[2023] JMSC Civ 129

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV02501

BETWEEN	**HEADLEY GRAY**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**SUPERINTENDENT LEON CLUNIS**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Khadine Colman instructed by Colman and Associates for the Claimant

Ms. Kristen Fletcher instructed by Director for State Proceedings for the 1st and 2nd Defendant

Heard: May 18, 2023 and July 12, 2023

Civil Procedure Rules-Application for permission to file defence out of time-CPR 10.3(9), Application to enter default judgment-CPR 12.3(1), CPR 12.3(6)

MASTER L. JACKSON (AG)

INTRODUCTION

[1] The claim filed on the July 3 2018 by Constable Headley Gray against the 1st and 2nd Defendants is that on August 16 2012, the 2nd Defendant, being the agent of the 1st Defendant and whilst acting in the course of his duty, seized the Claimant's motor car at Greenwood in the parish of St. James. As a result of the seizure, Constable Gray avers that he has suffered loss and expenses. The total amount being claimed is 14,626,000 million dollars.

[2] The 1st Defendant filed an acknowledgement of service July 27, 2018 on behalf of the itself and 2nd Defendant which is within the time frame of 14 days as stipulated by the CPR. The defence was not filed within 42 days as prescribed by the rules and as a result, the Defendants filed an application for extension of time to file defence on October 24, 2018. The application was accompanied by an affidavit sworn to by Carson Hamilton. A second affidavit was sworn to by him and filed March 14, 2019.

[3] It is apparent from the file, that the defence's application was not dealt with, but on October 4 2021, the Claimant filed a request for default judgment to be entered. Though the matter before me concerns the Defendant's application. It stands to reason that the outcome of the application for extension of time to file defence would determine the issue regarding the entering of default judgment against the Defendant. The analysis of the issues will focus on the Defendant's application to extend time to file defence.

[4] As an aside, the court queried from Ms. Fletcher what caused the delay in having her application filed October 24, 2018 only being heard May 18, 2023. She informed the court that it is the Registrar who was responsible for setting dates and that the date was not within her control. Whilst I am reminded by rule 11.4 of the CPR, which states, in part, that applications in writing are deemed made on the date when they are received by the court's registry, I also remind counsel that they too have a duty to follow up and ensure that their matters are dealt with in a timely manner. Having filed an application of this nature involving events that occurred in 2012, it would be incumbent on counsel to communicate the urgency to the registry and get an earlier date. The Court of Appeal in **Wright v Palmer and Salmon [2021] JMCA Civ 32** confirms this duty when it stated that *"it is the duty of a litigant, under the CPR, to assist the court in achieving the overriding objective, especially in ensuring that cases are dealt with expeditiously and fairly (rule 1.3). It is entirely the duty of the litigant to ensure that time tables are met".*

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[5] Ms. Kristen Fletcher for the Defendant made oral submissions in relation to her application. She started off by indicating that there was no delay on the part of

the Defendant in the hearing of the application for extension of time. Any delay concerning the hearing of the application is not to be attributed to the Defendant. Her view is that it is the Court that is responsible for setting hearing dates. As soon as the Court informed her of the date, she served the Claimant with the application on April 11, 2023, but a courtesy copy was served from October 25, 2018 while they awaited the hearing date.

[6] As it concerns any delay concerning the defence and the application, she posited that the defence was due October 22, 2018 and the Defendant's application filed October 24, 2018. This cannot be said to be inordinately long. The affidavit filed in support of the application indicated that the Chambers was waiting on instructions from the Commissioner of Police and as soon as those instructions were obtained another affidavit with draft defence was filed. She relied on the authority of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Senior (his father and next friend) [2013] JMCA Civ 16** and **McBean v AG [2019] JMSC Civ 243.**

[7] As it relates to the defence, she further submitted that there is merit to the defence as contained in the affidavit of Carson Hamilton. She submitted that the defendant had reasonable and probable cause to seize the motor vehicle. In relation to who can swear to the affidavit, she maintained that hearsay evidence can be used in interlocutory applications and that both affidavits are proper and comply with the CPR.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[8] Counsel for the Claimant relied on a number of authorities in its submission against the Defendant's application. The first submission by Counsel is that based on the authority of **Fiesta Jamaica Ltd. v National Water Commission [2010] JMCA Civ 4**, the affidavit does not provide the reason as to why they should be allowed an extension of time to file a defence as the defence does not present any triable issue.

