[2019] JMSC Civ 243

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV0113

BETWEEN	**CAMELIA MCBEAN**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**DEFENDANT**

N CHAMBERS

Ms Kristen Fletcher and Ms Apryl July instructed by The Director of State Proceedings Attorney-at-law for the Defendant

Ms Catherine Minto instructed by Nunes DeLeon and Scholefield Attorneys-at-law for the Claimant

Heard: October 10, 2019 and November 19, 2019

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

Master T. Mott Tulloch-Reid (Ag)

[1] There are two applications before me. One application was filed by the Defendant seeking permission to file her defence to the claim out of time and for time to serve the application to be abridged. The application is supported by two affidavits sworn to by Mrs Kimberley Clarke. The application and supporting affidavit were both filed on May 2, 2019 and the supplemental affidavit was filed on September 17, 2019. The Claimant has also filed an application. She wants judgment in default

of defence to be entered in favour of the claimant and a date set for damages to be assessed. That application along with the supporting affidavit sworn to by Ms Catherine Minto, was filed on June 19, 2019.

[2] The issue of abridging time to serve the Defendant's application appears to be a non-issue as Ms Minto did not raise it and in any event she was very prepared to answer the submissions raised by Ms Fletcher on behalf of the Defendant. Both counsel agreed that their submissions on the issue concerning the extension of time to file defence would be the same as those they would make concerning the application to enter default judgment and it was agreed by all that the outcome of the application for extension of time to file defence would determine the issue regarding the entering of default judgment against the defendant. The analysis of the issues will therefore focus on the Defendant's application to extend time to file defence.

[3] Part 10.3(9) of the Civil Procedure Rules ("CPR") provides that

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

The Rules do not indicate what is to be taken into account by the judge when making that determination as to whether or not to allow that extension of time. Ms Fletcher has directed me to the decision of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Senior (his father and next friend) [2013] JMCA Civ 16.** In that case, the Honourable Mr Justice Brooks at paragraph 14 indicated that although the CPR do not provide any guidelines that should assist the Judge in making that decision, the court is to have regard to the overriding objective, which enables the court to deal with the cases justly.

[4] In the case of Fiesta Jamaica Ltd. v National Water Commission [2010] JMCA Civ 4, the Court of Appeal adopted the decision of Lightman J in Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and ors [All England Official Transcripts (1997-2008) delivered 19 January 2000] held that in

applications such as this, the Court, in dealing with the case justly, should consider the following:

(a) The length of the delay;
(b) the reason for the failure to comply with the prescribed time;
(c) the prejudice that the Claimant will suffer because of the delay;
(d) the effect of the delay on public administration;
(e) the merits of the appeal (in this case I would say the merits of the defence);
(f) the importance of complying with time limits; and
(g) the resources of the parties.

Although Lightman J highlighted the above noted factors as the factors that should be considered, he also said that

> *"it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice."*

I believe it is important to highlight this particular aspect of the reasoning of Lightman J because has impacted on my decision.

Who is to swear the affidavit of merit?

[5] It has become common practice that the affidavit supporting the application contains some attempt by the Defendant to demonstrate that he/she has a defence with merit and to exhibit to that affidavit, a draft defence to strengthen that position. In the case before me, this has been done. Ms Minto however takes issue with the affidavit as it was deponed to, not by one of the police officers who is alleged to have caused harm to the Claimant but by Mrs Kimberly Clarke, an attorney-at-law in the Attorney General's Chambers.

[6] Mrs Clarke in her affidavit seeks to explain the reason for the delay in filing the defence. She says that the claim form and particulars of claim were served on the Defendant on March 22, 2019. Beginning on April 1, 2019 attempts were made to

obtain instructions from the Office of the Commissioner of Police but up to May 2, 2019 when the application was filed, those attempts had proven futile. In light of the fact that the defence was to be filed and served by May 3, 2019 and as it appeared they would not be able to meet the deadline, the application seeking permission was made.

[7] Of significance to me in the explanation given by Mrs Clarke is that at paragraph 10 she indicated that the Commissioner of Police in giving the Director of State Proceedings instructions would first have to seek instructions from the police officers against whom the allegations were made and that because of the passage of time between the incident and the date of the filing of the claim form, it was not likely that the deadline to file the defence would be met. On September 17, 2019, 4 months later, the Defendant found herself in a better position as Mrs Clarke was able to depone to a Supplemental Affidavit which indicated that she was now in receipt of full instructions, which would enable her to put forward a full defence, if allowed to do so by the Court. In that affidavit she sets out the instructions received by the Director of State Proceedings ("DSP") about how the incident happened, which at paragraph 3 of the Supplemental Affidavit, she says are within her knowledge and where they are not within her personal knowledge are true to the best of her information and belief and based on her review of the records of the Defendant's attorney-at-law.

