[2014] JMSC Civ. 213

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2010 HCV02813

BETWEEN ANITA VALAREE JOHNSON CLAIMANT/RESPONDENT

AND JAMES JACKSON T/A NEGRIL TREE HOUSE RESORT 1St DEFENDANT/1ST APPLICANT

AND LOVE NEGRIL LTD T/A NEGRIL TREE HOUSE RESORT 2nd DEFENDANT/2nd APPLICANT

Kwame Gordon instructed by Samuda & Johnson for the Applicants/Defendants
Jason Jones instructed by Nigel Jones & Company for the Respondent/Claimant

IN CHAMBERS

Heard: November 10, December 3 and 19, 2014
Application to Extend Time to File Defence – Rule 10.3(9) Civil Procedure Rules (CPR)- Factors to be considered

Oral Judgment

DUNBAR-GREEN, J(Ag.)

[1] This application of 17th January 2011 for an extension of time to file defence is made pursuant to Rule 10.3(9) of the Civil Procedure Rules, 2002 (C.P.R.). The original application, as filed on 11th November 2010, was to set aside a default judgement which had not yet been perfected.

[2] The application is supported by the affidavits of Donna Erica Brown and James Jackson filed 11th November, 2010 and 18th February, 2011, and that of Rohan Myrie filed 7th November, 2014.

[3] The grounds on which the applicants are seeking the orders are as follows:

i. that the first defendant does not trade as Negril Tree House Resort and as such the claimant does not have a bona fide claim against him;

ii. that liability is a live issue and the defendants wish to have the issues tried by this Honourable Court;

iii. that the defendants have a good defence to this action;

iv. the delay in filing the defence is not inordinate, neither was it the fault of the applicants; and

v. the setting aside of the the judgement will not be prejudicial to any of the parties.

Ground v. does not apply to the instant application and should have been amended.

Background

[4] In an action filed 14th June 2010, the respondent, Miss Anita Valeree Johnson, initiated proceedings against the applicants claiming damages for injury allegedly sustained on or about 26th April 2009, as she disembarked a jet ski in the applicants' beach waters at Negril Tree House, Westmoreland. She rented the jet ski from the 2nd applicant, rode it and while in the process of disembarking, allegedly stepped on a submerged pipe located below the waterline of the applicants' beach.

[5] According to the affidavit of Mr. Andrew Scott filed 6th September 2010, the Claim Form, Particulars of Claim, Prescribed Notes to the Defendants, Acknowledgement of Service Form and Defence (the documents), dated 5th February 2010, were served on the first applicant, Mr. James Jackson, director of the second applicant, on 26th June 2010 at Norman Manley Boulevard, Negril, Westmoreland at approximately 11.20 am, and he accepted service.

[6] Mr. James Jackson, by his affidavit filed 11th November 2010, admitted receipt of those documents but denied that he was personally served. He said that the documents were received via registered post in July 2010.

[7] Having received those documents, the first applicant forwarded them to his insurers, NEM Insurance Company Ltd, through its broker, Crichton Insurance Agency. The broker confirmed that on 10th July 2010, the documents were despatched to NEM. According to Mr. Jackson, he did nothing further because he thought the matter was receiving attention.

[8] The respondent filed a request for judgment in default of acknowledgement of service on 7th September, 2010. The judgment was not entered.

[9] On 1st November 2010, the applicants filed an acknowledgement of service. A defence was later filed on 11th November 2010. A Notice of Application to set aside Default Judgment was also filed on that date but was amended on 17th January 2011 by Master George. That amendment was for time to be extended to file defence.

The Affidavits in Support

[10] In his first affidavit, Mr. James Jackson deposed, inter-alia:

> 2. That the second defendant is a limited liability company duly registered under the Companies Act.
>
> 3. That the second defendant was, at all material times, trading as Negril Tree House Resort.
>
> 5. That by Agreement dated the 26th April, 2009, the claimant rented a jet ski from the Company. The jet ski was to be operated, manoeuvred and/or controlled by the claimant and I exhibit annexed hereto and marked "**JJ 1**" for identification a copy of the Rental Agreement.
>
> 6. That on or about the said 26th day of April 2009, the company was informed that there had been an incident in which the claimant stumbled while she disembarked the jet ski.
>
> 7. That during the month of June, 2009 the company received a letter from Messrs. Rosen, Schafer & DiMeo, attorneys-at-law for the claimant and the said letter was forwarded to its insurance brokers for onward transmission to the Insurers

and I exhibit annexed hereto marked "**JJ 2**" for identification, a copy of the said letter dated the 16th June 2009.

