[2013] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 160/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST APPELLANT**
AND	**WESTERN REGIONAL HEALTH AUTHORITY**	**2ND APPELLANT**
AND	**RASHAKA BROOKS JNR (A MINOR) BY RASHAKA BROOKS SNR (His father and next friend)**	**RESPONDENT**

Miss Marlene Chisholm instructed by the Director of State Proceedings for the appellants

Jason Jones instructed by Nigel Jones and Co for the respondent

16, 17 and 19 April 2013

BROOKS JA

[1] On 5 December 2012, a Master of the Supreme Court of Judicature refused an application by the Attorney General of Jamaica and the Western Regional Health Authority (the appellants) for an extension of the time allowed for filing their defence to a claim brought against them by Rashaka Brooks Jnr. Rashaka Brooks Jnr is a minor,

but his father and next friend, Mr Rashaka Brooks Snr (Mr Brooks), filed the claim on his behalf. The learned Master also:

a. refused the appellants' application for their acknowledgment of service, which was filed after the 14 days prescribed by the Civil Procedure Rules (CPR), to stand, and

b. granted Mr Brooks permission to enter judgment against the appellants in default of acknowledgment of service and in default of defence.

[2] The appellants are dissatisfied with the learned Master's ruling and have filed this procedural appeal to have it set aside. The essence of their appeal is that the learned Master utilised the wrong test in assessing their application for extension of time and did not give due consideration to the reason for their delay in filing an acknowledgment of service to the claim. Mr Brooks has resisted the appeal. He asserts that the learned Master was correct. A single judge of this court referred the appeal to the court.

[3] This appeal turns mainly on 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.

A brief background

[4] The claim asserts that when Rashaka was less than a year old he was the victim of negligent medical treatment while he was a patient at the Cornwall Regional Hospital

between May and June 2011. Among the allegations of negligence is that the child was transfused with A positive blood when his blood type was A negative. He was sent for treatment overseas where his condition was diagnosed and eventually resolved.

[5] All the relevant events in respect of the resultant legal proceedings took place in 2012. The claim form and particulars of claim were filed on 22 June and served on the Attorney General on 26 June. The appellants failed to file an acknowledgment of service within the 14 days allowed by the CPR. On 18 July, Mr Brooks filed an application for permission to enter judgment in default of acknowledgment of service. He served an advance copy of his application on the appellants. This prompted the appellants to file their acknowledgment of service on 23 July. They, however, also missed the 24 September deadline for filing their defence to the claim.

[6] The appellants did nothing about correcting that situation despite the fact that they were served, on 20 September, with another copy of the application mentioned above, which copy had a date for hearing of 12 November. They only acted when they were served, on 1 November, with an amended application for permission to enter judgment against them, this time, in default of defence. They then filed and served their application for extension of time to file the defence and for the acknowledgment of service to stand. This was on 9 November. The learned Master commenced hearing both applications on 12 November. She allowed the appellants to argue their application despite it having been short-served.

[7] The appellants supported their application with an affidavit that was filed on 9 November. The affidavit sought to explain the reason for the delay in filing the acknowledgment of service and the defence respectively. It also set out the reason for requiring more time to file the defence. In respect of the delay, the explanation was that by an administrative oversight in the Attorney General's chambers, the file in respect of this claim was not assigned to an attorney-at-law until 23 July (the date that the acknowledgment of service was filed). As far as the need for the extension of time was concerned, the affidavit set out the efforts made to secure instructions. It stated that some instructions had been obtained but that those instructions did not include instructions concerning the "testing of the infant Claimant's blood" (paragraph 9).

[8] The deponent, Miss Marlene Chisholm, went on to state the period within which she expected that the outstanding instructions would become available. She said at paragraph 10 of the affidavit:

> "We were advised by the Ministry [of Health] that further instructions were sought but they are not yet available. I have also made contact with representatives of the 2nd Defendant by telephone and email and I verily believe that the further instructions requested will become available before the end of November."

The learned Master's decision

[9] The learned Master, in reaching her decision, relied principally on two cases as providing guidance in assessing the appellants' application before her, namely **Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Frederick and Gertrude Flemmings** [2010] JMCA Civ 19 and **Fiesta**

Jamaica Ltd v National Water Commission [2010] JMCA Civ 4. Both cases are decisions of this court.

[10] She correctly gleaned from those decisions that an application for extension of time within which to file a defence must be supported by evidence, not only outlining the reason for the failure to comply with the prescribed time, but also demonstrating that there was merit in the defence. Having examined the cases, the learned Master said at paragraph [11] of her judgment:

> "I have to determine therefore if there is sufficient material before me which could provide a good reason for the delay in failing to comply with rule 10.3(1) of the CPR [prescribing the time for filing the defence] **and also** (emphasis supplied) if there is any information to satisfy me that there is merit in the case. (Per Phillips J.A. at [paragraph] [37] of the Phillip [sic] Hamilton case)." (Emphasis as in original)

[11] She thereafter reinforced her identification of the method of approaching her task. She said at paragraph [13]:

> "It is clear to me based on these two authorities that before I can exercise my discretion to grant the [appellants'] application to extend the time for filing their defence, there must be evidence before me that satisfactorily provides a good reason for the delay in failing to comply with Rule 10.3(1) of the CPR and also that there is merit in their case."

