[2023] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00048

BETWEEN	**BARRINGTON GREEN**	**1ST APPELLANT**
AND	**ANDREA GREEN**	**2ND APPELLANT**
AND	**CHRISTOPHER WILLIAMS**	**1ST RESPONDENT**
AND	**CHRISTINE WILLIAMS**	**2ND RESPONDENT**
AND	**WAYNE WILLIAMS**	**3RD RESPONDENT**
AND	**NADINE WILLIAMS**	**4TH RESPONDENT**

Written submissions filed by Nunes Scholefield Deleon & Co for the appellants

Written submissions filed by Tricia A Smith-Anderson for the respondents

3 February 2023

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

DUNBAR GREEN JA

[1] This is a procedural appeal from the decision of Master S Reid (Ag) (as she then was) ('the learned master') given on 6 April 2022, wherein she granted an application, filed on behalf of the respondents (defendants below) on 20 May 2021, for an extension of time in which to file a defence to the appellants' claim for, among other things, specific performance of an agreement for sale.

Background

[2] On 1 February 2002, the appellants (claimants below) entered into an agreement for sale with the now deceased vendor, Moses Williams, to purchase a lot of land, part of a larger parcel in Tower Hill, in the parish of St Mary, registered at Volume 1443 Folio 917 and Volume 1440 Folio 645 of the Register Book of Titles ('the property'), for a purchase price of $800,000.00. The appellants purportedly paid stamp duty and transfer tax on the sale and received letters of possession (dated 3 December 2008 and 3 April 2009) to take effect on 1 February 2002. They entered into possession and erected an incomplete dwelling. Sub-division approval was granted in 2006 but title was not transferred to the appellants.

[3] The vendor died on 11 November 2014, and on 3 May 2018, a "Grant of Administration with the Will Annexed", in the vendor's estate, was granted to the respondents (children of the vendor).

[4] On 18 March 2020, the appellants filed a claim against the respondents seeking a number of orders and declarations to facilitate the completion of the sale, including orders for specific performance and breach of contract, and alternatively, a declaration of title by adverse possession. On 17 April 2020, the claim form and particulars of claim were served on the respondents.

[5] On 4 May 2020, an unfiled acknowledgment of service was served on the appellants. However, the respondents failed to file a defence within the time stipulated by the Civil Procedure Rules ('CPR').

[6] On 11 June 2020, pursuant to rules 12.10(4) and 12.10(5) of the CPR, the appellants filed an application for judgment in default of defence, supported by an affidavit of urgency sworn by Catherine Minto, attorney-at-law for the appellants.

[7] On 24 June 2020, the respondents filed a defence in which they admitted to the agreement between the parties and grant of possession but challenged the appellants to strict proof of their assertion that the purchase price had been paid in full. They sought

to rely on alleged assertions by the vendor, during his lifetime, that the appellants had only paid a deposit towards the purchase of the property. The amount of the deposit was not indicated.

[8] Almost a year after filing the defence, the respondents, on 20 May 2021, filed an application seeking an extension of time in which to file their defence. The principal grounds of the application were that: (i) the defence filed on behalf of the respondents was filed out of time; (ii) the failure to file the defence in time was neither deliberate nor intended to disregard or abuse the process of the court; (iii) the respondents had a good defence to the claim; (iv) the appellants would not be prejudiced if the orders sought were granted; and (v) it is in the interests of justice for the orders sought to be granted.

[9] The respondents' attorney-at-law, Mrs Gloria Brown, swore an affidavit in which she explained that a junior attorney-at-law had been assigned the matter but failed to act on it. This was discovered in early to mid-May 2021 when an inventory of the file was done following the junior attorney's departure from the firm. The proposed defence was not exhibited.

[10] On 5 July 2021, the appellants filed an affidavit in opposition to the application for extension of time. The primary contention was that the 4th respondent did not have a good defence.

[11] The learned master, having examined the defence, made an order granting the extension of time to file defence and that the defence, filed on 24 June 2020, is permitted to stand. The appellants were ordered to file their reply within 14 days of the orders. Leave to appeal was also granted.

The appeal

[12] In the notice and grounds of appeal, filed on 20 April 2022, the appellants challenged the exercise of the learned master's discretion to grant an extension of time for the respondents to file and serve a defence, on the following grounds:

"a. The learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she granted the Respondents/Defendants an extension of time to file Defence.

b. The learned Master erred as a matter of law and/or wrongly exercised her discretion when she implicitly found that there was no need for an **Affidavit of Merit** on an application for an extension of time to file Defence out of time, in circumstances where an application for default judgment had also been filed. The learned Master instead found that the 'overriding objective' of the Civil Procedure Rules was the determining factor.

c. The learned Master erred as a matter of law and/or wrongly exercised her discretion when, (in the absence of *an affidavit of merit*), she proceeded to consider the Defence which was improperly and irregularly filed by the Respondents/ Defendants, after the Appellants/Claimants had already filed an application for default judgment.

d. The learned Master erred as a matter of law when she implicitly found that the test on an application for extension of time to file Defence when default judgment was being sought, is whether there are: **'Issues to be Tried'.** Further, the learned Master failed to identify the 'issues to be tried'.

e. Further and/or alternatively, the learned Master erred as a matter of fact and/or law and/or wrongly exercised her discretion when she found that there were issues to be tried, in spite of the **admissions** made by the Defendants in the irregular Defence, that was considered.

f. That the learned Master erred as a matter of law and/ or wrongly exercised her discretion when she found that the **Overriding Objective** weighed in favour of granting the extension of time having regard to:

(i) The eleven (11) month delay in the filing of the **application** for extension of time. The delay was inordinate, having regard to the facts in the matter, including the fact that on being served with the late defence, the Appellants'/Claimants' attorney immediately informed the Respondents/Defendants attorney, that the Defence filed was late;

(ii) The Defence was inordinately late, and there was no explanation for the late filing of the Defence;

(iii) The Appellants/Claimants had filed an application for judgment, almost two (2) weeks before the Defence was filed, and eleven (11) months before the application for extension of time;

(iv) The Respondents/Defendants were not treating with the matter, or the sale, with any urgency, or expeditiously. And the Appellants/Claimants were being prejudiced by these delays;

(v) There was no valid or legally viable defence before the Court to the claim ***as filed***, for specific performance of the contract, damages for breach of contract, and/ or adverse possession; [and]

(vi) That the learned Master erred as a matter of fact and law and/ or wrongly exercised her discretion when she found that the Appellants/ Claimants had suffered no prejudice by the delay in obtaining title for land purchased almost twenty years ago, and, that the Appellants/Claimants would not be further prejudiced by awaiting a trial date." (Emphasis/Italics as in the original)

Appellants' principal submissions

[13] In their written submissions, the appellants made five main points, summarised below.

