as to whether his Defence is meritorious.

PREJUDICE TO THE OTHER PARTY

[43] As it concerns the issue of prejudice, the Defendant's Affidavit state that if the Court were to grant the orders sought in this application it is unlikely that the Claimant will suffer any real prejudice. Counsel for the Defendant in her

submissions noted that the trial date could also be met and that, no judgment was yet entered for the Claimants.

[44] The Claimant's Attorney on the other hand, in her oral submissions noted that there would be prejudice to the Claimant if the orders being sought were granted. She noted that the Claimant's filed on the 13th of September 2019 a request for Default Judgment and it is after this request was filed, that the Defendant filed an Acknowledgment of Service.

[45] As pronounced in **Haddad v Silvera**, the payment of costs does not ameliorate any hardship which would be encountered by a party in circumstances of delay. Merely stating that the Claimant will not suffer prejudice is not sufficient. The Claimant has filed his claim against the Defendant from as far back as 2014 as it relates to an accident that allegedly occurred in 2010. The Claimant took the necessary steps to have his claim brought before the Court and has abided by the timelines given. They have also filed a request for Default Judgment as far back as 2016 and it is only after this request was filed, that the Defendant filed an Acknowledgment of Service on the 8th of November 2017 and then again 27th of March 2018, having been served with the claim from the 14th of July 2016. Any attempt to deprive the Claimant in these circumstances, would be unduly prejudicial to them.

[46] In keeping with its duty to regulate the pace of litigation, the Court has adopted a strict approach in giving consideration to the application for an extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay with complying with the rules. **In Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co SCCA No 18/2001 delivered on 11 March 2002**, Panton JA (as he then was) speaking to the Court's reluctance to assist tardy litigants, said:

"In this country, the behaviour of litigants, and, in many cases, their attorneys-at-law, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions. The widespread nature of this behaviour is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expectation that they should be followed without question or demur here. ... For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has

to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

[47] I am also further reminded that *"in our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application"*.

Flexnon v Constantine [2015] JMCA 55.

[48] As gleaned from the authorities cited above, there are several factors that the Court should consider in determining whether to grant an extension of time to file a Defence. The overriding objective of dealing with cases speedily and justly, the delay, the failure to provide a good explanation, the lack of a meritorious defence and the prejudice to the Claimant if the application is granted, have all weighed heavily on my mind. Of significance in this application however, is the delay and the wanton disregard by the defendant of the timelines established by the CPR.

CONCLUSION

[49] The Defendant has failed to comply with the various timelines as established by the CPR. He has also not proffered a good explanation for the numerous delays in this matter, particularly, the delay in filing his defence as well as his application for permission to file his defence out of time. Additionally, it cannot be said that the Defendant has established that he has a meritorious Defence from a reading of his Affidavit filed in support of his application. There being the likelihood of prejudice to the Claimant if the application is granted, and the interests of justice not being served, the application to extend time to file Defence is denied.

ORDERS

1. The Applicant/Defendant's Application to file its Defence and Acknowledgment of Service out of time filed October 10. 2018 is refused.

2. Judgment is entered against the Defendant in Default of filing an Acknowledgment of Service.
3. Leave to Appeal Granted.
4. Stay of Execution of this Judgment granted pending Appeal.
5. Applicant to prepare file and serve order.