IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 05691

BETWEEN	**LENROY LINTON**	**CLAIMANT**
A N D	**CONSTABLE R. RUSSELL**	**1ST DEFENDANT**
A N D	**CONSTABLE C. WILLIAMS**	**2ND DEFENDANT**
A N D	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**

Miss Tamico Smith instructed by Frater, Ennis & Gordon for the claimant
Miss Hazel Edwards for the 3rd defendant instructed by Director of State Proceedings

HEARD: 26th September 2012, 15th November 2012, 14th March 2013, 27th May 2013, 30th September 2013 and 20th November 2013

APPLICATION TO SET ASIDE DEFAULT JUDGMENT – APPLICATION FOR EXTENSION OF TIME FOR WHICH TO FILE DEFENCE – CRITERIA FOR CONSIDERATION – THE OVER-RIDING OBJECTIVE

BERTRAM-LINTON
MASTER-IN-CHAMBERS (AG.)

[1] As has now become the norm two (2) applications have dovetailed into each other. The claimant's application for leave to enter judgment against the third defendant was filed on April 11, 2012 served on the 8th June 2012 and was scheduled for hearing on the 20th June 2012. This apparently triggered the filing of the 3rd defendant's application on the 19th June 2012 requesting:

> *"1. That the time for the service of this notice of Application for Court Orders be abridged.*

2. *That leave be granted to the defendants to permit their Acknowledgement of Service filed in the Registry and served on the Claimant's attorney-at-law on September 5, 2011 to stand as filed and served within time.*

3. *That leave be granted to the defendants to permit their Defence filed in the Registry of the Supreme Court on September 5, 2011 and served the claimant's attorney-at-law on September 8, 2011 to stand as filed and served within time.*

4. *Any other order this Honourable Court deems fit.*

[2] Thereafter the defendants pray in their aid Rule 26.1(2)(b) and Rule 11.11(3)(b) and declare inter alia that they have a reasonable prospect of success.

[3] The claimant's attorney Miss Smith at the outset was quick to point out that the defendants' notice of application filed the day before the scheduled hearing along with the affidavit in support was only brought to her attention while waiting outside to come in for the hearing. She further highlights that purported service on September 8, 2011and referred to at # 3 was sent by fax to her office and repudiated by letter dated September 19, 2011, so that in fact there was no proper service as argued by the 3rd defendant.

[4] In fact she says there is no proposed defence before the court annexed to the application being brought belatedly by the 3rd defendant.

THE PROCEEDINGS

[5] This matter was commenced by Claim Form and Particulars of Claim filed on 3rd November, 2009. The claimant seeks damages for trespass, assault and battery and for false imprisonment as well as breach of their constitutional rights stemming from an incident on the 14th March 2007 when the claimant was shot and detained by the police. The 3rd defendant was made a party to the proceedings by virtue of the provisions of the Crown Proceedings Act.

THE CLAIMANT'S APPLICATION

[6] The affidavit in support of the claimant's application says that service of the documents in the claim form was made on the 3rd defendant from as far as the 4th November 2009 and up to the 4th May 2011 one year and seven months later neither an

Acknowledgement or Defence had been filed in response. Thereafter the 3rd defendant filed an Acknowledgement and Defence on 5th September 2011 without seeking the court's permission and their attempt at service of these documents on the claimant was repudiated. Miss Smith's major argument was that it was unconscionable to allow the defendants to defend at this time because they had even missed the agreed date for extension of time to file a defence that had been settled between the parties and their present application was only triggered by the claimant's request for default judgment.

DEFENDANTS' SUBMISSIONS

[7] Miss Edwards submitted on behalf of the DSP that the pivotal consideration in these circumstances was the real prospect of success of the defendants' case and over-riding objective. She highlights major weaknesses in the claimant's case and commends these to the court in furtherance of the idea that her side had a real prospect of success.

[8] She calls to her aid the principle laid down by the Privy Council in **ATTORNEY GENERAL v MATTHEWS [2011] UK PC, 38.**

There Dyson L, said of a similar application:

> *"It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the Claimant that judgment in default should be entered in his favour."*
>
> And
>
> "*No distinction is drawn in rule 10.3(5) between application for an extension of time before and after the period for filing a defence."*

[9] During the course of the submissions on September 26, 2012 Miss Smith objected to the use of the affidavit which the defendants had just filed and offered her in the waiting area just before the case was called. As well after submissions had begun another affidavit was filed by the defendants on November 7, 2012. Both of these were rejected by the court as irregular and unfair to the other side.