1. There was no affidavit of merit before the learned master. The sole affidavit which was filed in support of the application for extension of time was that of counsel. No draft defence was exhibited and the affidavit did not set out any factual matters or evidence which could be relied on to ground and/or substantiate a defence to the action. There was also no statement, *under oath*, as to the facts which would be relied on by the respondents to challenge the claim.

2. The learned master erred, in the absence of an affidavit of merit, to have considered and or given weight to the defence which was filed outside the time limits prescribed by the CPR, and without the leave of the court or consent of the appellants.

3. In the alternative, even if the learned master determined that it was appropriate to consider the defence, an examination of the defence would reveal that there was, in fact, no legally viable defence to the claim. The respondents have admitted the crucial aspects of the claim, that is, the agreement for sale and breach of the agreement by the vendor. In all other respects, the respondents have simply "not admitted" the majority of the claim. They would also be relying on alleged hearsay discussions with the vendor.

4. In light of these factors it is not certain why this matter was remitted to trial, the learned master having failed to indicate what were the issues to be tried, or cite any breach on the part of the appellants.

5. The learned master erred when she found that the overriding objective weighed in favour of the respondents, given the obvious delays in the completion of the sale, complying with the CPR, and filing of the application for extension of time, in addition to the absence of any merit to the defence.

Appellants' additional submissions

Ground a – incorrect exercise of discretion

[14] The appellants contended that the learned master's exercise of discretion, in favour of the respondents, was based on a misunderstanding of the law and or of the

evidence required to successfully mount the application for extension of time to file the defence, as there was no evidence put before her to satisfy the test of "real prospect of success"; and that she had erroneously considered and misconstrued the invalid defence filed.

Ground b – no evidence of a meritorious defence

[15] Rule 10.3(9) of the CPR, which deals with applications for extension of time to file a defence, does not establish the factors that a court would consider in these applications. However, the relevant factors were settled by this court in **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4. Those factors, are similar to the requirements which must be satisfied in relation to an application to set aside a judgment in default of defence.

[16] The appellants relied on **B & J Equipment Rental Limited v Joseph Nanco** ('**B & J Equipment v Nanco**') [2013] JMCA Civ 2, a case which involved an application to set aside a judgment in default of defence, arguing that the application to enlarge time should not only outline the reason for the respondents' failure to comply with the time limit prescribed by the particular rule, but should demonstrate that there is merit to the defence. In other words, the application must be supported by a statement under oath as to the applicant's version of the facts (an affidavit of merit), and for an applicant to succeed, he must satisfy the court that there is the real prospect of successfully defending the claim.

[17] In further support of that submission, the appellants referred to **National Commercial Bank Jamaica Ltd v Owen Campbell and Toushane Green** [2014] JMCA Civ 19 which, they say, affirms the principle that the "real prospect of success" test can only be satisfied on evidence, not pleadings. In that case, no affidavit was filed in response to a summary judgment application and the first instance judge had stated that there was "sufficient evidence by way of admissions on its own documents". However, Phillips JA, writing on behalf of this court, said at para. [28]: "[t]he court in assessing the parties' respective positions must do so on the basis of affidavit evidence…The particulars

of claim is a pleading, not evidence. As a consequence, there was no material before the court with regard to the alleged efforts made by the respondent".

[18] The appellants argued, further, that although the rule dealing with summary judgment (rule 15.5(2) of the CPR) specifically requires affidavit evidence, unlike rule 10.3(9) (which deals with enlargement of time), this court has held in several decisions that for an application for extension of time to succeed, "real prospect of success" must be demonstrated by the evidence. Consequently, the learned master was bound by those decisions as there were no exceptional circumstances in the instant case.

[19] It was also submitted that for a claimant to be deprived of a default judgment, and be asked to wait for trial, the court must be satisfied that, at trial, a defendant would be able to call evidence to bolster its defence. This is important in the instant case as the party with whom the appellants contracted is now deceased.

Ground c – reliance on invalid defence

[20] The appellants submitted that it was not appropriate for the learned master to have examined the proposed defence to determine whether the respondents had a real prospect of successfully defending the claim, since it was filed outside the stipulated time without the permission of the court or consent of the appellants, and only after an application for judgment in default of defence had been filed.

[21] They cited this court's decision in **Delroy Rhoden v Construction Developers Associates Ltd and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 42/2002, judgment delivered 18 March 2005 ('**Rhoden v Construction Developers**'), to support their contention that a defence filed outside the prescribed time limit is a nullity. Whilst noting that **Rhoden v Construction Developers** pre-dated the CPR, the appellants submitted that the provisions in the Civil Procedure Code ('CPC') and the CPR are similar in this respect. Consequently, the gravamen of the **Rhoden v Construction Developers** decision is applicable to both the CPC and the CPR.

[22] The appellants acknowledged the first instance decision of **Merlene Thorpe v United Estates Limited** (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 00257, judgment delivered 20 June 2006 ('**Thorpe v United Estates**') which states that a defence filed out of time is not a nullity, but was irregular, and sought to distinguish it on the bases that **Delroy Rhoden v Construction Developers** was not brought to the lower court's attention and that there was no assessment of the cumulative effect of rules 10.2 and 26.9. Moreover, they submitted, in **Thorpe v United Estates**, the defence was invalidated by the party's failure to file the defence in time.