[12] Based on that understanding, the learned Master found that, in the absence of evidence of the merits of their defence, the appellants could not succeed in their application. She said, in part, at paragraph [22]:

> "...the [appellants] up to the time that their application was heard had not put themselves in a position to advance the

merits of their case. I am consequently unable to assist them and the claimant's application [for permission to enter judgment in default] therefore succeeds."

The analysis

[13] In commencing the analysis of the learned Master's reasoning and conclusion, it is important to note that rule 10.3(9) of the CPR, which deals with applications for extension of time to file a defence, does not provide any guidance as to the manner of assessing such applications. The rule simply states:

> "(9) The defendant may apply for an order extending the time for filing a defence."

[14] As is well known by now, the principle that operates is 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. The overriding objective of the CPR is that courts are to strive to ensure that cases are dealt with justly. Rule 1.1(1) states:

> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."

Rule 1.2 explains the method by which the overriding objective is applied in the CPR. It states:

> "1.2 The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules."

[15] The result of applying that principle is that there should not be an inflexible stance where the court is given a discretion. Generally, each case is to be decided on its own

facts. This court has recognised this principle in previous decisions dealing with applications for extension of time within which to file a defence. In **Fiesta Jamaica Limited v National Water Commission**, the court approved an approach to assessing such applications. Harris JA, with whom the rest of the court agreed, said at paragraph [15] of her judgment:

> "The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the court's approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J., in a application for extension of time to appeal in the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors.** [All England Official Transcripts (1997-2008) (delivered 18 January 2000)]."

In his judgment, Lightman J said at paragraphs 8 and 9:

> "8. The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. **It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account**. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are

> there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.
>
> 9. I am in no ways setting out all the relevant factors, but all the factors I have set out appear to me to be relevant and require to be taken into account in deciding what justice requires in respect of the particular application. I should add that the existence of this broad approach, which decides the case by reference to justice, is not to be treated as a passport to the parties to ignore time limits because, as I say, one of the important features in deciding what justice requires is to bear in mind that time limits are there to be observed and that justice may be seriously defeated if there is any laxity in that regard." (Emphasis supplied)

Although Lightman J did mention the matter of merit, the point to be noted for these purposes, is that it "is no longer sufficient to apply some rigid formula in deciding whether an extension [of time] is to be granted".

[16] Despite the general principle that each case should be decided on its own facts, it is not unreasonable that the learned Master, after considering the decisions of this court, felt constrained to find that, in the absence of evidence of merit, she was obliged to refuse the appellants' application. The facts in the instant case, however, have a significant feature distinguishing it from the cases to which the learned Master referred. It is to be noted that in each of those cases, the defendant had provided, in support of its application for extension of time, a draft defence. The draft defence enabled the court to assess whether there was any merit to justify allowing it to go forward. It is in that context that the decision in both those cases must be assessed. 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.

[17] If, however, a draft defence is not available because the defendant's attorneys-at-law are not seised 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 reasonble time;
b. there are good reasons for the delay;
c. there is a good reason why the 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.

[18] The number of reasons for a defendant not being able to file a defence on time must be myriad. They are also most likely to arise where one is dealing with large corporations with many departments or, as in the instant case, with state entities. Indeed, it is in recognition of this principle that claimants with claims against the Crown are obliged to seek the court's permission in order to enter judgment against the Crown (rule 12.3(1) of the CPR).

[19] In our view, it is only just that a defendant who expects to be able to file a defence, but anticipates that he will not be able to file it within the time prescribed, or realises that the time prescribed has passed, should not be shut out, as of course, from being able to apply successfully for an extension of time.

[20] It may reasonably be argued that, if his application is to be considered, he is then placed in a better position than a defendant who has been able to produce a draft defence and, therefore, has that defence subjected to the scrutiny of the court. We certainly would not wish to open the floodgates for applications without evidence of merit to be made in an attempt to cure the sloth of attorneys-at-law or the parties whom they represent.

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

[22] Based on the above, we are of the view, with some diffidence, that the learned Master was in error when she found that she was obliged to refuse the appellants' application on the basis that she did. We find support for this position in the Privy Council decision of **The Attorney General v Keron Matthews** [2011] UKPC 38. In that case, the litigation arm of the Attorney General of Trinidad and Tobago found itself in a situation almost identical to that in which the appellants' attorneys-at-law find themselves. In **Keron Matthews**, the attorney-at-law in the Attorney General's

chambers was having difficulty getting instructions from the state's prison officer who had been accused of assaulting the claimant Mr Matthews.