[10] Miss Edwards contends that based on the **ATTORNEY GENERAL v MATTHEW** principle there was a valid defence before the court that had been filed and it was just a matter as the exercise of the court's discretion to let it stand.

[11] The real issues to consider in relation to the granting of the defendants' application are those criteria from such cases as **FIESTA JAMAICA v NATIONAL WATER COMMISSION [2010] JMCA CIV 4, PHILLIP HAMILTON v FLEMMINGS [2010] JMCA CIV 19.**

[12] The over-riding objective and/or the interests of justice should allow the substantial defence that has been proffered by the defendant as this is a proper case where costs will suffice to take care of whatever disadvantage the claimant may suffer bearing in mind the substantial and significant defence that has been proffered by the defendant.

THE ISSUES

[13] The main issue to be addressed is whether the 3rd defendant ought to be granted an extension of time to file its defence thereby allowing the defence filed on September 5, 2011 to stand. The flip side of this of course will determine whether the claimant is allowed to enter judgment in default against them.

[14] The principle which governs the approach to be taken was outlined by Harris JA in **FIESTA JAMAICA LIMITED v NATIONAL WATER COMMISSION [2010] JMCA CIV 4** where she adopted and approved the dicta of Lightman J in **COMMISSIONER OF CUSTOMS & EXCISE v EASTWOOD CARE HOMES (ILKESTON) LTD & ORS [2011] EWHC CH 456** as follows:

> *"In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be 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 defendant's case, the effect of the delay on public administration, the importance of compliance with time limits bearing in*

mind that they were there to be observed and the resources of the parties which might in particular be relevant to the question of prejudice."

[15] The major question here then is whether the affidavit in support of the defendants' application is of sufficient merit along with the defence filed on September 5, 2011 to warrant the order sought by the defendant and by extension to prevent the claimant from getting permission to enter default judgment.

[16] Before me for consideration are the Affidavits in support of the application filed. The defendants' affidavit in support is filed on June 19, 2012.

LENGTH OF THE DELAY AND THE EXPLANATION FOR IT

[17] The affidavit discloses that although the claimant document were filed and served on the 3rd and 4th November 2009 respectively it was not until some almost two (2) years later in September 2011 that an Acknowledgement and a defence was filed in the matter by the 3rd defendant. The reason given is that it was due to an oversight. (Paragraph 4 Affidavit of Hazel Edwards filed 19th June 2012).

[18] Counsel says as well that this was done before the request of the claimant made in April 2012 for default judgment was served on the Director of State Proceedings.

[19] The court notes however that the claimant had in May 2011 filed a request for default judgment (and wrongly so, since permission was needed).

[20] I believe this is a weak and inexcusable reason given by the 3rd defendant and that the period of the delay is way past the bounds of a simple oversight in fact it smacks more of the matter having been forgotten rather than merely a delay.

PREJUDICE TO THE OTHER PARTY

[21] The third defendant filed a defence in September 2011, the claimant were not obliged to accept service, as a right to apply for permission to enter default had now accrued as of sometime in or about January 2010. The claimant waited for some substantial time after this might accrued to apply for default judgment albeit using the wrong procedure and this application came subsequent to an attempt to serve the defence that had been filed on September 5, 2011 and serve on September 8, 2011.

All this time no application was made by the third defendant to regularise the Defence that had been filed until some nine (9) months later on June 19, 2012 and this was only after the claimant had filed and served their application for permission to enter default judgment on April 11, 2012 and the 8th June 2012 respectively.

[22] This situation as it has unfolded shows an unfortunate lack of regard by the 3rd defendant for the rules and procedures in its tardiness with the compliance regime laid down by the rules. With the result that after a substantial period of time the application is now being triggered only by the accrual of the right of the claimant which it seeks to reverse after holding out from meeting the allegations after the lengthy delay described before.

[23] Miss Edwards contends that costs will suffice to correct the disadvantage here based on the substantial defence put forward and in pursuit of the interests of justice the over-riding objective should be looked at.