[23] The appellants argued that rules 26.9(2) and 26.9(3) of the CPR will not avail the respondents because even though these rules provide that "an error in procedure does not invalidate any step taken in the proceedings unless the court so orders" and "…the court may rectify matters in relation to procedural errors", respectively, they only apply where a rule does not specify a consequence for a failure to comply with it. Rule 10.2(5) of the CPR, is not one of those rules, they argued, as it sets out the consequence for failing to file and serve a defence within the prescribed period. Rules 26.9(2) and 26.9(3) are, therefore, inapplicable to the instant case.

[24] It was also contended that since the application before the learned master was to regularise the defence (which was not properly before her), she could only have considered it in the context of the application for a judgment in default of defence, which was filed first in time and ought to have prevailed given the circumstances, including the absence of an affidavit of merit: **Thorpe v United Estates**. It was also inappropriate for the learned master to have relied on the irregular defence without some evidence of merit to satisfy herself that the respondents had a real prospect of successfully defending the action.

[25] In all the circumstances, the appellants argued, the defence was invalid and the learned master ought not to have given any weight to it.

Grounds d and e – real prospect of success test

[26] The appellants directed our attention to **Gordon Stewart et al v Merrick Samuels** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 2/2005, judgment delivered 18 November 2005 ('**Stewart v Samuels**'), in which the meaning of the "real prospect of success" was considered by this court, and posited that, in contrast to the tests of "good arguable case" and "a serious question to be tried", it is not a low threshold test. The learned master was, therefore, required to focus on the ultimate result of the action, or ultimate success or failure of the respondents' case, in making her determination. However, she fell into error when, without an assessment of the probability of success of the respondents' case, it was concluded that there were "issues to be tried" on the defence. The error was compounded by the learned master's failure to indicate what those issues are.

[27] It was also argued that even if this court were to find that the learned master could have considered the defence, an examination of it would reveal no legally viable defence as, among other things, there was no evidence challenging their claim, or alternatively, adverse possession. In support of this submission, reliance was placed on the decisions in **JA Pye Oxford Ltd v Graham** [2002] 3 WLR 221 and **Recreational Holdings 1 Limited v Lazarus** [2016] UKPC 22.

Ground f – overriding objective and prejudice to the appellants

[28] The appellants argued that in the context of applications for extension of time to file a defence, the overriding objective involves the consideration of settled factors: **Fiesta Jamaica Limited v National Water Commission**. As regards the length of the delay and the explanation for the delay they conceded that there are decisions from this court which are in the respondents' favour, for example, **Merlene Murray-Brown v Dunstan Harper et al** [2010] JMCA App 1. However, as regards the court's consideration of issues of prejudice, saving expense, allotting an appropriate share of the court's resources to cases and ensuring that cases are dealt with expeditiously and fairly,

a judge, in appropriate cases, should make use of the power to shut out unmeritorious defences, as in so doing he or she gives effect to the overriding objective.

[29] It was argued further that it is inimical to Part 1 of the CPR that the court's resources should be used on cases where the defence has no merit. For this reason, it was contended, the principle of a defence having a "real prospect of success" runs like a common thread throughout the provisions of the CPR. A court, dealing with an application of the type in contention, should, in seeking to manage cases justly, address its mind to this question. It was also a crucial factor in assessing prejudice in this case, the appellants contended. They cited **Commissioner of Lands v Homeway Foods Limited and another** [2016] JMCA Civ 21, **Paulette Bailey and another v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 103/2004, judgment delivered 25 May 2005, and **Manteca Warehouse Ltd v Anthony Chin-Que and others** (1988) 25 JLR 376, in support of their submission that, since the respondents have no real prospect of success, they ought not to have been permitted to delay the matter and unnecessarily deprive the appellants of a judgment in default of defence.

Respondents' submissions

Ground a

[30] The respondents submitted that the learned master was not palpably wrong in law and/or fact in the exercise of her discretion in granting the extension of time to file the defence, and that the order made was in furtherance of the overriding objective to deal with cases justly.

[31] They pointed to rules 10.3(1) and 26.1(2)(c) of the CPR, neither of which indicates what factors the court should consider when deciding whether to grant an extension of time within which to file a defence. They relied on this court's decision in **The Attorney General and another v Rashaka Brooks Jnr** [2013] JMCA Civ 16 ('**Rashaka**

Brooks'), particularly para. [14], where it was stated that when a rule does not provide specific guidance in its application, the court is to have regard to the overriding objective of ensuring that cases are dealt with justly.

[32] The respondents also cited this court's decision in **Paulette Richards v Orville Appleby** [2016] JMCA App 20, and submitted that it has reaffirmed that the guiding principles in the exercise of a judge's discretion, on an application for an extension of time, are those outlined by Panton JA (as he then was) in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999. These factors are the length of the delay, reasons for delay, whether there is an arguable case and the degree of prejudice to the parties, if time is extended.

[33] The respondents argued that the following principles from the Privy Council decision in **The Attorney General v Keron Matthews** [2011] UKPC 38, are also applicable:

> I. a defence can be filed without the permission of the court after the time for filing has expired;
>
> II. no distinction is drawn in rule 10.3(9) (the equivalent of rule 10.3(5) considered in that case) between applications for an extension of time before and after the period for filing a defence; and
>
> III. if judgment has not been entered when the defendant applies out of time for an extension of time, there is no question of any sanction having yet been imposed on him.

[34] Shortly, they contended that the learned master did not err as she exercised her discretion in accordance with rules 10.3(9) and 26.1(2)(c) of the CPR and well-established cases.

Ground b

[35] The court was asked to contrast the words used in rule 10.3(9) of the CPR with the imperative language in rule 13.4 that the application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed defence. Given the differences, it was argued, the legal principles including the requirement for affidavit evidence and satisfying the "reasonable prospect of success" test do not apply to an application for extension of time to file a defence. The appellants' reliance on cases which relate to applications to set aside default judgments was therefore questioned by the respondents, pointing out that such applications are governed by rule 13.4 of the CPR which is materially different from rule 10.3(9).

[36] The respondents maintained that rule 10.3(9) does not lay down any strictures as to the format for an application for an extension of time, and there is no rule requiring that the application must be supported by evidence on affidavit or that there should be a draft defence exhibited. It was, therefore, sufficient that the proposed defence was based on what their father had told them; contained a reply to each allegation in the particulars of claim; and outlined the bases on which the respondents would wish to defend the claim. The decision in **Adrian Samuda v James Davis and Frania Smith** ('**Adrian Samuda**') [2017] JMSC Civ 156, was cited in support of this submission.