8. That liability is a live issue and the company wishes to have its day in court.

9. That further, the default judgment entered herein was not the fault of the company's and the defendants wish for this matter to be tried on its merits.

10. That in light of the above, the defendants pray that the orders being sought herein will be granted as the granting of of the same will not be prejudicial to the claimant or any other party in this matter.

[11] In his second affidavit, Mr. Jackson deposed that the incident was reported to him by Mr. Rohan Myrie, an employee of the second applicant.

[12] In the affidavits of Miss Donna Erica Brown, Claims Manager, she acknowledged that the documents were received by NEM under cover letter from its broker dated 21st July 2010. However, she stated that it was upon sorting of the mail in November, 2010 that they were "discovered". She also stated that NEM had received a report of the alleged accident from Mr. Rohan Myrie on 14th July, 2009. The reasons stated for the delay were oversight and inadvertence of the insurers. She went on to say in her second affidavit that NEM was obligated under the policy of insurance with the applicants to provide legal representation in respect of the injury reported, and that NEM had investigated the matter and was in dialogue with the respondent's then attorney-at-law up to 29th October, 2009. She said further that NEM "was at all material times aware of the potential suit against the insured and they had every intention of providing the necessary legal support."

[13] In his affidavit, Mr. Rohan Myrie deposed, inter-alia:

> 3. On April 26, 2009 I was employed to the 2nd defendant in the position of Water Sports Manager. I am aware of the incident which occurred on the said date involving a Ms. Anita Johnson who was a part of a tour group from the Sunset Beach Hotel in Montego Bay. The said incident occurred at about 2.00 p.m. and I was able to observe what happened as I was then seated on the concrete flooring of the gazebo which is located in the vicinity of the water sports area.
>
> 4. I saw Ms. Johnson and a female companion rent a two person jet ski that afternoon and after they used the jet ski they returned to the section of beach designated for the return of the jet skis to the operators of the water sports.
>
> 5. I saw the female companion disembark the jet ski. Thereafter, I saw Ms. Johnson step off the jet ski into approximately two (2) feet of water while being assisted by one (1) of the operators of the jet ski and then I heard her cry out. She was assisted to the beach and she subsequently left with the tour driver who had carried the tour group of which she was a part to the location.
>
> 6. I subsequently heard that Ms. Johnson was alleging that she had stepped off the jet ski onto a pipe underlay which had injured her foot. I know that specific area of beach well which forms a part of the world famous Negril seven mile white sand beach strip. To my certain knowledge, there was no pipe underlay at the location where the water sports were being operated and where Ms. Johnson injured her foot.

[14] The defence exhibited as **"JJ3"** at paragraph 7 of Mr. Jackson's affidavit filed on 11th November 2010, as far as is material, stated:

1. The first defendant does not trade as Negril Tree house Resort.

2. The incident, the subject matter of these proceedings, was solely caused and/ or in the alternative significantly contributed to by the negligence of the claimant.

Particulars of the Claimant's Negligence

(i) Failing to disembark the jet ski with any or any proper care and attention;
(ii) Failing to take care where she was placing her feet;
(iii) Failing to have any or any proper regard for her own safety;
(iv) Failing to exercise due care and/or caution or to have any sufficient regard for her own safety...

The first defendant will say:-

1 He does not trade as Negril Tree House Resort.
2. At the material time he did not have a duty to take all reasonable and necessary steps to ensure the safety of the visitors to the premises of Negril Tree House pursuant to the Occupiers Liability Act.
3. That the claimant does not have a bona fide claim against this defendant.

The second defendant will say:

1. That it is a Limited Liability company and is duly registered under the laws of Jamaica and has its registered offices at Norman

Manley Boulevard, Negril P.O. Box 29, in the parish of Westmoreland.