[9] Ms. Coleman further opined, that the defence presented does not justify why the Claimant's motor vehicle was seized for years even after attempts to

retrieve the motor vehicle. In relying on the authority of **Wright v AG [2022] JMSC Civ 25** it was also argued that there is no certainty that the file provided by the Attorney General to counsel had an identifiable source and that a statement was taken from Superintendent Leon Clunis.

[10] As it relates to the delay, Counsel's argument was twofold. First the Attorney General allowing five years to pass without securing a date for the hearing of their application which was egregious. That this delay is prejudicial to the Claimant. Second, they have not accounted for the difficulty in obtaining the necessary instructions from August to October and the steps taken to overcome them. The upshot of their submission is that the Defendant did not act within a timely manner and as such they should not be allowed after five years to file a defence to the claim,as this would be prejudicial to the Claimant.

ISSUE

Whether an extension of time should be granted for the Defendants to file and serve their Defence.

THE LAW

[11] 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.

[12] 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 often 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.**

[13] Most recently, in **Green v Green etal [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".*

[14] It is therefore important, that in dealing with the application by the Defendants, I must examine the delay in applying to extend the time to file a defence, the explanation for the delay, the merits of the application/defence, the importance of complying with time limits, the prejudice to the other party and the delay on public administration.

THE DELAY

[15] The first issue the court must address is having regard to the facts in the matter, whether the delay in filing the application was inordinately long. The Claimant served the Defendants the claim and particulars of claim on July 23, 2018. The

acknowledgment of service was filed July 27, 2018 by the 1st Defendant on behalf of itself and the 2nd Defendant.

[16] Having filed an acknowledgment of service, the defence was due 42 days after the claim was served on the defendant. That would mean that the defence was due October 22, 2018. The defence was not filed.

[17] 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 Defendants whilst abiding by the time frame to file an acknowledgement of service, only failed in filing their defence on time. The defence should have been filed October 22, 2018. Having not filed it within the requisite time frame, the Defendants filed an application for extension of time to file defence on October 24, 2018 supported by an affidavit from Mr. Carson Hamilton. A second affidavit was filed by Carson Hamilton on March 14, 2019 with an unsigned draft defence exhibited to same.

[18] The delay in the application made by the defence in this case cannot be viewed as inordinately long. The Defendants realising, they have not met the deadline of October 22, 2018 filed their application for extension of time to file defence two days after with an affidavit in support sworn to by Mr. Carson Hamilton. In **Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockey [2013] JMCA** Civ. 23 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.

[19] The second affidavit of Mr. Hamilton with the draft defence attached however was filed March 14, 2019. That is about 5 months after the application was filed. The filing of this affidavit could be viewed as long, however, given that the relevant application with supporting affidavit was filed two days after the defence was due, and the circumstances of this case wherein, up to when the application was filed, the Attorney General's Chambers had only obtained "some" instructions from one of its agencies (MOCA) and was still awaiting

instructions from the Commissioner of Police, cumulatively it cannot be said that the delay in filing the application was long.

[20] Master Mott Tulloch-Reid (as she was then) in the matter of **McBean v AG [2019] JMSC Civ 243** where the application and supporting affidavit were both filed on May 2, 2019 and a second affidavit was filed on September 17, 2019 said that *"…the delay in making the application was minimal. The application was made one month after the initiating documents were served and up to that time, the instructions from the Office of the Commissioner of Police had still not been received. I am of the view that the Defendant has shown a desire from the get go to participate in the proceedings and has, in this case, acted in a timely manner".*

[21] In any event, even if one were to argue that the time frame from the filing from the application to the second affidavit with the draft defence is long, the length of the delay is only one factor the court should consider in determining whether to grant the application. Rattray J stated in **Devon Davis v Karen Marajah [2019] JMSC Civ. 7** that-

> *"The length of the delay is a consideration that strongly goes against granting the Application for an extension of time, without some valid and/or reasonable explanation being advanced for the delay. However, the mere fact of a delay ought not to be the determining factor, as the Court must also consider all the other factors as a whole."*

THE EXPLANATION FOR THE DELAY

[22] 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."*

[23] Rule 11.9(2) of the CPR requires all notices of application 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 application to extend time had this to say *"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".*

[24] 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" **(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 Brook** 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".