[37] They contended that the authorities have shown that a failure to file affidavit evidence and to exhibit a proposed defence tend to be fatal only in applications to set aside a default judgment. They cited **Attorney General of Jamaica v John Mckay** [2012] JMCA App 1 that applied **Ramkissoon v Olds Discount** (1961) 4 WIR 73 ('**Ramkissoon**'). The respondents disagreed that cases such as **Attorney General of Jamaica v John McKay** and **B & J Equipment v Nanco** stand as authorities for the principle that an affidavit of merit must be placed before the court in an application for extension of time to file a defence. Such is the requirement only in an application to set aside or vary a judgment obtained in default of defence.

[38] It was argued that if an affidavit of merit was required for an application to extend time to file a defence, the CPR would have expressly provided for this.

Grounds c to f

[39] As regards ground c (whether the proposed defence should have been examined), the respondents submitted that the first instance court in **Adrian Samuda**, in dealing with a situation where the defence was signed by the defendant and not the attorney-at-law (unlike the case of **Ramkissoon**), was of the view that it could examine the defence in order to determine whether or not "the defendant [had] a defence of merit".

[40] It was reiterated that, in the absence of specific guidance in any rule (such as in rule 10.3(9)), the court is to have regard to the overriding objective in applying that rule**.** Based on the overriding objective, it was argued, the court must be mindful that the order it makes should be the one that is least likely to engender injustice to either party. Therefore, any imposition of a mandatory requirement for an affidavit of merit in an application for extension of time to file a defence, where the rules do not require such an affidavit, would be inimical to the interest of justice. Reliance was placed on **Adrian Samuda** to support the argument that the learned master had properly considered the information contained in the proposed defence, in accordance with the overriding objective.

[41] It was further contended that the learned master's consideration of the contents of the defence was justified by these circumstances:

> i. there is nothing in the rules restraining the court from perusing the defence as long as it has not been struck out;
>
> ii. the draft defence contains material from which the merits of the defence could be ascertained; and
>
> iii. the defence was signed by the respondents.

Grounds d and e

[42] Under grounds d and e (the relevant test), the respondents contended that, contrary to the appellants' assertions, the relevant test in an application under rule 10.3(9), is not whether there is an "affidavit of merit", or whether there is a "real prospect of success"; but rather, whether there is "sufficient material" before the court from which the merits of the defence can be seen, and from which the court can exercise its discretion judicially and in the interests of justice. They, again, relied on **Strachan v The Gleaner Company and Dudley Stokes** and **Adrian Samuda**.

[43] The respondents submitted that each case must be decided on its own particular facts as there is no "hard and fast" theoretical circumstance that will trigger the court's discretion to grant or refuse an application of this type, and it is incumbent on the court, after examining all the circumstances of a case, to determine how best to deal with it justly.

Ground f

[44] As regards ground f (the effect of delay), the respondents contended that the learned master did not err in finding that the appellants would not be severely prejudiced if the application for the extension of time was granted since they had waited 18 years from the date of possession and eight years after the vendor's death to seek specific performance. She had also awarded costs to the appellants and they had not shown specifically how they would be prejudiced.

[45] Reliance was placed on this court's decision in **David Wong Ken v National Investment Bank of Jamaica Limited and others** [2013] JMCA App 14, in support of the contention that delay by itself is not determinative of an application for extension of time to file and serve a defence. In any event, the respondents argued, 25 days' delay in filing the defence was not inordinate and the 11-month delay in filing the application to extend the time within which to file the defence was explained. Additionally, they had placed before the court sufficient material upon which the learned master could and did properly exercise her discretion to extend the time within which to file the defence. They

submitted further that there would have been severe prejudice if their application for extension of time had not been granted, as it would deprive them of an opportunity to defend the claim and the appellants would then "reap the fruits of their unproved assertions on facts that would best be left for determination at a trial".

[46] As regards the appellants' assertion that they (the respondents) had no legally viable defence, it was argued that there is no sufficient memorandum in writing evidencing all the essential terms of the agreement for sale and there was no sub-division approval at the commencement of the contract. There was also nothing before the court to indicate that the inability of the deceased vendor to obtain a splinter title for the property was as a result of his failing. These were the circumstances that the court was required to examine to determine whether there had in fact been a breach of contract, it was argued.

[47] Reference was made to section 13(3) of the Local Improvements Act ('the Act'), under which, it was argued, the agreement for sale would be deemed a sub-division contract and the relevant provisions of the Act would become implied terms of the said contract. Reference was also made to section 13(1) of the Act, as well as **Malik Momin v February Point Resort Estates Ltd** [2022] UKPC 3 ('**Malik Momin'**) where, in a similar case, the Privy Council, in interpreting section 62 of the Bahamian Planning and Subdivision Act 2010, held that having regard to the plain language of section 62(1), and the fact that the vendor had not obtained the subdivision approval required by that statute, there could be no valid conveyance to the purchaser. In reliance on that opinion, the respondents contended that the unsigned instrument of transfer being relied upon by the appellants, as proof of payment of the full purchase price, is insufficient and its veracity would ultimately have to be tested at trial.

[48] In dealing with the alternative claim of title by adverse possession, the respondents referred to section 12 of the Limitation of Actions Act and the decision in **JA Pye v Graham** where the court held that there are certain categories of persons in whose favour time does not run for the acquisition of title by adverse possession, and that, in

determining the limitation period for purchasers who are granted permission by a vendor to enter into possession of the property being sold, time would not automatically begin to run in favour of the purchasers the moment they entered into possession. The argument made, in reliance on this authority, was that the appellants were not squatters or persons in whose favour time can run since they have admitted and maintained that they are "purchasers in possession" throughout their statement of case.

[49] The respondents argued that in the instant case there is no material before the court from which the court could properly grant the appellants' claim to title, by virtue of adverse possession. They cited the English Court of Appeal's decision in **Hyde v Pearce** [1982] 1 All ER 1029 (which was applied in **Shirley Doig-Warner v Theodore Lewis and another** (unreported), Supreme Court, Jamaica, Suit No CL 2002 W 070, judgment delivered on 7 April 2005), as authority for the proposition that a person who relies on a contract for sale to support his continued occupation of property, cannot thereafter assert title by adverse possession.

