[2022] **JMSC. Civ 25**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2016HCV02839**

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| **BETWEEN** | **ASTON WRIGHT** | **CLAIMANT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **DEFENDANT** |

**IN CHAMBERS**

Miss Mekilia Green instructed by Bignall Law, Attorneys-at-Law for the claimant

Miss Nicola S. Richards instructed by The Director of State Proceedings, Attorneys-at-Law for the Defendant

December 8, 2021 and January 19, 2022

**Application to extend time to file defence - Application filed without a draft defence - Application heard five years after application filed - Draft defence filed five years after application filed - Affidavit of merit deposed by Defendant's attorney-at-law.**

**MASTER STEPHANY ORR**

**[1]** On July 6, 2016, Mr. Aston Wright, the Claimant, commenced this claim against the Attorney General of Jamaica for damages for Negligence. He alleged that on February 22, 2016, a motor vehicle collision occurred along the Burnside Valley main road, Red Hills in the parish of Saint Andrew.

**[2]** He further alleged that a motor vehicle owned by the Defendant (i.e., registered to the Government of Jamaica) collided with the right rear section of a motor vehicle which he was driving.

**[3]** Mr. Wright's claim is in relation to a whiplash injury, which he says he sustained as a result of the collision which was caused by the Defendant's driver.

**[4]** An Acknowledgement of Service was filed on August 2, 2016 indicating that the Defendant was served with the claim on July 8, 2016. Their defence should have therefore been filed by August 19, 2016.

**[5]** Their Notice of Application to Extend the Time to file a Defence was filed on September 14, 2016. I will deal with the contents of this application later.

**[6]** On May 7, 2021, some four years and ten months after filing this claim, counsel for the Claimant filed a Notice of Application to Enter Judgement in Default of Defence against the Defendant.

**[7]** This application was scheduled for hearing on October 21, 2021. At that hearing, counsel for the Defendant informed the court of their pending application filed on September 14, 2016, which had not been issued with a hearing date.

**[8]** As a result, the Claimant's application to enter judgement in default of defence was adjourned to December 8, 2021 and the Defendant's application was scheduled to be heard at the same time.

**[9]** In keeping with Morrison, JA's guidance that:

> *"where there are two applications before the court, one of which will if granted, obviate the need to pursue the other, the sensible and most efficient course for the court to adopt will usually be to postpone consideration of the latter until after the former has been heard and determined."*[1]

The defendant's application was heard first.

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[1] New Falmouth Resorts Limited v NWC [2018] JMCA Civ 13

**THE LAW**

**[10]** The application to extend the time to file the defence was filed after the prescribed time limited to file the defence had expired. Rule 10.3(9) of the CPR allows the court to extend the time to file a defence. CPR 26.1(2)(c) enables the court to extend the time to comply with an order, direction or rule of court after the prescribed time for compliance has expired.

**[11]** Neither rule provides the court with any guidance in the exercise of its discretion to extend time. The principle governing the court's approach in granting or refusing an application for an extension of time was summarized by Lightman, J in **Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Others**[2].

**[12]** The courts in this jurisdiction have endorsed and adopted these principles, and in **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 at paragraph [15] Harris, JA (as she then was) in dealing with an application to file a defence out of time set out the following guidelines for the court in the exercise of its discretion;

> *"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 was to be granted. Each application has to be viewed by reference to the criterion of justice."*

**[13]** 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 application, the effect of the delay on public administration, the importance of complying 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.

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[2] [2001] EWHC Ch. 456.

**[14]** Importantly, the factors which will be considered may vary from case to case based on the circumstances of each case, but the court is to adopt a holistic approach in considering these various factors.

**[15]** The circumstances of this case have required me to consider: the delay in applying to extend the time to file a defence and the importance of complying with time limits, the explanation for the delay, the merits of the application and the prejudice to the other party.

**THE DELAY**

**[16]** One of the considerations of the court is whether there was any delay on the part of the Defendant in applying to file the defence out of time. As I have indicated, the defence was due on August 19, 2016 and the application was filed less than one month later on September 14, 2016.

**[17]** Of note is that when the application was filed, the affidavit in support of this application did not include a draft defence. This was not fatal to the application as Brooks, JA (as he then was) in **The Attorney General & Others v Rashaka Brooks Jnr & Another**, [3] distinguished Defendants such as large corporations and the Attorney General, which he said should not be barred from making an application to file their defence out of time, simply because they were unable to provide a draft defence and affidavit of merit at the time the application was heard.