[25] In **Attorney General of Jamaica v Roshane Dixon & Attorney General of Jamaica v Sheldon Dockery**, 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".*

[26] Mr. Carson Hamilton Crown Counsel within the Litigation Division of the Attorney General's Chambers, swore to the affidavit that was filed with the

application. In it, he states that the Chambers obtained the claim form and particulars of claim from the Claimant on July 23 2018 and filed an acknowledgement of service on July 27 2018. The Chambers then by letter dated August 15, 2018 sought to obtain instructions from the Major Organized Crime and Anti-Corruption Task Force in order to facilitate the preparation of the defence. On August 17, 2018 they received some instructions, however, further to the review of the instructions, it was apparent that further instructions were needed from the Office of the Commissioner of Police. A letter was prepared August 22, 2018 to the Commissioner's Office and to the date of filing the application, these instructions were not obtained. As a result, the application was made requesting further time to obtain the instructions and to file the defence. He further stated that the delay was not meant to be a deliberate disregard for the rules of the court.

[27] A second affidavit was filed on March 14, 2019 by Mr. Carson Hamilton. He does not explain the delay in filing same, but in it he stated that the information they requested from the Office of the Commissioner of Police was obtained November 2, 2018. This information was used to prepare the draft defence that was attached to his second affidavit.

[28] The particulars of claim filed by the Claimant, avers that on or about August 16 2012, the motor vehicle in question was in the possession of the Claimant's nephew when it was seized and taken by the "3rd Defendant, being the agent and or servant of the 1st Defendant while acting in the course of his duty". It is apparent from this that the Claimant himself was not present and thus his information concerning the seizure was given to him by someone else.

[29] His particulars of claim also state that the motor car was not returned, and as a result through his counsel a letter was sent to the then Assistant Commissioner of Police, Devon Watkis and Mr. Nigel Parke, Legal Advisor of MOCA by his then Attorneys-at-Law Murray & Tucker. This letter was also copied to then Commissioner of Police, Leon Clunis. It further states that within days, MOCA responded and arrangements were made for the Claimant to meet Commissioner Clunis at his office. That meeting did not yield any benefit.

[30] The very particulars of claim itself confirms that there are a number of persons/agencies that the Attorney General's Chambers would need to obtain information from in order to prepare a defence. In fact, mention is made in the particulars to a 3rd Defendant, but there are only two Defendants named in the claim. Needless to say, MOCA, the Office of the Commissioner of Police are just perhaps the two obvious entities that the Chambers would need to liaise with.

[31] This is not a situation where the Defendant speaks directly to his Attorney. Notwithstanding that Superintendent Leon Clunis is listed as the 2nd Defendant, the Chambers would still need to ascertain in light of the particulars of claim (especially since the Claimant himself was not present when his vehicle was seized), who exactly were the police officers/entities involved in the seizure, get instructions from them and then prepare the defence.

[32] In light of the foregoing, I find that the Defendants have to my satisfaction provided a reasonable explanation for the delay. The explanation was not limited to the delay in filing the application, but also in filing the affidavit of merit with the draft defence attached.

[33] Albeit that I do believe that the explanation provided is sufficient, 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. **(see Dunbar-Green JA in Green v Green).** That is to say, whether there is merit to the Defendant's defence or as Shelley-Williams J framed it in **Hyatt v Shirley Walker [2021] JMSC Civ 168** "does the defendant have an arguable case?". This will be examined below.

THE DEFENCE

[34] Applications to extend the time to file a defence must be supported by affidavit evidence which outlines the facts being relied upon to defend the claim. This affidavit is often called the affidavit of merit. Morrison JA, as he then was, in **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2** noted that the affidavit of merit must demonstrate a 'prima facie defence.' This position

was followed in **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, supra**, then 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…'*