2. That it was, at the material time, the owner of premises known as Negril Tree House Resort located at Negril Beach, in the parish of Westmoreland and is in the business of, inter alia, restaurants, watersports and retail boutiques.
3. That on or about the 26th day of April, 2009 the claimant rented a single person jet ski from the second defendant.
4. That the claimant, along with other guests, were instructed as to how to manouvre the jet ski in the water and then disembark once the half hour ride was over.
5. The claimant completed her ride on the jet ski and while in the process of disembarking the jet ski she stumbled.
6. That this defendant took all reasonable care to prevent the risk of injury arising from the use and occupation of its facilities and jet skis in all the circumstances and that the area where it is alleged that the claimant stumbled is a part of the world famous Negril 'seven mile beach' consisting of pristine waters. The area is free from any pipes or object foreign to the natural undulation created of sand and sea water.
1. Accordingly, the defendants were not in breach of The Occupiers Liability Act, their contractual duty or any other.
2. The jet ski was in the custody, care and control of the claimant at the material time and she failed to take appropriate care for her own safety as there is nothing in the layout and design of its facility to reasonably cause risk of injury or to cause the defendant to be in breach of the Occupiers Liability Act.
3. That the defendant will rely on exemption Clause number 11, contained in the Jet Ski Rental Agreement dated the 26th April, 2010.

10. The defendant will say that the claimant, wholly, or in the alternative, significantly contributed to her alleged injuries.
11. If, which is not admitted, the claimant suffered loss and damage and incurred expenses, these were not as a result of any negligence on the part of the defendants and the defendants reserve the right to have the claimant examined by an Orthopaedic Specialist of their choice.

[15] Here, I pause to note that the inaccurate numbering of the defence and other inelegances, are as filed.

The Applicants' submissions

[16] Among his submissions, counsel for the applicants, Mr. Kwame Gordon, argued that the applicants have a real prospect of successfully defending the claim for the following reasons:

(I) there can be no claim against the first applicant as he did not trade as Negril Tree House Resort;
(II) the respondent caused or contributed to her own injury and the second applicant took all precautions to prevent injury to the claimant;
(III) the allegation that the respondent stepped on a pipe on the beach floor is being challenged;
(iv) the application was made to the court as soon as reasonably practicable after finding out that the default judgment had been requested;
(v) the first applicant forwarded the matter to the insurers and thought it was being handled. The failure to file an acknowledgement and defence was due to an oversight on the insurer's part;

(vi) the delay was approximately three months; and

(vii) the respondent would not be prejudiced as she would have been aware of the filed defence since, at the minimum, November 2011.

[17] Counsel relied on **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 and **Dave Blair v Hugh C. Hyman & Co. (A Firm) and Hugh C. Hyman** SC 2297 of 2005 (unreported).

The Respondent's Submissions

[18] Among his arguments, counsel for the respondent, Mr. Jason Jones, submitted that:

(i) an acknowledgement of service should have been filed by 11th July, 2010;

(ii) the defence became due on 23rd September 2010;

(iii) the respondent requested judgment in default of acknowledgement of service on 7th September, 2010;

(iv) the applicants made an application for extension of time as late as 17th January 2011. They, therefore, delayed for approximately four (4) months after the defence became due. This delay was inordinate;

(v) the applicants knew about the incident from July 14, 2009 and had completed their investigation from October 2009. They were, therefore, in a position to file an acknowledgement of service and defence from the time they were served in 2010;

(vi) the excuse of inadvertence and oversight on the part of their insurance company is not a good reason for delay;

(vii) the evidence relied on by the applicants is inadequate. They have presented no documentary evidence to support their assertion that there is no pipe beneath the water,

despite an examination being conducted.

Furthermore, a two month delay in examining the area was long, and any evidence could have been removed within that two month period. A report from NEPA should have been provided and not just assertions that NEPA examined the area and found no pipes;

(viii) there is documentary evidence attached to the affidavit of Donna Brown which shows that the first applicant trades as Negril Tree House;

(ix) the applicants have not shown that they have a meritorious defence; and

(x) the payment of costs by the applicants would not satisfy the element of prejudice to the respondent.