[23] Their Lordships, at paragraph 3 of their judgment, described the situation which faced Gobin J, who heard the application for extension of time to file the defence:

> "3. On the same day [of refusing to consent to an extension of time for the defence to be filed], the claimant filed an application for permission to enter judgment in default of defence. This application was served on the defendant on 29 December. On 13 January 2010, the Legal Department of The Prison Administrative Offices told Ms Cross that arrangements would be made for Prison Officer Garcia to meet her on 19 January. On 14 January, the defendant filed an application under CPR 10.3(5) and 26.1(1)(d) for an extension of time for the filing and service of the defence on the grounds that additional time was needed to obtain complete instructions. This application was served on 15 January."

[24] The judgment does not reveal whether any information concerning the merits of the defence was placed before the court, but it seems from the context, that there was none so placed. What is clear is that there was no draft defence in place. Gobin J was in a position similar to that in which the learned Master was placed in the instant case. Their Lordships described what occurred at the hearing, at paragraph 4 of their judgment:

> "4. On 18 January, Gobin J heard both the claimant's application for permission to enter judgment in default of defence and the defendant's application for an extension of time. She dismissed the claimant's application and granted the defendant an extension of time until 9 February to file and serve the defence (with judgment for the claimant in default). The claimant appealed to the Court of Appeal on 22 January. Gobin J gave her written reasons on 8 February. The defendant filed a defence on 9 February...."

[25] The Court of Appeal of Trinidad and Tobago overturned Gobin J's decision. When their Lordships considered the appeal from the decision of the Court of Appeal, they allowed that appeal. Although the issue before their Lordships turned on whether the application should have been treated as an application for relief from sanctions, they expressed no reservation about the regularity of the application before Gobin J or the order that she had made.

[26] Having decided that the learned Master was in error, it is therefore permissible for us to consider the application afresh. This consideration will include an analysis of the second ground of appeal filed by the appellants. In it, they complain that the learned Master failed to give due consideration to the length of the delay and the explanation for failing to file the acknowledgment of service.

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

[28] The first aspect to be assessed is the length of the delay. The appellants, by the time the application was filed, were almost seven weeks late in filing their defence. According to Miss Chisholm's affidavit, a further three weeks would have been required for them to be in a position to file the defence. The learned Master found that the

delay was not inordinate. We do not readily agree that such a delay is not inordinate, but the length of the delay should not be considered as determinative of the application.

[29] The next aspect to be considered is the reason for the delay. The learned Master regarded the explanation for the delay in filing the acknowledgment of service, namely the administrative oversight in assigning the file to an attorney-at-law, as being inadequate. It is for that reason that she refused the application for the acknowledgment of service to stand as properly filed.

[30] We find that the application in that regard was misguided and that the learned Master was in error with regard to the order refusing the application. The fact is that, at the time that it was filed, no permission was needed for that acknowledgment of service to have been filed. Rule 9.3(4) is the relevant rule that specifies the time within which the acknowledgment of service must be filed. It states:

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

[31] A footnote to the rule specifies some exceptions, but those do not apply in these circumstances. It may be gleaned from the rule that, unless there is a request for a default judgment, a defendant may file an acknowledgment of service without the permission of the court. In the instant case, there was no such request. There could have been no such request as permission to obtain a judgment in default of acknowledgment of service, pursuant to rule 12.3(1), had not yet been granted. The

appellants need not have asked for permission for the acknowledgment of service to stand. Based on the above the second ground of appeal should also succeed.

[32] We do not regard the explanation for the delay as inadequate and lacking in credibility. Miss Chisholm attributed the initial delay to administrative oversight in her chambers. 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 usually when the behaviour is grossly negligent that the litigant's position is imperilled. We do not regard this as grossly negligent behaviour. In addition, Miss Chisholm's efforts to secure the required instructions are credible and she has given a time for the completion of that exercise.

[33] Finally, we consider the matter of prejudice. Mr Brooks has brought nothing to the attention of the court to show that he would be prejudiced if the appellants were granted an extension of time within which to file the defence.

[34] In considering the application as a whole, we will not shut out the appellants from filing a defence in circumstances where the outstanding instructions included the result of blood testing and other scientific work.

Conclusion

[35] Based on that assessment, and considered as a whole, we find that the application provided a credible reason for the delay and that the learned Master should have granted an extension of time for the appellants to file their defence. Despite their success before us, we would not grant any costs to the appellants.

[36] We therefore make the following orders:

1) The appeal is allowed.

2) The time limited for the filing of the defence herein is hereby extended to 26 April 2013, and in the event that the appellants comply within the extended time, the orders of the Master made herein on 5 December 2012 and any judgment filed pursuant thereto, shall be set aside, but shall remain in place in the event of non-compliance by the appellants.

3) No order as to costs.