[50] Given those circumstances, it was argued, the proposed defence disclosed an arguable defence to the allegations made by the appellants.

Appellants' reply to the respondents' authorities

[51] The appellants made submissions, in reply, to the cases relied on by the respondents as follows.

A. <u>Strachan v Gleaner Company Limited and Dudley Stokes</u>

[52] The respondents' use of the **Strachan v The Gleaner Company and Dudley Stokes** reinforces the appellants' submission that the learned master plainly erred when she utilised the test of "issues to be tried" instead of the more stringent test of "real prospect of success" which was introduced by the CPR. Counsel for the appellants acknowledged that the test considered in determining whether to grant an extension of time to file an appeal was whether there was an "arguable case" which, she contended, is the equivalent of the "issues to be tried" test: **Gordon Stewart v Merrick Samuels**

at pages 6-7. She submitted, however, that since the enactment of the CPR those latter tests have been replaced by the "real prospect of success" test which requires that the court go beyond merely identifying issues for determination at trial.

B. **Rashaka Brooks**

[53] The appellants submitted that it is only in certain special circumstances that the court would grant an extension of time to file a defence where there is no evidence as to the merits of the defence. In **Rashaka Brooks**, the court considered the peculiar position of "state entities" such as the Attorney General's Chambers and the difficulty experienced by them in obtaining instructions from other state entities, such as the police.

[54] It was argued that, unlike the circumstances of that case, there were no special circumstances in the instant case to justify the respondents' omission to file an affidavit of merit with an exhibited draft defence; and, there was no affidavit setting out any difficulty being experienced by the respondents' attorneys-at-law in securing instructions for the purpose of filing an affidavit of merit.

C. **The Attorney General v Keron Matthews**

[55] The appellants argued that the respondents' broad submission that a late defence can be filed without the permission of the court ignores the context of para. 14 of the Privy Council's decision in **The Attorney General v Keron Matthews** which is that a defence can be filed late without the permission of the court if the claimant does nothing or waives late service. Applying that reasoning to the instant case, the appellants submitted that they did not waive late service or sit idly by, as they applied for a judgment in default of defence before the late defence was filed. They also contended that based on the cases of **Thorpe v United Estates** and **Rhoden v Construction Developers**, a defence filed late had to be regularised, as there is no implicit permission in the CPR.

D. **Adrian Samuda**

[56] The appellants submitted that this case does not assist the respondents. Firstly, there was no application for a default judgment in that case and therefore the court was

not dealing with a corresponding application for the imposition of the sanction for failure to file defence. Secondly, the defence considered by the court was, in fact, exhibited to an affidavit of merit. The case, therefore, reinforces the requirement for an affidavit of merit. Moreover, the application for extension of time was dismissed as the judge found that there was no merit in the evidence before her as the affidavit filed in support of the application "did not speak to matters which would tend to show that the [2nd respondent] had a defence".

E. Section 13 of the Local Improvements Act and **Malik Momin**

[57] The appellants contended that the respondents' submission that there is no sufficient memorandum in writing evidencing all the essential terms of the contract ignores the fact that there is a stamped "particulars of sale", receipts, written correspondence and an instrument of transfer before the court - setting out the parties, property and price - which is, all that the law requires to establish a binding agreement to sell land.

[58] They further submitted that the **Malik Momin** case does not assist the respondents as section 13 of the Act is materially different from section 62 of the Bahamian Planning and Subdivision Act in that the former expressly provides that the validity of a sale contract will not be affected by the failure to obtain subdivision approval prior to entering into the contract. Further, there is no conveyance in this case as the parties are still at the contract stage. On the latter point, the appellants indicated that "conveyance" as referred to in the Bahamian statute is distinct from "sub-division contract" referred to in section 13 of the Act. The sub-division contract, it was indicated, is the actual sale agreement, while the conveyance is the instrument of transfer which follows the agreement for sale.

F. **Hyde v Pearce and Shirley Doig-Warner v Theodore Lewis**

[59] The appellants submitted that these cases are irrelevant as there is no evidence from the respondents that the appellants' continued occupation of the property was

pursuant to the contract of sale, as opposed to in their own right as proprietors. The appellants went on to submit that the Privy Council in **Recreational Holdings 1 (Jamaica) Ltd v Lazarus** held that even someone who (mistakenly) believes that he is occupying property as owner, can claim adverse possession. Further, the submissions advanced by the respondents concerning section 13 of the Act, the **Malik Momin** decision, and an insufficient memorandum in writing, would render **Hyde v Pearce** and **Shirley Doig-Warner v Theodore Lewis and another** inapplicable.

Analysis

Issue and standard of review

[60] There were no written reasons for the learned master's decision and the parties were not in agreement as to what her oral reasons were. In such circumstances, it is for this court to consider "…whether [the] decision, without reasons, demonstrates a proper exercise of the learned [master's] discretion" (see **Ray Dawkins v Damion Silvera** [2018] JMCA 25, at para. [47).

[61] The principal issue in this appeal is whether it was plainly wrong for the learned master to have granted an extension of time for the respondents to file a defence. The determination of that issue will be guided by the principles expressed by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** ('**Hadmor Productions**') [1983] 1 ALL ER 1042, 1046 (and reiterated in **Attorney General of Jamaica v John McKay**, paras. [19] and [20] and numerous other authorities from this court). In **Hadmor Production,** Lord Diplock said: –

> "Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court… is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently…It may set aside the judge's exercise of his

> discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that the facts existed or did not exist… Since reasons given by judges…may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it…"

[62] As the first ground of appeal (ground a) requires an assessment of whether the learned master's exercise of discretion was based on a misunderstanding of the law and/ or of the evidence in relation to this type of application, it will be answered after a consideration of all the other grounds.

Grounds b, d and e – Whether there was need for an affidavit of merit, and did the learned master apply an incorrect test?