[19] Counsel relied on **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4; **Attorney General of Jamaica v Roshane Dixon and Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ 23; **Attorney General of Jamaica and Western Regional Authority v Rashaka Brooks Jnr** [2013] JMCA Civ 16; **Peter Haddad v Donald Silvera** SCCA No 31/2003, delivered 31st July 2007; **Sasha Gay Saunders v Michael Green et al** 2005 HCV 2868; **Michelle Daley v Shantell Diggan (b.n.f. Aplan Evans) et al** C.L. 2002/D-034; **Anwar Wright v Attorney General of J***amaica* 2009 HCV 4340; **Ken Sales & Marketing Limited v James & Company (A Firm)** SCCA 3/05; **Teslyn Carter v Jamaica Urban Transit Company Limited et al** 2008 HCV 00555; **H.B. Ramsay & Associates Ltd. et al v Jamaica Redevelopment Foundation Inc. et al** [2013] JMCA Civ 1; and **Guardsman Alarms Limited v Graymil Engineering Limited et al** HCV 001113 of 2007.

The CPR

[20] Rule 9.3(1) provides:

> The general rule is that the period for filing an acknowledgement of service is the period of 14 days after the date of service of the claim.

[21] Rule 9.3(4) states:

> A defendant may file an acknowledgement of service at any time before a request for default judgment is received at the registry out of which the claim form was issued.

[22] Rule 10.3(1) states:

> The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form.

[23] Rule 5.1(1) states:

> The general rule is that a claim form must be served personally on each defendant.

[24] Rule 5.5(1) states:

> Personal Service of the claim form is proved by an affidavit sworn by the server stating -
>
> (a) the date and time of service;
>
> (b) the precise place or address at which it was served;
>
> (c) the precise manner by which the person on whom the claim form was served was identified; and
>
> (d) precisely how the claim form was served.

[25] Rule 10.3(9) states:

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

[26] On the respondent's submissions, the period for filing an acknowledgement of service would have expired on 11th July 2010. The applicants, on the other hand, made no submissions as to when the period for filing an acknowledement of service would have expired. It was only by the affidavit of the first applicant that there was an averment that the documents were received in July 2010. No specific date was provided, neither was there any document evidencing that they had been received by registered post.

[27] I am satisfied that the applicants were served on the date the respondent said they were. The affidavit of Mr. Andrew Scott supports this finding as it meets the requirements of rules 5.1(1) and 5.5(1) of the CPR. The averment of the first applicant that he received the documents in July 2010 by registered post was not supported.

[28] Rule 10.3(9) is authority for the court's exercise of discretion in extending time for the filing of a defence. However, that rule does not indicate what the court should consider in the exercise of this discretion.

Principles to be applied

[29] In **Strachan v The Gleaner Company** Motion No. 12/1999 (delivered 6th December 1999), Panton JA (as he then was) outlined the factors which a court should consider when making a determination whether to extend time. Although the court was dealing with an extension of time in relation to the filing of an appeal, it provides guidance on how rule 10.3(9) could be interpreted. Panton JA said the court should consider: (i) the length of the delay (ii) the reasons for the delay (iii) whether there is an arguable case, and (iv) the degree of prejudice to the other parties if time is extended. He also said that:

Notwithstanding the absence of a good reason for delay, the court is not bound to reject an application for an extension of time,as the overriding principle is that justice has to be done.

[30] Similarly, in **Fiesta Jamaica Limited v National Water Commission,** Harris JA adopted the approach of Lightman J, in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd v Ors**. [2001] EWHC Ch 456, where he outlined the principle as follows:

In deciding whether an application for extension of time was to succeed under r3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to viewed by reference to the criterion of justice...

Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that there were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice.

[31] In **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend),** Brooks JA also adopted the principle as stated by Lightman J. and went on to say that in the absence of specific guidance in a particular rule, the court is to have regard to the overriding objective, in applying that rule (Rule 1.1(1) of the CPR).

The length of delay

[32] I find that the period of delay between the date when the defence became due and the filing of the application to extend time was approximately four (4) months.

[33] From the decided cases it is patent that the length of delay, while not determinative, is important. The courts have emphasized consistently that time limits are to be observed. The defendant was required by rule 10.3(1) of the CPR to file its defence within forty-two (42) days of the service of the Claim Form. This was not done.

[34] In **Fiesta Jamaica Ltd. V National Water Commission**, the issue for the Court of Appeal was whether McIntosh, J had correctly exercised his discretion in refusing an application for leave to file defence out of time. In that case, the delay was approximately six (6) months but Harris, JA did not consider it to be inordinate. She went on to examine the reasons for the delay and merits of the defence. She found no good reason for the delay and that the defence was unmeritorious.

