



[2019] JMSC Civ. 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 02464

BETWEEN	DEVON MARK DAVIS	CLAIMANT
AND	KAREN MARAJAH	DEFENDANT

IN CHAMBERS

Mrs. Trudy-Ann Dixon-Frith instructed by DunnCox for the Claimant

Ms. Moneaque McLeod instructed by Rogers and Associates for the Defendant

Heard: 27th July, 2018 & 11th January, 2019

Civil Practice and Procedure—Notice of Application to file Defence and Counterclaim out of time - Rules 10.3 (1), 10.3 (9), and 26.1 (2) (c) of the Civil Procedure Rules - Factors to be considered by the Court in deciding whether to grant an extension of time.

Cor: Rattray J.

[1] Devon Mark Davis, the Claimant and his wife, Jennifer Davis were married on the 11th August, 2001 in Birmingham, England. To date they remain married. Sometime in 2005, the Claimant purchased property located at 4 Church Grove, Balvenie Heights, Mandeville, in the parish of Manchester (“the property”), being the land comprised in Certificate of Title registered at Volume 1113 Folio 272 of the Register Book of Titles, which was registered solely in his name. It is contended by the Claimant that the purchase of the said property was fully funded by himself and his wife.

[2] In or around June, 2005, the Claimant met Karen Marajah, the Defendant and thereafter commenced a relationship with her. Subsequently, sometime in January, 2006, the Claimant began constructing a house on the property. In January, 2007, the Defendant began residing with him in the unfinished house, which was eventually completed in or about 2012.

[3] The relationship between the two has since ended, and the Claimant has sought to have the Defendant vacate or otherwise deliver up possession of his property. Up to the date of this action being instituted, the Defendant has not given up possession of the property. Consequently, the Claimant commenced this action on the 3rd August, 2017, against the Defendant by way of Claim Form, seeking the following reliefs from the Court: -

- a) Recovery of possession of the property known as ALL THAT PARCEL of land being part of DUNROBIN in the parish of Manchester containing by survey Nine Thousand Eight Hundred and Forty-Seven Square Feet and Five Tenths of a Square Foot of the shape and dimensions and butting as appears by the plan annexed to Certificate of Title and being part of land formerly registered at Volume 1000 Folio 398 and being the land comprised in Certificate of Title registered at Volume 1113 Folio 272 of the Register Book of Titles, bearing civic address known as 4 Church Grove, Balvenie Heights, Mandeville, in the parish of Manchester;
- b) An injunction restraining the Defendant whether by herself or by her servants and or agents or howsoever from entering or using property known as ALL THAT PARCEL of land being part of DUNROBIN in the parish of Manchester containing by survey Nine Thousand Eight Hundred and Forty-Seven Square Feet and Five Tenths of a Square Foot of the shape and dimensions and butting as appears by the plan annexed to Certificate of Title and being part of land formerly registered at Volume 1000 Folio 398 and being the land comprised in Certificate of Title registered at Volume 1113 Folio 272 of the

Register Book of Titles, bearing civic address known as 4 Church Grove, Balvenie Heights, Mandeville, in the parish of Manchester;

c) Costs and Attorney's costs; and

d) Such and further relief as this Honourable Court deems fit.

[4] The Claim Form and Particulars of Claim were served on the Defendant, who acting on her own behalf filed her Acknowledgement of Service on the 13th September, 2017, indicating, *inter alia*, that she was served with the said documents on the 30th August, 2017. Subsequently, she retained the firm of Messrs. Rogers and Associates, as her legal representatives in this matter. On the 19th October, 2017, her Attorneys-at-Law, placed themselves on the record by filing a Notice of Appointment of Legal Representation.

[5] No Defence was filed on behalf of the Defendant within the forty-two day period after service of the Claim Form, as stipulated by Rule 10.3 of the **Civil Procedure Rules (CPR)**. As a result, the Claimant's Attorneys-at-Law filed an Ex-Parte Notice of Application for Court Orders on the 12th March, 2018, seeking Judgment in Default of Defence to be entered in favour of the Claimant pursuant to Rule 12.5 of the **CPR** for her failure to file a Defence in this matter. That Application was set for hearing on the 11th May, 2018.

[6] Subsequently, on the 7th May, 2018, the Defendant's Attorneys-at-Law filed her Defence and Counterclaim out of time, without the consent of the Claimant or the permission of the Court. In addition, two (2) days later the Defendant's Attorneys-at-Law on the 9th May, 2018, also filed a Notice of Application to file Reply to Defence and Defence to Counterclaim Out of Time. Clearly, the heading of that Application was incorrect, as the Defendant would not be applying to file a Reply to her own Defence. The relief sought by the Defendant in the said Application was for an Order that she be granted permission for her Defence and Counterclaim filed on the 7th May, 2018, to stand as at the date of filing.

[7] By Order of the Court made on the 11th May, 2018, both Applications were adjourned to the 27th July, 2018, to be heard together. Costs were also awarded to the Claimant to be agreed or taxed.

[8] When these Applications were before this Court on the 27th July, 2018, the Court thought it prudent to first hear the Defendant's Application to file Defence and Counterclaim out of time, before that of the Claimant for Default Judgment. It is the Defendant's Application that is therefore before the Court for its consideration.

[9] The grounds relied on to support the Application are as follows: -

- a) Time has expired for the Defendant to file a Defence;
- b) The Defendant has a good explanation for her failure to file a Defence;
- c) The Defendant has a good Defence to the claim as is set out in her Counterclaim;
- d) The Claimant will not be prejudiced if the Orders sought herein are granted;
- e) The Defendant will be severely prejudiced if the Court denies the Orders sought herein;
- f) This Honourable Court is empowered to grant the Orders herein;
- g) It is in the interest of justice that the Orders sought herein are granted;
- h) Granting the Orders herein would be in accordance with the overriding objectives of the Court.