[35] In examining the affidavit, I will first examine the issue of who can swear to the affidavit of merit. In **Green v Green etal** the Court of Appeal examined the affidavit from the Attorney Mrs. Brown that was filed with the application for extension of time to file defence. Dunbar-Green JA had this to say *"Although hearsay evidence is admissible in interlocutory applications (rule 30.3 of the CPR), the affidavit from Mrs Brown was bereft of any evidence dealing with the merits of the defence and, therefore, would not have disclosed a real prospect of the respondents successfully defending the claim or a "sufficiently meritorious case" for the learned master to consider. Counsel only made a bald assertion at para. 11 to the effect of having a belief that the respondents had a good prospect of successfully defending the claim, and that the interests of justice required that the case be decided on the merits. Furthermore, it had not been shown that, whether based on personal knowledge or information and belief, "she could swear positively to the facts on which the [respondents relied]" (see Attorney General of Jamaica v John Mackay). And, there was nothing in the affidavit to suggest exceptional circumstances that would justify a grant of the order, in the absence of evidence of merit"*

[36] A similar situation confronted Master Orr in the matter of **Wright v AG.** In that matter the Defendant's affidavit states the source of the information on which the Defendant intends to rely as being information taken in her review of the file in the Attorney General's Chambers. In rejecting the affidavit as not being one of merit Master Orr had this to say *"a reasonable inference is that the information in her affidavit which speaks to how the accident happened is not within her personal knowledge. Who then did this information come from as she simply states that it came from the Defendant's file? How then does the court*

properly assess the Defendant's defence if the source of this evidence is unknown? There is no identifiable source of this information."

[37] **Wright v AG** should be compared to **McBean v AG**. In the former, although the Attorney General alone was sued, the Claim involved a motor vehicle accident, where the Claimant alleges that a motor vehicle owned by the Defendant which was driven by a named police officer, collided in his motor vehicle the Claimant was driving. In the latter, the Claim was against unnamed Police Officers for a claim of Malicious Prosecution. Counsel for the Claimant in **McBean v AG** argued that the Attorney from the Attorney General's Chambers was not the appropriate person to swear to the affidavit of merit. In dealing with the issue, Master Mott Tulloch-Reid (as she then was), relied on Lightman J's decision in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and ors [All England Official Transcripts (1997-2008) delivered 19 January 2000**], wherein he states *"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"* to determine the issue.

[38] In dealing with the issue, she further opined that *"in the case at bar, the Attorney General is being sued. She is the only Defendant named. The Particulars of Claim refers only to police officers acting as agents of the Crown. It does not at any time name the police officers. It is therefore my view that a sweeping rule should not be made against attorneys-at-law swearing affidavits in circumstances where the party who is being sued is the Attorney General of Jamaica although the claim is really against servants and/or agents of the Crown who may not be immediately available to sign initiating documents but who could be available as witnesses on behalf of the Attorney General who must face the claim*".

[39] She then ruled that *"Mrs Clarke is able to properly swear to the affidavit. She has indicated the basis on which she was able to do so, by stating that she received instructions and also from reviewing the records of the Defendant. Her Affidavits combined have helped me to determine the source of her instructions – she said she was awaiting instructions from the Commissioner of Police and*

it would appear that those were received so that she could file the Supplemental Affidavit and a draft defence in September 2019".

[40] I am also reminded that hearsay evidence is acceptable in interlocutory proceedings and I am also guided by Brooks JA in the decision of **Rashaka Brooks** when he stated *"applying that (overriding objective) principle is that there should not be an inflexible stance where the court is given a discretion. Generally, each case is to be decided on its own facts".*

[41] In examining the issue of who can swear to the affidavit of merit, I find that the matter of **Jamaica Record Limited et al v Western Storage Limited Supreme Court 37/89** is significant**.** Although this matter involved an application to set aside default judgment, I filed the analysis by the Court of Appeal on affidavits of merit to be applicable and useful. In this matter, the respondent argued that in house Attorney for the appellant could not swear to an affidavit of merit as he had no personal knowledge. They relied on **Ramkisoon v Olds Discount Co. (TCC) Ltd (1961) 4 W.I.R 73.** The Court of Appeal distinguished Ramkisoon and noted that the affidavit in that case was sworn to by a solicitor who had no personal knowledge of the facts stated in the defence. In the matter before them, the affidavit was signed by Counsel who is in the in house Attorney and Secretary for the Appellants and he was authorised to swear to the affidavit by them.

[42] In the instant case, Mr. Carson Hamilton is Crown Counsel within the 1st Defendant's Chambers and he swore to two affidavits. In his first affidavit, he indicated that the delay in filing a defence is due to the fact that whilst the Chambers has received some instructions on August 17, 2018, it is not sufficient and additional instructions are required from the Commissioner of Police. In the second affidavit, he states that the facts stated therein are true to the best of his knowledge, information and belief as taken from the file held at the Chambers. He was also advised by the Attorney with conduct on behalf of the Defendants Ms. Kimberley Clarke, that instructions were received from the Office of the Commissioner of Police on November 2, 2018.