[35] In **Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockery**, Dockery's application came seven (7) months after the expiration of the period for filing a defence. Another three months after, a supplemental affidavit was filed exhibiting a draft defence. At paragraph 18, Harris, JA stated:

> *In an application for an extension of time, the delay and the reasons therefor are the distinctive characteristics to which the court's attention is drawn. It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice.*

[36] What the court reiterated, however, was that the length of delay was not determinative. The excuse given was also to be considered. This was also the case in **Preston and Haddad v Silvera.** However, the weaker the excuse, the less likely the court will be to countenance a tardy applicant who seeks to extend time.

Reasons for the delay

[37] The courts have held repeatedly that administrative oversight is not a good reason for delay. The Privy Council in **Attorney General v Universal Properties Ltd** [2011] UKPC 37 determined that inexcusable oversight was not a good explanation. Although their lordships were dealing with a different type of application than in the instant case, it stands to reason that the delay, in whatever circumstances, must be excusable. At paragraph 23 their Lordships said:

> *To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.*

[38] In **Kensales Marketing Ltd. v James & Company (a firm)** the Court of Appeal found that "inadvertence and certain procedural problems in office" was not a good explanation for failure to file an acknowledgement of service in time.

[39] In **Saunders v Green et al** the dilatory defendant sought to rely on the excuse that documents had been mislaid by his insurance company. At paragraphs 10-11 of his judgment Sykes, J said :

> *10. Mr. Hart is seeking to absolve himself of any responsibility by placing all the blame on NEM. This is no excuse at all. Mr. Hart is the person sued. It is his servant or agent who is alleged to have committed a tort. Mr. Hart has a responsibility to see that he complies with the court procedures. The documents that accompany the Claim Form are in the plainest of language. It spells out the consequences of failure to file an acknowledgement of service or a defence …*

11. Mr. Hart has failed to indicate what communication he had with NEM between February 8, 2007 when he claims he got the claim form and particulars of claim and the date judgment was entered. There is no evidence that he was in consistent contact with NEM or Mr. Murray to prompt them to act …

[40] Similarly, Daye, J(Ag.), was not impressed with the excuse of administrative oversight in **Daley and Another v Wong and Another.** At page 4 of the judgment he said:

This explanation seeks to cast blame on the insurer. The insurer is the agent of the defendants. In this regard, the insurers cannot be separated from the defendants' conduct Therefore the delay cannot be justified by blaming the insurer. Accordingly, in my view the defendants have not satisfied Rule. 13.3(1)(b).

[41] By contrast, in the **Attorney General of Jamaica v Rasheka Brooks,** Brooks JA did not regard the explanation of administrative oversight as inadequate and lacking in credibility. He said at paragraph 32 of the judgment:

Such oversight has, more than once been excused in these courts on the basis that a deserving litigant ought not to be shut out because of an error by his attorney-at-law. It is grossly negligent that the litigant's position is imperiled.

[42] The main issue for the Court of Appeal was whether the learned Master was correct in stating that in the absence of evidence concerning the merits of the defence, the application to extend time must necessarily fail.

[43] In that case the reason for the delay was administrative oversight in the Attorney General's Chambers. The court disagreed with the learned Master that "in the absence

of evidence of the merits of [a] defence, the appellants could not succeed in their application." Brooks JA stated at paragraph 15 that the result of applying the overriding principle to deal with cases justly, demands that there should not be an inflexible stance where the Court is given a discretion. At paragraphs 16 and 17 he states furher:

> *Clearly, if there were no merit to a proposed defence, it would be a waste of the Court's limited resources to allow that defence to proceed to trial. If, however, a draft defence is not available because the defendant's attorneys-at-law are not seized with the requisite instructions by the time the defence is due, does it mean that the defendant has no hope of pursuing a successful application to extend time until he is able to file a draft defence? It would seem to me, on the application of the overriding objective, that in certain special circumstances, such a defendant, as long as he can satisfy the Court that:*
>
> *(a) the application is made within a reasonable time;*
>
> *(b) there are good reasons for the delay;*
>
> *(c) there is good reason why the extension should be granted; and,*
>
> *(d) there would be no undue prejudice to the claimant*
>
> *should be able to secure an extension of time.*