[63] The respondents breached rule 10.3(1) of the CPR which states that, as a general rule, the defence should be filed within 42 days of service of the claim form. Under rule 10.3(9), a party who fails to file a defence within the prescribed time can apply for an order extending time for filing the defence. Rule 26.1(2)(c) provides, among other things, that the court may extend or shorten the time for compliance with any rule even if the application for an extension is made after the time for compliance has passed.

[64] The learned master, therefore, had a discretion to enlarge the time within which the respondents could file a defence. But, as neither rule 10.3(9) or rule 26.1(2) particularises any of the factors which she should consider in exercising that discretion, the learned master was required to have regard to the overriding objective of dealing with the case justly in the context of all relevant factors, including those that are particularised by Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors** 2000 Lexis Citation 2473 at para. 8, as follows:

> "…**[F]irstly,…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**." (Emphasis added)

[65] These principles were applied in **Fiesta Jamaica Limited v National Water Commission**, in which an application for extension of time to file a defence (supported by an affidavit with a draft defence exhibited) was refused by a judge at first instance, and summary judgment granted. On appeal, consideration was given to whether the affidavit supporting the application "contained material that was sufficiently meritorious" to have warranted the order sought.

[66] Harris JA, writing on behalf of this court, said:

> "16. …**The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought**. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant had given good reasons for its failure to have filed its defence in the time prescribed by Rule 10.3(1) of the Civil Procedure Rules (C.P.R.) **but also that the proposed defence had merit**." (Emphasis added)

[67] The court found that the judge was correct in refusing to grant the application for extension of time to file the defence as the proposed defence was unmeritorious, it having not raised any "triable issues" worthy of a defence or an arguable defence to the claim, and no good reason or plausible excuse had been offered for the appellant's failure to adhere to the requirement of filing a defence. It also found that the judge was correct in granting the respondent summary judgment, and ordered that the action should proceed to assessment of damages as the "inescapable inference to be drawn from that affidavit was that the appellant had accepted liability of the damages to the National Water Commission's pipeline and had taken steps to compensate the respondent".

[68] As noted earlier, in that case, unlike the instant case, an affidavit was filed with a draft defence attached. It was based on the contents of the said affidavit that a determination was made about the strength of the defence.

[69] **Rashaka Brooks** was a case in which there was only an affidavit from counsel explaining the delay in the filing of a defence to the claim and outlining the party's efforts in securing instructions for the defence. There was no evidence of merit (nor a draft defence filed) but special circumstances influenced the position taken by this court to set aside the master's refusal to grant an extension of time to file a defence.

[70] In delivering the reasons, Brooks JA (as he then was) stated, at para. [10], that the master had correctly gleaned from cases including **Fiesta Jamaica Limited v National Water Commissioner** that an application for an extension of time within which to file a defence must be supported by evidence, not only outlining the reason for the failure to comply with the prescribed time, but also demonstrating that there was merit in the defence. At para. [15], he expressly adopted the factors from the dictum of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors** that were applied in **Fiesta Jamaica Limited v National Water Commission**.

[71] Nonetheless, Brooks JA went on to say that, although Lightman J mentioned "the matter of merit", this did not mean that there should be "some rigid formula in deciding whether an extension [of time] is to be granted'" as each case should be decided on its own facts. On that premise, he explained, in para. [17], that where a draft defence is not available due to lack of instructions at the time when the defence is due, it does not mean that the defendant has lost all hope of advancing a successful defence. He then outlined the special circumstances in which such an application could succeed, as being when:

> " a. the application is made within a reasonable time;
>
> b. there are good reasons for the delay;

c. there is a good reason why the extension should be granted; and

d. there would be no undue prejudice to the claimant."

[72] At para. [21], Brooks JA concluded:

> "… it is our view that it is only in special circumstances that such an application should succeed. A defendant who has not produced **evidence of merit** should only be successful if he were able to convince the court that it would be just to extend the time. The decision should lie within the discretion of the judicial officer hearing the application. Without laying down any mandatory criteria, such an application should address the issues identified by Lightman J and explain to the satisfaction of the court **the efforts made to secure the evidence concerning the element of merit and the reason for its absence.**" (Emphasis added)

[73] **Rashaka Brooks** is clearly an exception to the general rule. The principle that an application to extend time to file a defence can succeed without "evidence of merit" demonstrating, among other things, that there is merit in the defence, applies only to a narrow set of special circumstances none of which have been disclosed in the facts of the instant case. The defaulting entity in that case was a state agency which demonstrated difficulty in obtaining specific instructions in the matter. 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" (para. [21]). The absence of instructions resulted in there being no draft defence for the consideration of the master.

[74] In the instant case, the respondents were clearly not in the enviable position of the Attorney General in **Rashaka Brooks**, so it was incumbent on them to produce evidence of a meritorious defence or evidence that would convince the learned master that it would be just to extend the time. Not only was there no evidence of merit but

nothing to indicate whether any effort had been made to secure it and/ or any explanation for its absence. **Rashaka Brooks**, therefore, does not assist the respondents.

[75] Neither will the respondents succeed in their reliance on **Adrian Samuda**, a case to which I will return at paras. [87] and [88]. Suffice it to say, at this point, that it has already been established by other authorities that evidence of merit is required, which for all practical purposes is an affidavit of merit. In **Paulette Richards v Orville Appleby**, this court reaffirmed that in considering the application for enlargement of time, one of the guiding principles (enunciated by Panton P in **Strachan v The Gleaner Company Limited and Dudley Stokes**) is "whether there is an arguable case [for an appeal]". These requirements are in keeping with the overriding objective of dealing with cases expeditiously and fairly. The imperative of doing justice requires that unmeritorious defences be shut out at the earliest opportunity. This also saves expenses and enables the court to divert its resources to those cases which need to proceed to trial.