[8] Ms Minto objects to this course of action. Ms Minto is of the view that Mrs Clarke is not the proper person to swear the Affidavit of merit. The evidence should come directly from the person against whom the allegation is made. She says further that even if the Attorney is permitted to depone to the affidavit of merit, she should, in keeping with CPR 30.2(b)(i) indicate the source from which the averments came. I believe that Ms Minto, in her submissions was referring to CPR 30.3(2)(b) which provides as follows:

> ***"****…an affidavit may contain statements of information and belief where the affidavit is for use in any application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –*

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

(ii) the source for any matters of information and belief.

[9] Ms Minto also relies on the case of **Ramkissoon v Old Discount Co (TCC) Ltd (1961) 4 WIR 73** to support her position as it relates to the swearing of the affidavit. In that case, the affidavit that supported the application to set aside a default judgment, was supported by an affidavit sworn to by the appellant's solicitor and a statement of defence signed by counsel. The solicitor's affidavit did not purport to testify to the facts set out in the defence nor did he claim to have personal knowledge of the matters put forward to excuse the failure to deliver the defence. It was held on appeal, that the solicitor's affidavit did not amount to an affidavit stating facts showing a substantial ground of defence; and as the facts related in the statement of defence were not sworn to by anyone, there was no affidavit of merit before the judge or the Court of Appeal.

[10] In my view the cases are to be distinguished. First, I am not privy to the content of the affidavit sworn to by counsel in the **Ramkissoon case**. The content thereof would have been very helpful in determining what the judge and the Court of Appeal had to consider in that case. Second, that case concerned and application to set aside default judgment. This is a case which is dealing with an extension of time to file a defence. It is my view that the standard to be achieved in both cases is different. The CPR is clear in what is to be considered in applications to set aside the default judgment. In applications to extend the time within which to file a defence, by virtue of the absence of clear directions, the Court is, in my view, allowed to exercise its discretion more widely albeit within the confines of doing justice, which brings me back to this aspect of Lightman J's decision which is sometimes overlooked

> *"it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice."*

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

[11] Ideally the servants and/or agents against whom the allegations were made would be the best person to swear the affidavit but I am satisfied that in this particular case before me, and for the purposes of this particular application when the Attorney General of Jamaica is the party to the claim and her servants and/or agents have not been sued or named specifically in the claim, Mrs Clarke is able to properly swear the affidavit. She has indicated the basis on which she was able to do so, by stating that she received instructions and also from reviewing the records of the Defendant. Her Affidavits combined have helped me to determine the source of her instructions – she said she was awaiting instructions from the Commissioner of Police and it would appear that those were received so that she could file the Supplemental Affidavit and a draft defence in September 2019.

Reason for the delay

[12] I am of the view that the explanation given for the failure to file defence within time is a reasonable explanation. This is not a situation where the defendant speaks directly this attorney. This a situation where the Attorney General must first consult with the Office of the Commissioner of Police to determine who were the policemen or women who are concerned with the claim and then obtain their instructions. I am mindful of the fact that these persons may not be easily available as over the

course of time they may be reassigned or resign and so they may not be easily found for instructions to be obtained readily.

The length of the delay

[13] I am also of the view that the delay in making the application was minimal. The application was made one month after the initiating documents were served and up to that time, the instructions from the Office of the Commissioner of Police had still not been received. I am of the view that the Defendant has shown a desire from the get go to participate in the proceedings and has, in this case, acted in a timely manner.

The degree of prejudice to the Claimant if time is extended

[14] The Affidavit which supports the Claimant's application does not set out whether the Claimant will suffer any prejudice because of the delay. The Defendant is of the view that any prejudice the Claimant will suffer can be relieved with a payment of costs. I will state here that the incident was alleged to have taken place in December 2013 but the Claim Form was not filed until March 20, 2019, almost 6 years later. In fact, the Claimant's claim was filed in the year that the claim would have become statute barred. The Claimant did not herself seem to be in a hurry to put her case to the court. The Claimant cannot therefore say a delay will prejudice her as she has herself contributed to any delay in bringing the claim to court in her failure to file the claim in a timely manner. Acting in a timely manner to prevent prejudice, in my view, is not just the duty of a Defendant, it is also the duty of the Claimant. The Claimant has deponed at paragraph 7 of her affidavit filed on October 4, 2019 that the continuation of the charges, even after the investigating officer concluded she had done nothing wrong, has caused her prejudice as she is unable to secure gainful employment. She has however failed to show or say how she will be prejudiced if the Defendant is allowed to file her defence out of time. It is that prejudice, which I have to contemplate at this time. The prejudice she depones to in her affidavit is one, which a trial judge would have to consider and take into account at a trial when damages are being assessed.

