[2013] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 148 & 149/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
A N D	**ROSHANE DIXON**	**RESPONDENT**

A N D

BETWEEN	**ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
A N D	**SHELDON DOCKERY**	**RESPONDENT**

Miss Alicia McIntosh instructed by the Director of State Proceedings for the appellants

Mrs Marvalyn Taylor-Wright instructed by Taylor-Wright & Co for the respondents

5 March 2012 and 21 June 2013

HARRIS JA

[1] In these appeals, the appellant seeks to set aside the orders of Master Bertram-Linton (Ag) (as she then was) in which she refused to grant applications by the appellant to extend the time within which to file defences. The learned

master, after refusing the applications, granted the respondents leave to enter judgment in default of defence. In the interest of expediency and convenience these cases, although not consolidated, were heard by the learned master simultaneously.

Background re Sheldon Dockery

[2] On 2 July 2010, the respondent, Sheldon Dockery, commenced proceedings against the appellant claiming damages for false imprisonment and malicious prosecution. The claim form having been served, an acknowledgement of service was filed by the appellant on 19 July 2010. No defence having been filed, on 31 January 2011, the respondent filed an application to enter judgment in default of defence.

[3] On 7 March 2011, the appellant made an application for an extension of time to file and serve a defence. In a supporting affidavit, sworn by Miss Alecia McIntosh, paragraphs 4 and 5 state:

> "4. That the time in which to file a Defence in this matter pursuant to Rule 10.3 (1) of the Civil Procedure Rules 2002 expired on or about October 15, 2010. We had yet to receive complete instructions which would enable us to comply with the aforementioned rule. Sufficient instructions to enable an assessment of the claim were only received earlier this month.
>
> 5. The delay in filing a Defence was not deliberate and should the Court be minded to grant the orders sought in this application it is unlikely that the Claimant will suffer any real prejudice."

[4] On 10 June 2011, the appellant, through Miss McIntosh, filed a supplemental affidavit exhibiting a draft defence. Paragraphs 2 and 3 state:

> "My knowledge of the facts and matters deponed herein is taken from the file held at the Attorney General's Chambers and is true in so far as it is in my personal knowledge and where it is not in my personal knowledge it is true to the best of my knowledge, information and belief.
>
> I crave this Honourable Court's indulgence to refer to the Affidavit of Alicia E. McIntosh in Support of Notice of Application for Court Orders filed May 31, 2011, seeking leave to file a Defence herein out of time. Further to that Affidavit a copy of the draft Defence is attached hereto as exhibit **"AEM-1**."

It appears that the applications for extension of time and for default judgment were also heard simultaneously.

[5] The appellant filed the following grounds of appeal:

> "1. The Learned Master erred when she held that the draft defence contained no triable issues on its face.
>
> 2. The Learned Master erred when she failed to give due regard to the overriding objective.
>
> 3. The Learned Master erred when she determined that the inability to obtain complete instructions amounted to no excuse at all for the delay in filing a defence."

Background re Roshane Dixon

[6] On 25 March 2011, the respondent, Roshane Dixon, instituted proceedings against the appellant claiming damages for assault and battery. The claim form

and particulars of claim were duly served on the appellant on 23 March 2011. On 8 April 2011, the appellant filed an acknowledgment of service. Having neglected to file a defence within the prescribed time, the appellant, on 9 May 2011, sought leave to file and serve defence out of time. On 3 June 2011, the respondent made an application for leave to enter judgment in default of defence. This was supported by an affidavit by him. The latter application was fixed for hearing on 21 September 2011.

[7] On 23 June 2011 an affidavit sworn by Miss McIntosh was filed in support of the appellant's application. The contents of paragraphs four and five of that affidavit are almost identical to paragraphs 4 and 5 of that filed in support of the application in Dockery's case. A draft defence, which was exhibited to an affidavit by Miss McIntosh, filed on 21 September 2011 was also before the learned master.

[8] The following grounds of appeal were filed:

> "1. The Learned Master erred when she held that the criteria set out in the relevant case law were not satisfied.
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> 2. The Learned Master erred when she held that the criteria set out in the *Civil Procedure Rules 2002* were not satisfied.
>
> 3. The Learned Master erred when she failed to give any or give due consideration to the Defendant's draft defence.

4. The Learned Master erred in her interpretation of the relevant case law and Civil Procedure Rules."

Submissions

[9] Similar submissions were made by counsel on both sides, in respect of each case.