[44] What emerges from Brooks, JA's reasoning are the following:

(i) in cases where a rule does not prescribe how a judge's discretion is to be exercised, then the discretion should be exercised in the context of the overriding objective of the CPR, which is to deal with cases justly;

(ii) in dealing with cases justly, the court cannot be inflexible. It needs to look at the specific

characteristics or circumstances and exercise the discretion accordingly;

(iii) in some cases the discretion may be exercised favourably towards a dilatory litigant if he has a good defence, while in others he may still find favour with the court even if he did not exhibit a draft defence, provided the other criteria are met; and

(iv) administrative oversight can amount to an adequate explanation, such as in a case where large entities with many departments, are involved.

[45] **The Attorney General v Rasheka Brooks** can be distinguished from the cases cited as taking a different view on administrative oversight. The applicant was a large government department and it was its own oversight which was in play. On the face of it, delay occasioned by one's own diliatory conduct is reprehensible.However, Brooks JA recognised that it might not be unreasonable for there to be administrative lapse when one is dealing with a large organisation with several departments, such as the Attorney General's Chambers which interfaces with Ministries and the numerous other government departments, agencies and corporations.

[46] An entity such as NEM insurance, hardly qualifies as a large entity with several departments such that administrative lapse should be readily countenanced. Insurance companies, by their very nature, are involved in two activities: the selling of insurance and the settling of claims. It is therefore inexcusable for NEM to have overlooked a claim which had been served on it for over five (5) months and which pertained to an incident which NEM had already investigated a year prior. The affiant, Miss Brown, had been aware of a potential suit yet the company did not alert itself.

[47] I have considered further that the excuse of adminstrative oversight was inadequate as it fell short of an explanation for NEM's tardiness. Also, it was not an

excuse which was given by the defendants themselves but their insurer, which is not a party to the suit.

[48] Accordingly, I find that the delay of four (4) months was inordinate having regard to the nature of the entity to which the delay was attributed and the absence of an explanation for the administrative lapse. It is expected that civil cases will be pursued with expedition. This philosophy underlies the objective of the CPR to deal with cases justly. When cases are delayed there is a cost to the opposing party and the resources of the court are taxed.

The Defence

[49] The next aspect to be considered is the defence and whether it has merits. This approach is consistent with judicial dicta that the absence of a good explanation for delay is not in itself sufficient to justify an unfavourable exercise of the court's discretion; the court must consider all the circumstances. In Peter **Haddad v Donald Silvera,** Smith, JA observed:

> *The Court has an untrammeled discretion. This discretion must be exercised judicially. There must be some material upon which the Court can exercise its discretion … The cases also established that notwithstanding the absence of a good reason for delay the Court was not bound to reject an application for an extension of time as the overriding principle was that justice had to be done.*

[50] It is therefore appropriate for the court to consider whether the defendants have a real prospect of successfully defending the claim (**Swain v Hilman** [2001] 1 All.E.R. 91). I am, however, mindful that what is required at this stage is not for the court to conduct a trial of the issues or to resolve the issues of fact, but to determine whether there is a real as opposed to fanciful prospect of the applicants defending their case.

[51] In this matter, the applicants provided an answer through the affidavits and draft defence. The first limb of their defence concerns the issue of whether the first applicant is a proper party. (By the time of hearing this application the 1st applicant had been substituted by an executor). The applicants have exhibited documents which take issue with the claim as to the first applicant's status. This matter will therefore have to be decided on its merits, and by itself is not a deciding factor as to whether the applicants have a real prospect of successfully defending the claim.

[52] The question of what or who caused the respondent's injury will also have to be determined at a trial. This case will turn largely on whether a pipe was present in the beach waters of the applicants' beach and so caused injury to the respondent as she disembarked the jet ski. I accept Mr. Jones' submission that a report from NEPA would have been useful at this stage, but I do not think that its absence amounts to a deficit of evidence. There is potentially a myriad of issues in contest including the admissibility of such a report, if it exists, and whether there was an underlay in the waters. In other words, what caused the respondent's injury is in issue and there are two extreme positions in contest.