[76] In the decision of **Hoip Gregory v Vincent Armstrong** [2013] JMCA Civ 36, a case in which this court was asked to set aside a master's refusal of an application for extension of time within which to file a defence, this court, in dismissing the appeals (on the bases that the delay was egregious and the explanation for it unacceptable), reiterated the general principles at para. [7] thus:

> "It is now fairly well established that in considering whether to grant an extension of time in which to file a defence, the court should consider, amongst other things, the length of the delay, the reason given for the delay, **whether the defence has a real prospect of success** and the effect of the delay in the context of the overriding objective, … the court should include in its consideration the principle that time limits established by the CPR should be observed…" (Emphasis added)

[77] It is arguable that **Hoip Gregory** v **Vincent Armstrong** broke new ground by introducing a more stringent "real prospect of success" test, instead of the "arguable case" test (applied in **Strachan v The Gleaner Company Limited and Dudley**

Stokes, **Paulette Richards v Orville Appleby** and **Philip Hamilton v Frederick Flemmings and Gertrude Flemmings** [2010] JMCA Civ 19), and the "triable issues/arguable defence" test applied in **Fiesta Jamaica Limited v National Water Commission**. This 'new' test, counsel for the appellant argued, has replaced the less stringent tests and requires the court to go beyond merely identifying issues for determination at trial and to "look at the evidence and consider what is the likely and ultimate outcome at trial".

[78] In so far as it pertains to the factors which may be considered, I see no fundamental conflict between the cases or replacement of one test by another. 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, and has "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)**. See also **Thamboo Ratnam v Thamboo Cumarasamy** [1965] 1 WLR 8, at page 12, and the exceptional case, **Rashaka Brooks**, that demonstrated special circumstances which would make it just to allow the defence to proceed to trial in the absence of evidence of merit.

[79] I will now consider, briefly, the sole affidavit filed in this matter.

[80] 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.

[81] The requirement for some evidence of merit must mean that there should be some facts or material to make even an iota of difference by challenging the appellants' claim. 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, but, as Phillips JA observed in **Philip Hamilton v Frederick Flemmings and Gertrude Flemmings**, the considerations are on the premise that a defaulting party does not have an unqualified right to an extension of time. The learned master departed from this approach by granting the application without any evidence that there was a meritorious defence. She therefore erred.

[82] **Attorney General v Keron Matthews** does not assist the respondents. The Board's opinion that "a defence can be filed without the permission of the court after the time for filing has expired" was said in the context of the broader statement that - "[i]f the Claimant does nothing or waives late service, the defence stands, and no question of sanction arises". It is common ground that the appellants, in the instant case, filed an application for judgment in default of defence prior to the filing of the late defence. The appellants are, therefore, correct that in these circumstances the respondents could not have properly relied on the late defence nor would the late defence "stand", without more. The late defence would have had to be regularised.

[83] For the foregoing reasons, these grounds succeed**.**

<u>Ground c – Whether the learned master should have examined the proposed defence filed out of time in the absence of evidence of its contents</u>

[84] The appellants have complained that the learned master erred when she found that the proposed defence had merit. In arriving at her decision, the learned master

examined the defence that was filed out of time and which was not exhibited to the affidavit of Mrs Brown.

[85] They relied on this court's decision in **Rhoden v Construction Developers** in which Downer JA, at page 31 of the decision, agreed with Lords Herschell L.C. and Russell in **Smurthwaite v Hannay** [1894] AC 501 that, "to take a procedural step not warranted by any enactment or rule was not a mere irregularity but a nullity". The learned judge of appeal went on to explain at page 33 that: "[w]here the defendant is required to serve a copy of the defence on the plaintiff, there must be strict compliance with the rules. Non-compliance renders the filed defence null and void".

[86] Counsel for the appellants acknowledged that **Rhoden v Construction Developers** preceded the CPR but she contended that the rules are similar in that they deal with the time for filing a defence and the consequence of non-compliance. Counsel sought to distinguish the first instance decision of **Thorpe v United Estates Limited** (holding that a defence filed out of time was not a nullity but was irregular) on the bases that **Delroy Rhoden** had not been brought to the attention of the first instance judge and neither was the judge's attention seemingly drawn to the cumulative effect of rules 10.2 and 26.9 of the CPR. On the strength of that reasoning, counsel for the appellants submitted that the proposed defence was invalid and the learned master ought not to have considered it.

[87] The respondents placed heavy reliance on para. [34] of the first instance decision of **Adrian Samuda**. It too concerned an application for extension of time to file a defence. An important distinction was that the judge considered a defence that was not only signed by one of the defendants but exhibited to an affidavit of merit sworn by the attorney-at-law in the matter, and contained evidence being relied on by the defendants. The contents of the exhibited defence were the same as in the filed defence. In considering the application, the judge applied the factors in **Strachan v The Gleaner Company v Dudley Stokes**, referred to the principles in **Rashaka Brooks** and placed heavy premium on giving effect to the overriding objective. She ultimately found that

there was an inordinate delay in making the application to extend time to file the defence, that the reason offered for the delay was insufficient and that the defence put forward in the affidavit did not "speak to the matters which would tend to show that the 2nd defendant had a defence": para. [39].

[88] **Adrian Samuda** does not assist the respondents. The circumstances here are very different as there was no evidence in support of any of the statements contained in the proposed defence. The fact that the proposed defence was purportedly signed by the respondents made no difference since the statements contained therein constituted pleadings and not evidence. It also did not matter that the defence remained on the file and was not struck from the record.

[89] **Thorpe v United Estates Limited** and **Rhoden v Construction Developers** referred to several cases for the respective positions on whether a defence filed outside the prescribed time limit is a nullity or irregular. Those who advocate that it is an irregularity seem to do so on the basis that a document which is a nullity is completely valueless, which is not the case with a defence as it can be regularised. Regardless of the position taken in the cases, it is clearly the case that the defence, by itself, cannot be relied on to satisfy the court of its merit. I, therefore, accept the appellants' submission that, in the circumstances of the instant case, it was not proper for the learned master to have relied on the very document that the respondents were seeking to regularise without its contents forming a part of the evidence before her. In the circumstances, there was no material on which the learned master could exercise her discretion. The proposed defence being a pleading could not meet the requirement for "evidence of merit", neither could it justify the learned master's decision that there were "issues to be tried".

[90] The appellants have also contended, in the alternative, that an examination of the defence would reveal that there is in fact no legally viable defence to the claim. In my opinion, given the absence of any evidence of the defence that the respondents intended to rely on, there is nothing for this court to consider. Cases such as **Fiesta Jamaica**

Limited v National Water Commission, Phillip Hamilton v Frederick Flemmings and Gertrude Flemmings and **Hoip Gregory v Vincent Armstrong** are distinguishable, as the court had an 'affidavit of merit' from which to make an assessment of the viability of the defence. In this case, there was none. This ground, therefore succeeds.