[10] Miss McIntosh submitted that the appellant has a good defence, one which is arguable and has a good prospect of success. It was her further submission that the learned master failed to disclose whether consideration was given to the proposed defences. Citing ***Fiesta Jamaica Ltd v National Water Commission*** [2010] JMCA Civ 4, in which this court approved a dicta of Lightman J in the case of ***Commissioner of Customs and Excise v Eastwood Care Homes*** [2001] EWHC Ch 456 as to the criteria to be adopted in an application for an extension of time, she submitted that in ***Fiesta***, the court was of the opinion that even where there is insufficient reason for the delay the court should give consideration as to whether in the interest of justice, the proposed defence is arguable. The delay, she argued, could not be regarded as inordinate and in the interest of justice, even where the reasons for the delay are insufficient, the court should have regard to the merits of the defence.

[11] The learned master, she argued, failed to consider that any prejudice caused by the delay could have been remedied by an award of costs.

[12] Mrs Taylor-Wright submitted that the learned master correctly found that the appellant had not met the criteria for an extension of time and he had not, in his grounds of appeal shown any proper basis upon which the learned master could have exercised her discretion in his favour.

[13] Counsel further contended that no explanation had been given by the appellant for his failure to file his defence in compliance with the rules. She argued that there is a delay in filing the defences and further, no reason has been proffered by the appellant for his failure to do so within the prescribed time. She cited the case of ***Peter Haddad v Donald Silvera*** SCCA No 31/2003 delivered on 31 July 2007, in support of her submission and made reference to the following extracts from it:

> "The Court has an untrammelled discretion. This discretion must be exercised judicially. There must be some material upon which the Court can exercise its discretion (see ***Patrick v Walker***) [(1969) 11 JLR 303]. The question is, In what circumstances should the court extend the time for compliance with a rule? …" (page 8)

At pages 11-12, the court said:

> "The authorities show 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."

[14] Mrs Taylor-Wright continued by saying that the court, in ***Haddad v Silvera,*** adopting the principle in ***Revici v Prentice Hall Inc*** [1969] 1 WLR

157; [1969] 1 All ER 772, was of the view that payment of the costs does not give a dilatory applicant a right to an extension of time.

[15] Counsel further submitted that having regard to the overriding objective, an application for an extension of time ought to be made promptly. The failure to get instructions, she argued, is an inadequate excuse for the delay. The appellant having not given an explanation for failure to seek extension of time is fatal, she contended.

Analysis

[16] In dealing with Sheldon Dockery's claim, the learned master found that it was unacceptable that approximately 10 months had expired after the claim form and particulars of claim had been served and seven months and two weeks had passed after the expiry date of the filing of the defence. She stated that a substantial reason must be given for the failure to comply with the rule but none was given. She found that Miss McIntosh's affidavit did not give a reason for the failure to obtain instructions before May 2011. It was also her finding that Miss McIntosh had not stated what attempts had been made to get the further instructions. She went on to adopt the court's view in ***Haddad v Silvera*** that costs cannot be employed as a salve to relieve prejudice. She found that there was no merit in the defence as it mainly denies the claim of false imprisonment and that the respondent sustained injuries. She adopted the reasoning in ***Haddad v Silvera*** as to the effect of the delay, within the context of the

interests of justice. Although she did not expressly speak to her findings in respect of Roshane Dixon's claim, in light of her decision, it can reasonably be inferred that she had applied the same principles in dealing with the appellant's application.

[17] The court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing. In ***Strachan v The Gleaner Company*** Motion No 12/1999 delivered 6 December 1999, Panton JA (as he then was) outlined the following factors which a court takes into consideration in the exercise of its discretion on an application for an extension of time:

> "(i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> (iv) the degree of prejudice to the other parties if time is extended."

He further said that:

> "Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for a extension of time, as the overriding principle is that justice has to be done."

[18] It cannot be denied that rule 1.1 of the CPR under which the appellant seeks assistance, 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 particular case. In an application for an extension of time, the delay and the reasons therefor are the distinctive characteristics to which the court's attention is initially drawn. It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. It follows therefore, that in applying the overriding objective, 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.

[19] The first issue to be addressed relates to the length of the delay in making the applications. In Dixon's claim, the appellant did not make his application until approximately one month after the time for filing the defence had expired. In Dockery's claim more than seven months had expired before the appellant sought to make his application. In Dixon's claim, the delay was not long. This cannot be said to be true in Dockery's case. However, in either case, the length of the delay cannot be regarded as being determinative of the issue.

[20] The further question now arising is whether the excuse given by the appellant for the delay can be treated and accepted as satisfactory. It is perfectly true that this court, has in cases, including ***Fiesta,*** and ***Haddad v Silvera***, pronounced that some reason for the tardiness must be given, even if it is

insufficient. The proposition that the inadequacy of a reason does not in itself prevent the court from assisting a tardy applicant does not mean that the court will look with favour upon such an applicant in all cases. Failure to act within the requisite period is a highly material criterion, as Smith JA stated in ***Haddad v Silvera***. The weaker the excuse, the less likely the court will be inclined to countenance a tardy applicant who seeks the court's aid to extend time.