**[18]** He explained that large corporations and this Defendant would likely need to take instructions from several or differing departments or divisions which may preclude them from being able to meet the 42-day time period from service of the claim, as prescribed by the rules.

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[3] [2013]JMCA Civ 16

**[19]** Importantly, he said that by making a distinction for this particular set of Defendants, the court was not seeking to place these particular Defendants in a better position than the Defendant who had been able to produce a draft defence for the scrutiny of the court.

**[20]** Of equal importance is that Brooks, JA (as he then was) was of the 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."*

**[21]** It could therefore reasonably be argued that there are two types of Applicants; those who are able to satisfy the requirement of producing a draft defence and affidavit of merit when the application is made, and those who are unable to do so.

**[22]** It may very well be however, that although a Defendant files his application without the affidavit of merit exhibiting the draft defence, by the time the application is actually heard, he has been able to procure instructions and has therefore filed a draft defence which is exhibited to an affidavit of merit. At the hearing, this affidavit of merit and draft defence are before the court for consideration.

**[23]** At the hearing, the applicant would no longer fall into that category of cases described by the court in **Rashaka Brooks** [4], who are unable to provide a draft defence and affidavit of merit when the application is heard.

**[24]** In calculating any delay, such a defendant must be required to account for that period between the filing of his application to extend the time to file his defence, and the filing of his affidavit of merit exhibiting the draft defence. If not, it would be far too easy for applicants such as large corporations or the Attorney General as described by the court, to quickly file their applications to extend the time either before or shortly after the prescribed time to file their defence expires, and then

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[4] Supra 3 at paragraph 17

relax for as long as they wish, confident in the belief that they had duly applied for the extension in a timely manner, albeit without properly placing the application before the court as there would be no affidavit of merit.

**[25]** This confidence that they could delay without any consequences, would be further bolstered by the knowledge that the Registry does not always issue hearing dates in a timely manner.

**[26]** These applicants would need not overly concern themselves with their duty under Part 3.1 to further the overriding objective which includes dealing with all claims expeditiously.

**[27]** Equally, such a defendant should also be required to explain why he took so long to file his affidavit of merit where he seeks to rely on same at the hearing of the application. This would be in keeping with the existing requirement to explain any delay.

**[28]** If this were not required, such a defendant would be placed in a better position than the defendant who is required[5] to and indeed files his affidavit of merit exhibiting the draft defence simultaneously with his notice of application for an extension of time to file defence. The court was clear to express in **The Attorney General & Another v Brooks** that it did not intend to place these applicants in a better position than other applicants.

**[29]** There are numerous decisions emanating from both courts which speak to the necessity of adhering to timelines prescribed by the rules or orders of the court.

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[5] Rule 11.9(2) requires all notices of application to be supported by affidavit evidence unless a rule, order or practice direction provides otherwise. Applications are not properly before the court until the supporting affidavit is filed. Applications to extend the time to file a defence have a further requirement that the supporting affidavit must include evidence outlining the defence to satisfy the requirement of a defence of merit and exhibit the draft defence. The affidavit must also explain any delay. While the required evidence need not be in one affidavit, all of the evidence must be before the court for the application to be properly before the court for the application to be heard.

CPR 1.3 imposes a duty on all parties to further the overriding objective which mandates that claims must be dealt with expeditiously, and by doing so requires all parties to treat each stage of the claim with alacrity. More particularly, where a party has breached a rule or order of the court, he must always move quickly to remedy the breach.

**[30]** The court cannot countenance or ignore the actions of a Defendant who delays in properly placing his application before the court so that it can be heard.

**[31]** For these reasons, in calculating the delay by this Defendant in making the application to file its defence out of time, I have considered the period between the filing of the application on September 16, 2016 and the filing of the affidavit of merit on December 5, 2021 which it sought to rely on at the hearing on December 8, 2021.

**[32]** The Defendant by my calculation would have delayed some five years and nearly four months in properly making an application to file its defence out of time.

**[33]** The starting point in considering the nature of the delay is that the Defendant is to file a defence within forty-two days of service of the claim. In examining the case law dealing with similar applications, I have not seen where the court has granted an extension after a similar period. In the circumstances of this particular case, I would find the Defendant's delay in making the application to file defence out of time most egregious.

**THE EXPLANATION FOR THE DELAY**

**[34]** The Civil Procedure Rules [2002] as amended created a system of timelines and consequences, procedural checks and balances which were absent under the old regime of the Civil Procedure Code. The overriding objective of these rules is to deal with cases justly, which includes dealing with claims expeditiously.