Ground f – Whether the learned master wrongly exercised her discretion when she found that the overriding objective weighed in favour of granting the extension of time

[91] The record reveals that on 17 April 2020, the claim was filed and served; on 4 May 2020, an acknowledgment of service was served; on 11 June 2020, a request for judgment in default of defence was filed by the appellants; on 24 June 2020, the respondents filed their proposed defence after the time had expired to do so; by letter of 1 July 2020, the appellants notified the respondents' attorney-at-law that the defence was late and that the appellants had already applied for judgment in default of defence; and, almost a year later, on 20 May 2021, the respondents filed their application for an extension of time to file a defence. Curiously, the respondents' then attorney-at-law indicated that she came into the matter in June 2020, yet the exhibited acknowledgment of service under her purported signature is dated 30 April 2020 and was apparently served on 4 May 2020.

[92] As already indicated, the overriding objective requires that the court should have regard to factors such as the reasons for the delay, prejudice and other effects of the delay, and the court's role in saving expenses and managing resources. It was, therefore, necessary for the learned master to determine and evaluate such considerations that arose from any reason proffered as to why a defence was not filed within the time limit prescribed, and whether irrespective of the delay, in the interests of justice, the case should proceed to trial. These conditions are in furtherance of the overriding objective.

[93] The respondents' explanation for their late application to regularise the filing of the defence, which was accepted by the learned master, was administrative oversight in the office of the respondents' attorney-at-law. But noticeably absent from Mrs Brown's

affidavit was any established protocol in her office that was breached by the then associate. Neither was there any evidence as to the reasons for the delay in filing the proposed defence. 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. I come to this conclusion partly because the appellants had long before written to the respondents' attorney-in-law to alert her to the lateness of the defence and to the fact that the appellants had applied for judgment in default of defence. There was also no good reason provided for the late filing of the defence. It is not good enough to blame a 'derelict' former junior attorney-at-law, without more.

[94] There are authorities from this court stating that delay, by itself, is not determinative of the application for extension of time (see, for example, **David Wong Ken v National Investment Bank of Jamaica Limited and Ors**). The court has also been lenient where the oversight has been that of the attorney-at-law (see **Merlene Murray-Brown v Dunstan Harper et al**), and also indicated that a litigant should not ordinarily be prejudiced by the mistake or failings of his attorney-at-law (see **Jamaica International Insurance Company Limited v The Administrator General** [2013] JMCA App 2). This court has also held that even where no good reason was offered for the delay, in the interests of justice the defence should be assessed where the circumstances warrant (see **Philip Hamilton v Frederick Flemmings and Gertrude Flemmings**).

[95] Nothing in these authorities blunts the cumulative effect of the late filing of the defence and the inordinate delay in making the application to extend time to regularise the defence, which must be unspeakable prejudice to the appellants - if for no other reason than the fact that, for the better part of a year they were waiting on the respondents to act while their application for judgment in default of defence was pending.

For as long as it took the respondents to seek to regularise the defence filed out of time, the suit was stymied and the appellants shut out from a judgment which they had long applied for and, possibly, were entitled to. It cannot be just a matter of costs as some defaults will not necessarily be adequately ameliorated by an award of costs, and generally, the court has a duty to ensure the expeditious and fair disposal of cases by ensuring that time limits are adhered to unless there is good reason for delays. The letter and spirit of the CPR demand that it be so.

[96] In **Paulette Bailey and Another v Incorporated Lay Body of the Church in Jamaica and Cayman Islands in the Province of the West Indies**, it was correctly pointed out that the CPR is aimed at "providing litigants with speedy justice" and the "courts cannot not now, without good reasons, countenance disobedience of these rules, and say that the panacea is cost" (para. 20). In **Manteca Warehouse Ltd v Anthony Chin-Que and others**, it was aptly stated that "in order [that] a litigant should be driven from the judgment seat, some very good reasons should be shown to allow that to take place" (page 377). See also **Attorney General of Jamaica v Roshane Dixon and The Attorney General v Sheldon Dockery** [2013] JMCA Civ 23 where Harris JA observed, at para. [32], that "[i]n keeping with its duty to regulate the pace of litigation, the court has adopted a strict approach in giving consideration to an application for an extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay in complying with the rules".

[97] The respondents have failed to provide any evidence of merit from which the learned master could justifiably conduct an evaluation of the merits of the proposed defence, coupled with inordinate delay and no good reason for same.

[98] In the circumstances, this ground succeeds.

Ground a

[99] In my opinion the learned master erred in the exercise of her discretion in granting the extension of time for the respondents to file a defence, in circumstances where there

was no evidence of merit for her consideration on the question of whether the proposed defence should go to trial. In the absence of some evidence of merit there was no material that was "sufficiently meritorious" to justify a conclusion that there were "issues to be tried". The learned master also erred when she gave weight to the proposed defence without any evidence to ground it.

[100] For these reasons and those elaborated earlier in the judgment, this ground succeeds.

Conclusion

[101] 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.

[102] In the instant case, the delay in seeking to regularise the filed draft defence was inordinate. Whilst there was an explanation for the delay, albeit a questionable one, there was no evidence of merit as the sole affidavit filed (to which the draft defence was not exhibited), was devoid of any evidence challenging the claim or putting forward the defence being relied on by the respondents. Since there was no evidence of merit and the proposed defence by itself was insufficient to satisfy the learned master that there was a defence of merit, the learned master was not in a position to determine whether there were "triable issues". There was also no special circumstance which could justify a departure from the general principle that evidence of merit is required in an application

for extension of time. The learned master erred when she considered and gave weight to the defence filed outside the time limit prescribed by the CPR as the statement of defence was a pleading, not evidence.

[103] For all these reasons, I would allow the appeal and set aside the order of the learned master with costs to the appellants, to be agreed or taxed.

F WILLIAMS JA

ORDER

1. The appeal is allowed.

2. The order of the learned master, made on 6 April 2022, is set aside.

3. Costs in this appeal to the appellants, to be agreed or taxed.