THE MERITS OF THE DEFENDANTS' CASE

[24] I think it is necessary that the defence filed on September 5, 2011 be examined in order to determine whether it discloses a reasonable prospect of success and an arguable defence to the claim.

[25] Let us look at paragraph 5-11 of the defence which states as follows:

> *"5. The Defendants will say that the 1st and 2nd Defendants acted in self defence of each other at the material time. The Defendants will also say that the 1st and 2nd Defendants did not shoot at the Claimant or point their weapons at the Claimant as alleged or at all. Further, that the 1st and 2nd Defendants first saw the Claimant after the shooting had ceased. The Claimant was not in the 1st and/or 2nd Defendant's contemplation during the time that the gunmen exchanged gunfire with the 1st and 2nd Defendants.*
>
> *6. The Defendants will say that the 1st and 2nd Defendants at all material times, acted with reasonable and probable cause and did not act maliciously in response to the gunmen on March 14, 2007. Further, they did not use excessive force in the circumstances.*

7. *The 1st and 2nd Defendants had no control over or any proximate relationship with these gunmen and are not responsible for the gunmen's actions at all.*

8. *The Defendants will say that the Claimant was an innocent bystander at the material time.*

9. *The Defendants do not know who shot the Claimant. Further, the Defendants do not know where the Claimant's residence is. He must prove same.*

10. *The 1st and 2nd Defendants did not physically enter, search or otherwise peruse any building or place where the Claimant was.*

11. *After seeing the Claimant for the first time, the 1st and 2nd Defendants assisted the Claimant to get medical treatment. The 1st and 2nd Defendants did not detain or threaten to kill the Claimant as alleged or at all."*

[26] The defendants allege that they acted in self defence during the shooting or in defence of each other having been so engaged by gunmen while on patrol. They deny any malice toward the claimant and in fact describe him as an innocent bystander who could have been shot by the gunmen. They insist that the first time they saw him was after the shooting had subsided and he was assisted to get medical treatment.

[27] This defence on the face of it would seem to be quite substantial as Miss Edwards has suggested and certainly raises a full answer to the claim.

[28] A court in the exercise of its discretion is bound to have regard for the phrase "real prospect of success". The test that is applicable speaks to the relevant party's prospect of success being realistic and not just a fanciful one.

[29] In this regard I adopt the words of Lord Woolf after quoted as follows from **SWAIN v HILLMAN [2001] ALL ER 91**

> *"The words 'no real prospect' of being successful or succeeding do not need any amplification, they speak for themselves. The word real distinguishes fanciful prospect of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."*

[30] If this defence as outlined holds at trial it would be dispository of the matter in favour of the defendants.

THE OVER-RIDING OBJECTIVE

[31] Rule 1.1 enunciates the "overriding objective" of the rules as enabling the court to deal with cases justly. Rule 1.1(2) says that this includes making sure that cases are dealt with expeditiously. Rule 1.2(2) provides that the court must seek to give effect to the over-riding objective when it "interprets the meaning of any rule". The court is conscious of this. Deciding cases on their merit is always preferred and certainly advisable. However in the present circumstances and taking all the factors into account, I feel that the administration of justice would best be served by allowing the claimant permission to enter default judgment at this time. The language of the over-riding objective is applicable to all parties. It is undesirable for parties and in this case the Director of State Proceedings to so blatantly flout the rules as laid down for time limits and simply come at the last minute to say "but I have a good case". It is observed that the claimant had agreed at one stage for the defendant to have more time than allotted by the rules to file its defence and even then the defendants did not use the time. I am alive to consideration of justice for both sides and the need to act justly in keeping with the rights of all parties and as such make the following orders:

1. The time for service of the defendants' application for Court Order is abridged.
2. Leave to the defendants to permit their Acknowledgement of service filed on September 5, 2011 to stand as filed and served within time is refused.
3. Leave to the defendants to permit their defence filed on September 5, 2011 to stand as filed is refused.
4. The claimant is permitted to enter Judgment in default of Defence.
5. The matter is to proceed to Assessment of Damages on a date to be fixed by the Registrar or on the application of the claimant's attorney-at-law.
6. The claimant's attorney is to prepare file and serve the orders made.
7. Costs for this application is to the Claimant to be agreed or taxed.