[43] Having regard to the numerous authorities on the issue, and given the circumstances of this case and based on the particulars of claim filed by the Claimant, I find that Mr. Hamilton's affidavits have been properly sworn to and he has outlined clearly the source of his information. That is, instructions received from the Office of the Commissioner of police, the file held at the Chambers and Ms. Kimberly Clarke the Attorney with conduct of the matter in the Litigation Division.

[44] The second issue I must examine, is what must be contained in the affidavit of merit. As the name suggest, the affidavit must demonstrate that the Defendants have a meritorious defence. The defence should raise triable issues and should not be fanciful. Whether the Defendants will succeed on their defence is not an issue for the court at this stage. It is sufficient if the Defendants are able to show that they have a good defence on the merits. I am also reminded that whilst the affidavit filed exhibited a draft defence, it 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 would have to be contained in the Affidavit supporting the application.

[45] The affidavit at paragraph 6 (i) to (ix), outlines the defence. In summary the 1st Defendant indicates that the 2nd Defendant had reasonable and probable cause to seize the motor car purportedly owned by the Claimant. The seizure was conducted through a joint operation with local and international entities based on intelligence received. Subsequently, notices and a letter were sent to the Claimant who failed to follow the instructions to retrieve his vehicle.

[46] Whether there was reasonable and probable cause by the 2nd Defendant when the motor car was seized. Whether the seizure was lawful and whether the Claimant failed to mitigate his losses by following the instructions to retrieve his motor vehicle when he was contacted/informed so to do, are indeed triable issues. What has been raised in the Affidavit of Merit is more than fanciful in the circumstances.

PREJUDICE TO THE OTHER PARTY

[47] As it concerns the issue of prejudice, the Defendant's affidavit does not state whether if the court were to grant the orders sought in this application if it is unlikely/likely that the Claimant will suffer any real prejudice and the due administration of justice would not have been done.

[48] Nevertheless, the court should consider this factor in determining whether to grant the application. It is to be noted that the alleged incident occurred August 16, 2012 and the claim was filed July 3, 2018. This would mean that the claim was filed in the year that the claim would have become statute barred. The particulars of claim with exhibits attach show correspondence with various persons at MOCA etal up until 2014. In letter dated February 19, 2013 it was stated that if the vehicle was not returned legal action would be taken. Legal action/proceeding, was not instituted until 2018. The Claimant cannot now say that they would be prejudiced by any delay on the part of the Defendants filing their defence late, when the Claimant has waited on the eve of the claim being statute barred to file this claim.

[49] Moreover, the Defendants in this matter acted with alacrity in filing their application for permission two days after the due date for the defence and the second affidavit with draft defence was filed about 5 months after. All this time, the Claimant did not even file his request for default judgment until October 4, 2021, almost three years after the Defendants filed their application. This is not a Claimant who is clearly strapped for time or can be said to be prejudiced by any delay. Moreover, the trial date can still be met if the defence is filed.

CONCLUSION

[50] I believe that the Defendants acted in a timely manner in making their application for an extension of time within which to file their Defence. The explanation for the delay was reasonable and after filing the application, took steps to obtain instructions and file a second affidavit with draft defence. This affidavit puts forward a defence of merit. The defence is not fanciful and the issues raised therein, are triable. The issue of prejudice can be cured with costs to the Claimant.

ORDERS

1. The Defendants are to file and serve a Defence to the Claim within 14 days of this order.
2. The Claimant's application for default judgment in default of Defence to be entered against the Defendants is refused.
3. The parties are to attend mediation on or before October 13, 2023.
4. All relevant parties, are to be in attendance at the mediation.
5. Should mediation be unsuccessful, the parties are to attend Case Management Conference on November 27, 2023 at 11:00am for 1 hour.
6. The Defendant is to pay the Claimant's costs in the Defendant's application to extend time to file Defence. Cost to be agreed or taxed
7. There shall be no orders as to costs in the Claimant's application to enter default judgment.
8. Leave to appeal is granted.
9. The Defendant's attorney-at-law is to prepare, file and serve the Formal Order.