

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

SUPREME COURT CIVIL APPEAL NO 80/2006

**BETWEEN HOIP GREGORY APPELLANT
AND VINCENT ARMSTRONG RESPONDENT**

SUPREME COURT CIVIL APPEAL NO 81/2006

**BETWEEN HOIP GREGORY APPELLANT
AND O'BRIEN KENNEDY RESPONDENT**

Nigel Jones instructed by Bishop and Partners for the appellant

**W. Anthony Pearson instructed by Pearson and Company for the respondent
O'Brien Kennedy**

25 and 31 July 2013

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree fully with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] In these two appeals, Mr Hoip Gregory requests this court to set aside the refusal by the Master in Chambers of the Supreme Court of Judicature, of Mr Gregory's application for an extension of time within which to file a defence to claims instituted against him by Messrs Vincent Armstrong and O'Brien Kennedy respectively. The learned Master refused the applications on 19 September 2006.

[3] Both claims arise from the same motor vehicle crash. The claimants both assert that on 1 November 1998, Mr Gregory negligently drove a Mitsubishi Pajero motor vehicle, then owned by Alcan Jamaica Company Limited. As a result of that negligence, the claims assert, the Pajero struck a Subaru motor car that was, at the time, being driven by Mr Armstrong and in which Mr Kennedy was a passenger.

[4] The claims were both filed on 28 October 2004. Although Mr Gregory filed an acknowledgement of service on 1 April 2005, in the case of Mr Armstrong's claim and 27 June 2005, in respect of Mr Kennedy's, Mr Gregory failed to file a defence within the time prescribed by the Civil Procedure Rules 2002 (the CPR). It was not until 6 June 2006 that Mr Gregory filed his application seeking permission from the Supreme Court to extend the time within which to file his defence.

[5] Mr Nigel Jones, appearing for Mr Gregory, submitted that although Mr Gregory's delay was lengthy, that delay should not be fatal to his application. Learned counsel asserted that an explanation was given for the delay and that explanation was not contradicted by Messrs Armstrong and Kennedy (the respondents). In addition to that

fact, Mr Jones argued, there were live issues to be tried in which Mr Gregory had a real prospect of success. He pointed out that, to date, no judgment has yet been entered against Mr Gregory in either claim. In the circumstances, learned counsel submitted, the learned Master was wrong to have refused the application.

[6] Mr Pearson, on behalf of Mr Kennedy, informed the court that Mr Armstrong had died since the filing of the claim. Learned counsel stressed the delay of 14 months by Mr Gregory in making his application. Mr Pearson argued that the reason given for the delay, that Mr Gregory's attorneys-at-law were awaiting "a more complete medical report" in order to file his counter-claim, was without merit. Learned counsel pointed out that this collision occurred almost 15 years ago. He argued that the delay in bringing the matter to trial would "undoubtedly be prejudicial to the claimants in each claim", particularly as the driver of the Subaru, Mr Armstrong has since died. Mr Pearson stressed the fact that almost seven years had elapsed since the refusal by the learned Master. He urged this court, on those bases, not to disturb the order of the learned Master, but to dismiss the appeal.

The analysis

[7] It is now fairly well established that in considering whether to grant an extension of time in which to file a defence, the court should consider, among other things, the length of the delay, the reason given for the delay, whether the defence has a real prospect of success and the effect of the delay in the context of the overriding objective. With regard to the overriding objective, the court should include in its

consideration the principle that time limits established by the CPR should be observed. Authority for these principles may be found in the cases of **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4 and **Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Frederick and Gertrude Flemmings** [2010] JMCA Civ 19.

[8] It is also fairly well established that the court will not apply a rigid formula to these considerations but should consider that each case will turn on its own peculiar facts and the overall impact of a refusal or a grant of the application should be considered (**See Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors** All England Official Transcripts (1997-2008) (delivered 18 January 2000)).

[9] Taking all these matters into consideration and applying them to this case, it is easy to find that Mr Pearson's arguments are compelling. The delays by Mr Gregory have been egregious. It cannot be denied that the delay by the claimants in filing these claims just three days prior to the expiration of the limitation period has contributed to the delay. Nonetheless, Mr Gregory, operating against that background, has caused a situation where a trial, which will turn on the evidence of eye-witnesses, one of whom is now dead, will be severely prejudiced.

[10] Mr Gregory's explanation for his delay in filing a defence is unacceptable. His attorneys-at-law were in possession of a medical report from August 2005, almost 10 months prior to filing the application that came before the learned Master. The

circumstances of his case are quite different from those in the case of **Attorney General of Jamaica and Another v Rashaka Brooks** [2013] JMCA Civ 16, on which, among others, Mr Jones relied, in support of his submissions.

[11] In **Rashaka Brooks**, the defendants asserted that their delay in filing a defence to the claim was because they were awaiting a scientific report in respect of a critical issue in the claim. In the instant case, not only was the anticipated medical report not critical to the defence, but Mr Gregory could have filed his defence and counter-claim using the medical report that he did have. The **Rashaka Brooks** case does not assist Mr Gregory.

[12] It is also to be noted that the instant case is not one where, even if Mr Gregory's efforts to file a defence fail, a trial is inevitable. This is because the other defendant, Alcan Jamaica Company Limited has since been removed as a defendant.

[13] In the circumstances, it would seem that, considering the appeal as a whole, Mr Gregory should not be allowed to defend this claim. The decision of the learned Master was correct and should not be disturbed. I would dismiss both appeals.

LAWRENCE-BESWICK JA (Ag)

[14] I too have read the draft judgment of Brooks JA. I also agree and have nothing to add.

PANTON P

ORDER

1. Both appeals are dismissed.
2. Costs to the respondent in SCCA No 81/2006 to be taxed if not agreed.