**[35]** The court is therefore tasked, not only at the case management conference or pre-trial review, but at every encounter with the parties and/or counsel, to further the

overriding objective. The court must seek to ensure that with each interaction orders are made with the view of moving the claim closer to a determination of the issues, whether by trial, mediation or a court order.

**[36]** It is against this background that Harrison, JA said that ***"time requirements laid down by the rules are not mere targets to be attempted but they are rules to be observed."*** [6]

**[37]** The time periods prescribed by the rules do not exist merely because the court is concerned about backlogs and statistics. These rules exist primarily because, as the authorities have shown, delay is inimical to the good administration of justice in that it fosters and procreates injustice.[7]

**[38]** A court that is concerned with good administration of justice and eliminating delays will therefore be concerned with the reason that an applicant provides for any delay in taking a procedural step or complying with a rule or order of the court.

**[39]** Any reason(s) provided for the delay in applying to the court to rectify a breach, must explain in detail the reason for the delay. The explanation must also speak to the entire period of the delay.

**[40]** In **Peter Hadadd v Donald Silvera** [8] the court said that ***"****in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules."*

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[6] Arawak Woodworking Establishment Ltd. v Jamaica Redevelopment Bank Ltd. [2010] JMCA App 6 [16]
[7] Attorney General of Jamaica v Roshane Dixon & Attorney General of Jamaica v Sheldon Dockery [2013] JMCA Civ23 [18]
[8] Unreported SCCA No 31/2003 delivered on July 31, 2007

**[41]** Both affidavits filed by the Defendant seek to explain the delay in filing the defence by outlining that there were administrative pressures at the Attorney General's Chambers. They also explain that they were unable to secure instructions in a timely manner.

**[42]** Where the Defendant seeks to explain any delay on the basis that it experienced difficulties in securing instructions, there must be some evidence as to the steps that were taken to secure these instructions. There must also be evidence of the difficulties experienced in securing their instructions, and the steps taken to overcome them. So too the defendant would have to explain the "pressures" at the Attorney General's Chambers.

**[43]** It is only with this information that the court can properly assess whether the explanation provided by the applicant justifies the favourable exercise of the court's discretion.

**[44]** The court has said that a bare statement that a delay was due to the inability of the applicant to obtain adequate instructions to assist in complying with the rules is highly unsatisfactory and cannot be regarded as a proper explanation for the delay. Having received inadequate or no instructions, it was incumbent upon the applicant to pursue a request for instructions or any additional information needed with due dispatch.[9]

**[45]** This claim arises from a simple motor vehicle accident. Instructions to prepare this defence would ultimately come from the driver of the motor vehicle involved in the collision. This is not a case where several government units must provide substantial documentation in the preparation of the defence. The defendant's explanation must therefore outline the steps that were taken to obtain instructions

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[9] Supra 7 at paragraph [21]

from this driver and the reasons why his instructions or his statement were not forthcoming and when they were received.

**[46]** So too, the Defendant must also provide an explanation for the delay in filing the draft defence and affidavit of merit where it is not filed with the notice of application. There was no explanation as to why the affidavit of merit exhibiting the draft defence was filed a mere three days before the hearing, or some five years after their application had been filed.

**[47]** The Defendant has provided a reason for the delay, but the explanation provided has not satisfactorily explained the delay with sufficient detail. The explanation is also limited to the delay in filing an application to extend time, but does not address the delay in filing the affidavit of merit and draft defence which the Defendant sought to rely on at the hearing of its application. I could not in these circumstances accept the submission that the Defendant has provided a good or a reasonable explanation for the delay.

**THE DEFENCE**

**[48]** It is always emphasised that applications to extend the time to file a defence must be supported by affidavit evidence which outlines the facts being relied upon to defend the claim. This affidavit must be deposed by someone who can speak to the facts from personal knowledge or who can speak to such matters by way of information and belief, but with the source of such belief disclosed in the affidavit[10].

**[49]** The affidavit which exhibits the draft defence was sworn by counsel for the defendant who stated that:

> *"Insofar as the facts outlined in my affidavit are within my knowledge, those facts are true and where they are not within my knowledge, they are true*

[10] Supra Nanco at paragraph [67]

*to the best of my knowledge information and belief and are based on my review of the records of the Defendant's Attorney-at-Law"*

**[50]** Later in the affidavit she outlines that Constable Shamar Berry was driving service vehicle BN 017 along the Burnside Valley main road, Red Hills in the parish of Saint Andrew.