[53] The case of **Guardsman Alarm Limited v Graymill Engineering Ltd et al** relied on by the respondent is distinguishable from the instant case. The defendant averred theft but brought not even *prima facie* evidence that a report had been made to the police. In that case the judge found that the defence was mere vacuous assertions.

[54] With respect, I do not regard as "vacuous assertions", the defence in the instant case that there was no pipe, simply on the basis that there was no NEPA report exhibited to the affidavits. There was an eye witness, in the affiant Rohan Myrie, Water Sports Manager, who deposed that to his "certain knowledge there was no pipe underlay at the location where the water sports were operated and where Miss Johnson injured her foot." The applicants also rely on an exclusion clause in the jet ski rental agreement.

[55] On the face of the defence, without getting into the merits, what has been mounted is capable of proof and provides a sufficient answer to the claim. In the unreported case of **Sydney Malcolm v Metropolitan Management Transport Holdings Limited & Anor** Suit No. C.L. 2002/M225 (delivered 21/5/2003), Mangatal, J. (Ag) (as she then was), puts the application of the test in these terms:

> *It is important to recognize that the application of the test does not involve an analysis at this stage of whether the defendant has a real likelihood, as opposed to a real and not fanciful prospect of succeeding. That is why one does not at this stage examine the affidavits and opposing factual disputes to assess what the likely outcome will be. Indeed what may appear to be a weak case, will stand as a case with a real prospect of success where the issues are joined in reality. What the court must satisfy itself of is that what is raised by way of evidence at the hearing of the application is the gravamen of real and not fanciful defence.*

Prejudice

[56] Mr. Jones relied on the dictum of Harris, JA in **Attorney General v Roshane Dixon and Sheldon Dockery** in which the court found that the defence had merit but denied the application on the basis that the other requisite criteria for the extension of time had not been met. At paragraph 31 of the judgement Harris, JA said:

> *As pronounced in **Haddad v Silvera**, the payment of costs does not ameliorate any hardship which would be encountered by a party in circumstances of delay.*

[57] Mr. Jones did not indicate in his submissions how the respondent might be prejudiced if the court were to grant an extension of time for the applicants to file their defence, in the particular circumstances of this case where a default judgment had not been entered. He simply asserted a view that the payment of costs would be inadequate to satisfy the issue of prejudice to the respondent. Without more, any delay

adversely affects a compliant litigant but 'adverse effect' is not necessarily synonymous with 'hardship'. Mr. Jones would need to go further and show that hardship has or would be occasioned by the delay. In the absence of a demonstration of same, the court has to balance the likelihood of prejudice to the respondent against the justice of the situation were the case to be determined without a trial.

Conclusion

[58] Most of the cases cited by counsel on both sides involved applications to set aside default judgments. Whilst the principles to be applied are mostly similar, the distinguishing characteristics are sufficient to dissuade the court from placing total reliance on them for guidance. In particular, in those cases, the claimant would have had “something of value”. A judgment would have already been granted. In cases where a judgment has not been granted, the courts can be less rigid. Notably, the CPR sets out at rule 13.3 considerations that must be looked at when a judge is exercising the discretion to set aside a default judgment while it is silent on what the judge should consider when exercising a discretion to extend time. Therein lies the authority for flexibility in the exercise of the judge's discretion to extend time.

[59] The applicants have failed to file a defence in time and have not given a good excuse for the delay. But, having shown a real prospect of successfully defending the claim, the court's coercive powers will be tempered. I have considered the likelihood of prejudice to the respondent and have come to the conclusion that it is outweighed by the justice of the situation in granting an extension. It is worth repeating that the overriding objective of the CPR is to do justice between the parties. This means that as far as possible cases must be decided on their merits and not on the basis of procedural lapses.

The Order

[60] Based on the foregoing, I make the following orders:

1. The applicants are granted an extension of time within which to file their defence.
2. The defence filed 10th November 2010 is allowed to stand.
3. The applicants are to serve the defence within seven (7) days hereof.
4. The matter is to proceed to mediation. Mediation is to be completed by 2nd April 2015.
5. Case management conference, if relevant, is set for 20th April 2015, at 11am for half hour.
6. Costs to the claimants to be taxed if not agreed.
7. Leave to appeal granted.
8. Applicants' Attorney-at-Law to prepare, file and serve order herein.