[21] In both claims, the reasons advanced were stated to be the lack of complete instructions to assess the claim. The bare statement that the delay was due to the inability of the appellant to obtain adequate instructions to assist in complying with the requisite rule is highly unsatisfactory. This cannot be regarded as a proper explanation for the delay. Having received inadequate instructions, it was incumbent upon the appellant to have pursued the request for any additional information needed with due dispatch.

[22] The learned master was correct in finding that the appellant had not proffered a good reason for the delay. It is without doubt that the material placed before her, in explaining the tardiness of the appellant, was not enough to have moved her to be sympathetic to his application.

[23] The appellant complained that the learned master did not, or did not adequately, address the matter of the merits of the defences. In dealing with the issue of the merits to Dockery's claim, she rejected the proposed defence, by finding that it contained denials in respect of the false imprisonment and

the injuries suffered by that respondent. In our view, this finding, does not in itself, show that the proposed defence against Dockery's claim was unmeritorious.

[24] The learned master, ought to have considered the proposed defence against Dockery's claim in its entirety, in order to ascertain whether it raises proper answers to the respondent's claim. In his claim, Dockery averred that, having been informed that he was wanted by the police, on 5 August 2003, he attended the Black River Police Station accompanied by his attorney-at-law where he was questioned by Corporal Dave Bell, whom he informed that he was not the driver of a particular motor vehicle, on 4 August 2003. The police officer, he alleged, refused to look at a contract which shows that he had rented the vehicle to one Wayne Brown. Thereafter, he averred that Corporal Bell falsely instituted criminal charges against him which terminated in his acquittal. He further alleged that the evidence against him was fabricated by Corporal Bell.

[25] In the proposed defence, the appellant stated that on 4 August 2003, the respondent was observed driving a motor vehicle and when ordered by the police to stop, he refused to do so. His failure to obey, it is alleged, resulted in a chase, following which, the vehicle was found abandoned with vegetable matter resembling ganja in it. It has been further alleged that the respondent's acquittal was on a technical point of law and not that the facts were fabricated.

[26] The respondent was convicted in the Resident Magistrate's Court for Saint Elizabeth for the possession of ganja, dealing in ganja and trafficking ganja. He was acquitted on appeal. It could be said that, on the face of it, the appellant had raised a substantial answer to this respondent's claim.

[27] In our opinion, there is clearly some substance to the defence. This however, does not mean that the appellant would be entitled to have time extended to file his defence. The opportunity to pursue his defence would be available to him only if all the other requisite criteria for an extension of time are fulfilled.

[28] The learned master did not treat with the defence in Dixon's case. In his claim, Dixon averred that on 1 January 2001, while walking along a beach, the servants or agents of the appellant shot him, causing him to sustain serious injuries, as a result of which, he was hospitalized. While in hospital, he was handcuffed to a bed. After being discharged from the hospital, he was held in custody for three days and was subsequently released without being charged with any offence.

[29] The proposed defence contains denials as well as averments, none of which answers the respondent's claim. It is of significance that the police denied shooting the respondent, yet he remained handcuffed in the hospital, was taken from the hospital by them, placed in custody and was subsequently released. Clearly, the appellant's defence is without merit.

[30] So far as prejudice is concerned, in speaking to the issue, in paragraph 5 of her affidavit, Miss McIntosh said:

> " 5. The delay in filing a Defence was not deliberate and should the Court be minded to grant the orders sought in this application it is unlikely that the Claimant will suffer any real prejudice."

[31] As pronounced in ***Haddad v Silvera***, the payment of costs does not ameliorate any hardship which would be encountered by a party in circumstances of delay. The respondents have filed their claims against the appellant and are desirous of having the matter concluded by the court. In each case, leave has been granted for a judgment in default of defence to be entered against the appellant. Any attempt to deprive the respondents of their right to proceed with their claim, in these circumstances, would be unduly prejudicial to them. An order for an extension of time would preclude them from proceeding to take steps to realize the fruits of their judgments. In such circumstances, compensation by way of costs would not be an option.

[32] In keeping with its duty to regulate the pace of litigation, the court has adopted a strict approach in giving consideration to an application for an extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay with complying with the rules. In ***Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co*** SCCA No 18/2001 delivered on 11 March 2002, Panton JA (as he then was) speaking to the court's reluctance to assist tardy litigants, said:

> "In this country, the behaviour of litigants, and, in many cases, their attorneys-at-law, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions. The widespread nature of this behaviour is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expectation that they should be followed without question or demur here. ...
>
> 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. Once there is a situation such as exists in this case, 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."

[33] In light of the failure of the appellant to proffer a satisfactory excuse for the delay in both cases, there being no material from which a defence to Dixon's claim can be established and there being the likelihood of prejudice to the respondents, if the applications were granted, the interests of justice would not have been served. Accordingly, the appeals are dismissed with costs to the respondents to be agreed or taxed.