**[51]** Her affidavit details that the car driven by the Claimant was on the opposite side of the road and that upon seeing the service vehicle, Mr. Wright swerved from the middle of the road on to the left-hand side. As a result, the vehicle which he was driving collided with the side of the service vehicle causing minor damages. The right rear door and horizontal front door of the service vehicle were damaged.

**[52]** In concluding her description of the accident, she stated that in denial of the claim the Defendant will say that at all material times Constable Berry exercised reasonable care while operating the service vehicle and took all necessary steps to avoid the accident.

**[53]** Miss Richards relied on s.32 and s.51 (2) of the Road Traffic Act and submitted that drivers are required to operate a motor vehicle on the public road using due care and attention and with reasonable consideration for other users of the road. She also submitted that a driver has a duty to take evasive action to avoid a collision. In the circumstances, the driver of the Defendant's vehicle exercised due care and attention and reasonable care in the operation of the vehicle, and therefore has a good defence.

**[54]** Miss Green for the Claimant submitted that the defence was just a bare denial of the accident. She was unable to satisfactorily expand on this submission when asked to so do.

**[55]** The Defendant's affidavit states the source of the information on which the Defendant intends to rely as being information taken in her review of the file in the Attorney General's Chambers. There is no identifiable source of this information. There is no indication that a statement was secured from Constable Shamar Berry,

the driver of the motor vehicle involved in the collision with the Claimant or a passenger in the vehicle.

**[56]** In **Mark Brown v The Attorney General Of Jamaica & Detective Constable Wayne Wellington**[11] the court considered an application to set aside a default judgment. Similar to the case at bar, the affidavit of merit was sworn by counsel from the Attorney General's Chambers.

**[57]** Counsel for the Claimant had argued that there was no affidavit of merit before the court as counsel did not have personal knowledge to swear the affidavit. He submitted that the affidavit of merit had to be within the knowledge of the affiant or contain statements of the information and belief with the sources and grounds thereof. He argued further that since counsel had stated that the defence was drafted "upon instruction contained in a file", the origin or authors of which are unknown, it amounted to no more than hearsay evidence and was inadequate to satisfy the requirement of an affidavit of merit.

**[58]** His submissions did not find favour with the trial judge. However, much later, Morrison JA referencing that decision in B & J Equipment Limited v Nanco said that he was inclined to *"treat Mark Brown v Attorney General of Jamaica and Detective Constable Wayne Wellington… as a case decided on its own special facts.*"

At paragraph [46] he said that:

> *"As regards (1) the person who one would have expected to speak to the merits of the case in Mark Brown v The Attorney General & Detective Constable Wayne Wellington must surely have been the second named defendant, and not the Attorney General, whose liability, if any, would have been purely vicarious; as regards (ii) even if hearsay evidence is acceptable in interlocutory proceedings, the person applying to set aside a default judgment must generally produce an affidavit, whether based on personal knowledge or information or belief, from someone who can swear*

[11] Unreported CL 2000/B-011

> *positively to the facts upon which the defendant intends to rely; and finally as regards (iii) there does not appear to have been any evidence in the case to suggest that there were any exceptional circumstances justifying departure from the well-established rule requiring an affidavit of merit in the circumstances."*

**[59]** Counsel makes the distinction that the facts that are in her personal knowledge are true and where they are not within her personal knowledge, they are true to the best of her knowledge information and belief. She does not however state that part of her evidence which is in her personal knowledge and that which is not. It is unlikely that counsel was a passenger in the motor vehicle driven by Constable Shamar Berry and she did not say so.

**[60]** A reasonable inference is that the information in her affidavit which speaks to how the accident happened is not within her personal knowledge. Who then did this information come from as she simply states that it came from the Defendant's file? How then does the court properly assess the Defendant's defence if the source of this evidence is unknown?

**[61]** In the absence of satisfactory evidence as to the source of the information as to how the accident occurred, which is in effect the facts on which the Defendant relies to establish that there is a defence of merit, I could not find that the Defendant has a good defence on the merits.

**PREJUDICE AND THE CONDUCT OF THE PARTIES**

**[62]** While hearing the oral submissions, I enquired as to whether any attempts had been made to secure a date for the hearing of the application. In response, counsel for the Defendant pointed out that it was the duty of the Registry to issue dates in a timely manner. She conceded however that there was no indication on her file that any correspondence had been sent to the Registrar of the Supreme Court requesting a date for the hearing of the application. She submitted further that this does not mean that no steps were taken to secure a date for the hearing of the application.