The merits of the defence

[15] I must now consider the merits of the defence. Ms Minto in trying to distinguish the **Rashaka Brooks case** has pointed out to me that the merits of the defence must be considered because there is an affidavit which attempts to speak to the merits of the Defendant's case, to which a draft defence is exhibit, whereas in **Rashaka Brooks** there was none. She submits that since the Defendant now has a defence I must look at it and if it has no real prospect of succeeding I am not to allow it to go any further. She argues that in a case of malicious prosecution I am to consider whether the person against whom the allegation has been brought has a reasonable and probable cause for acting in the manner in which he did. It is the police, she says, who initiates the claim, they have an independent role separate and apart from the complainant. They cannot rely on the investigations of the complainant; they must do their own investigations. For that submission I was referred to the decision of the Honourable Ms Justice Carol Edwards (as she then was) in the case of **Denese Keane-Madden v The Attorney General of Jamaica and Corporal T Webster-Lawrence [2014] JMSC Civ 23.**

[16] There is nothing before me which would suggest that the police did not conduct their own investigations. The Particulars of Reasonable and Probable cause set out in the draft defence say at ii. that

> *"upon receiving the report, the police suspected illegal activity and commenced investigations in November 2013."*

At iii, the pleadings continue that

> *"following from those investigations, the Claimant … was suspected on reasonable and probable grounds to have committed offences against common law, the Larceny Act and the Forgery Act. This suspicion arose by virtue of the Claimant's involvement in the processing of a number of unauthorised withdrawals from the accounts of credit union members."*

What is to be determined is whether the investigations were properly carried out. If I should inquire into that at this stage, it is my view, that I would be embarking on a mini-trial and I do not believe that that is my role at this stage. The issue of

whether the servants and/or agents of the Crown acted with or without reasonable and probable cause in their prosecution of the Claimant, is a matter to be determined by the judge of fact at the trial of the matter after the evidence of the parties and their witnesses have been put before the Court and tested on cross-examination.

[17] Ms Minto also argues that a proper affidavit of merit is not before the Court because all the evidence sets out is that the Claimant was charged because she processed transactions. This she says was not a sufficient basis for the servants/agents of the Crown to arrest and prosecute the Claimant. The evidence however goes a bit further than Ms Minto takes it. At paragraph 6 of Mrs Clarke's supplemental affidavit she speaks to a report being made to the police, which prompted an investigation which first implicated a Mr Otis Brown and which further investigations revealed that the Claimant "had been involved in the processing of several unauthorised withdrawals". It is the result of those investigations, says Mrs Clarke, which led to the arrest of Ms McBean, not merely the processing of transactions.

[18] Ms Minto then throws into the mix, the letter dated June 24, 2016, authored by the investigating officer, Mr Denton Burton, which suggests that Ms McBean is innocent. I wish to however remind Ms Minto of the decision of Lord Denning in the case of **Glinski v McIver [1962] 1 All ER 696**. Lord Denning, in speaking of a police officer's state of mind noted that the police officer is not the person who judges whether a witness is speaking the truth. Guilt or innocence, he said, is for the tribunal, not the police officer. The police officer is only concerned that there is a proper case to be put before the court.

[19] It is my view that the challenges which Ms Minto raised to the evidence put forward by the Crown to support a position of reasonable and probable cause, are challenges which are best left to the trial judge.

CONCLUSION

[20] In **Biguzzi v Rank Leisure plc [1999] 1 WLR 1926**, the English Court of Appeal encouraged courts to utilise the greater powers afforded under the CPR to allow the trial of appropriate cases. That approach would allow for an extension of time in which to file a defence but applying proportionate sanctions for the failure to file within time.

[21] I believe that the Defendant acted in a timely manner in making her application for an extension of time within which to file her Defence. She gave a good explanation for her inability to file in time and then during the interim of awaiting a Court date for the hearing of her application, took steps to obtain her instructions. There is an affidavit of merit which exhibits a draft defence which puts forward a defence that has a real prospect of succeeding. The issues before the Court on both the Claimant's case and the Defendant's case are triable issues and as such, I find that this is an appropriate claim for trial. I therefore order as follows:

(a) The Defendant is to file and serve a Defence to the Claim on or before November 25, 2019.

(b) The Claimant's application for default judgment in default of Defence to be entered against the Defendant is refused.

(c) The parties are to attend mediation on or before January 16, 2020. All relevant parties, including the police officer(s) against whom the allegations are made are to be in attendance. If the police officers against whom the allegations are made are absent from the mediation, the Defendant's statement of case will stand struck out and the Registrar is to enter judgment in favour of the Claimant. If the Claimant fails to attend mediation, her statement of case will be struck out.

(d) Should mediation be unsuccessful, the parties are to attend Case Management Conference on January 29, 2020 at 11:00am for ½ hour.

(e) The Defendant is to pay the Claimant's costs in the Defendant's application to extend time to file Defence in the amount of $52,500.00 to the Claimant on or before January 28, 2020.

(f) There shall be no orders as to costs in the Claimant's application to enter default judgment.

(g) Leave to appeal is granted.

(h) The Defendant's attorney-at-law is to prepare, file and serve the Formal Order.