**[63]** Where no hearing date was issued five years after the Defendant's application to extend the time to file its defence was filed, we would have failed in our mission to provide timely and efficient court services. Miss Richards is quite correct in her submission that it is the duty of the Registry to issue the date in a timely manner. However, I am reminded that CPR 1.3 provides that:

> *It is the duty of the parties to help the court to further the overriding objective.*

**[64]** There was no evidence before me of any communication with the Registry to secure a date for the hearing of the application, I could not therefore accept counsel's submission that communication had indeed been sent. The Defendant had a duty to take the necessary steps to secure a hearing for the application filed on September 16, 2016.

**[65]** As I touch on the issue of the duty imposed on parties to help the court to further the overriding objective, I must address the conduct of the Claimant in these proceedings. Counsel in her submissions alluded to the Claimant being prejudiced by the Defendant's delay. Miss Richards responded that the court could award costs against the defendant in respect of any prejudice to the claimant. I believe we have come to accept that costs no longer ameliorate any hardship endured by a party where there is delay.

**[66]** In truth however, it seems that the claimant was content to sit back and take no steps to pursue his claim for more than four years while his claim languished before the court. There was no indication that counsel was aware of the Defendant's pending application, which would have been evident from a necessary search of the court file when the application to enter judgment was made. In addition, counsel for the Defendant indicated that correspondence was delivered to the Claimant's Attorneys-at-Law informing them that an application was filed to extend the time to file their defence. There was no evidence of any communication between counsel during the four-year period enquiring as to the status of the Defendant's application. While one party's delay will most usually always prejudice

the other party, I am hard pressed to accept the submission on prejudice in the particular circumstances of this case.

**[67]** When both applications were heard there was no bundle filed on behalf of the Claimant in compliance with Practice Direction 8 of 2020.

**CONCLUSION**

**[68]** Counsel has prayed in aid of the overriding objective. Rule 1.1 of the CPR imposes an obligation on the court to deal with cases justly. In order to give effect to the overriding objective, under the rule, the court, in its application and interpretation of the rules must ensure as far as is practicable that cases are dealt with fairly and expeditiously. The court, in considering what is just and fair looks at the circumstances of the peculiar case. No one factor is determinative of the application and the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.

**[69]** This duty however must also be balanced against the court's obligations to uphold the procedural rules and orders of the court which guide litigants and their Attorneys-at-Law and are necessary for good and fair administration.

**[70]** *"For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. … the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."*[12]

**[71]** Not only was the defendant's delay of over five years egregious, nothing was done by the defendant during the five-year period to secure a date for the hearing of its

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[12] Supra at paragraph [32]

application. The defendant seemed content to allow the application to languish as was evident in the filing of the affidavit of merit a mere three days before the hearing of the application, despite having had prior notice of the application date.

**[72]** Delay is not the only consideration. I have stated earlier that the defendant did not provide an acceptable explanation for the delay. While the inadequacy of a good explanation for the delay does not preclude the court from granting an extension, the weaker the excuse, the less likely the court will be inclined to assist a tardy applicant.

**[73]** For the reasons outlined earlier, I am not satisfied that the defendant has presented a defence of merit.

**[74]** I accept that the claimant did nothing to further his claim, however, having carefully considered the defendant's application to extend the time to file a defence, if the application is granted, the interests of justice, particularly our duty under the overriding objective to deal with claims expeditiously, would not have been served. The orders of the court are therefore as follows:

1. The Defendant's application to file its defence out of time filed on September 14, 2016 is refused.

2. Judgment is entered against the Defendant in default of defence with damages to be assessed.

3. No order is made for costs.

4. Standard Disclosure is to take place by January 31, 2022

5. Inspection is to take place by February 11, 2022

6. Witness Statements are to be filed and exchanged by March 4, 2022

7. Written submissions and a List of Authorities in relation to the damages claimed is to be filed and served by April 1, 2022.

8. An Agreed Bundle of Documents is to be filed and served by the Claimant's Attorneys-at-Law by April 1, 2022.

9. An Assessment Bundle which includes the written submissions filed on behalf of both parties is to be filed by the Claimant's Attorneys-at-Law and the index served on counsel for the Defendant by April 22, 2022.

10. A Pre -Trial Review is scheduled for May 2, 2022 at 11:00am for thirty minutes at which time, provided the parties have complied with the case management orders the claim will be transferred to the Assessment Court for a hearing date to be scheduled.

11. Cross examination is limited to 30 minutes for each witness

12. Oral Submissions are limited to 20 minutes for each counsel.

13. Leave is granted to the Defendant to Appeal.

14. The Claimant's Attorney-at-Law is to prepare, file and serve this Order

STEPHANY ORR

MASTER