[10] The instant Application was supported solely by an Affidavit sworn to by Counsel Mr. Pierre Rogers filed on the 9th May, 2018. In opposition to the Application, the Claimant relied on his Affidavit in Support of Ex-Parte Notice of Application for Court Orders, filed on the 12th March, 2018.

[11] Part 10 of the **CPR** outlines the relevant provisions that apply to the filing of a Defence. Rule 10.2(1) provides that a Defendant who wishes to defend a claim or part of a claim must file a Defence. The time period for filing such a Defence is stipulated by Rule 10.3 (1) which states that: -

“The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form.”

[12] However, a Defendant may seek an extension of time to file a Defence pursuant to Rule 10.3 (9) of the **CPR**, which reads: -

“The defendant may apply for an order extending the time for filing a defence.”

[13] Additionally, Rule 26.1 (2) (c) of the **CPR** also provides that: -

“Except where these Rules provide otherwise, the court may -

(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed...”

[14] The Court enjoys wide discretionary powers to grant an extension of time. It however, will only exercise such powers, if sufficient material has been placed before the Court, which would enable it to properly exercise its discretion. It is noted that Rules 10.3 (1) and 26.1 (2) (c) of the **CPR**, do not speak to the relevant factors that the Court should take into account when considering whether or not an extension of time should be granted. Guidance must therefore be sought from case law.

[15] In the case of **Paulette Richards v Orville Appleby** [2016] JMCA App 20, F. Williams JA reaffirmed that the guiding principles for the Court's consideration, in the exercise of its discretion on an Application for an extension of time are those outlined by Panton JA (as he then was) in **Strachan v The Gleaner Company Limited and Dudley Stokes**, Motion No. 12/1999, a judgment delivered on the 6th December, 1999. In that case the learned Judge of Appeal enunciated at page 20 that: -

“(1) Rules of court providing a time-table for the conduct of litigation, must, prima facie, be obeyed.

(2) Where there has been a non-compliance with a time table, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider-

(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.

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

[16] It is in the application of these principles that the various submissions and the evidence ought to be considered by the Court.

The length of the delay

[17] The length of the delay is a very important factor to be considered by the Court. Mr. Rogers in his Affidavit deponed that: -

"3. On the 3rd August 2017, the Claimant initiated Claim Form and Particulars of Claim in the Supreme Court of Judicature, which were served on the Defendant on the 30th day of August 2017.

4. The Defendant acting on her own behalf filed an Acknowledgement of Service on the 13th day of September 2017.

5. The time to respond to the Claim Form expired on the 10th day of October 2017 with the Defendant having not filed a Defence.

6. After the expiration of the relevant period, I was retained to act on behalf of the Defendant in the proceedings herein.

7. Upon being retained a Notice of Appointment of Legal Representation filed on the 19th day of October 2017 placing my name on the record for the Defendant..."

[18] The Affidavit of Service filed on the 21st September, 2017, deponed to by the Bailiff, Everett Mullings, contradicts the Defendant's contention that she was served with the Claim Form and Particulars of Claim on the 30th August, 2017. In his Affidavit he deponed in so far as is relevant: -

“3. That under cover of letter dated August 10, 2017 from Messrs DunnCox, Attorneys-at-Law on record for and on behalf of the Claimant, I received the following documents for service upon the Defendant: -

- a. Claim Form filed on August 3, 2017 along with Acknowledgement of Service of Claim Form, Form of Defence, Prescribed Notes for Respondent (Claim Form), and Application to Pay by Instalments; and Particulars of Claim filed on August 3 2017, duly bearing the seal of this Honourable Court (and are collectively called “the said documents”).*

...

5. That on Tuesday, August 29, 2017 at 12:10 p.m., I attended the Motor Vehicle Examination Depot (“Depot”), located at Levy Lane, Mandeville in the parish of Manchester to renew the Certificate of Fitness on my motor vehicle. While waiting at the Depot to be served, I saw the Defendant drive in on the said premises of the Depo.

6. That I walked over to her and told her I have documents from Messrs DunnCox, Attorneys-at-Law to deliver to and serve upon her. Therefore, I then proceeded to hand the said documents listed in paragraph 3 (a) herein to the Defendant.”

[19] Mrs. Dixon-Frith argued that even if it is accepted by the Court, which is in dispute, that the Defendant was served with the Claim Form and Particulars of Claim on the 30th August, 2017, her Defence would have been due by the 12th October, 2017, being forty-two clear days from the date of admitted service. She argued that the delay was inordinate and inexcusable. Further, she submitted that there was delay on the part on the Defendant in filing the requisite Application for an extension of time, rather than seeking to file same, once Counsel was retained in the matter.

[20] In determining the time within which the Defendant should have filed her Defence, it is important to remember that time does not begin to run for the filing of a Defence during the long vacation. This is stated at Rule 3.5(1) of the **CPR**, which was amended by the Rules Committee of the Supreme Court, with effect from the 15th November, 2011. The amended Rule 3.5(1) provides that: -

“During the long vacation, the time prescribed by these Rules for filing and serving any statement of case other than the claim form, or the particulars of claim contained in or served with the claim form, does not run.”

[21] In **RBC Royal Bank (Jamaica) Limited (Formerly RBTT Bank (Jamaica) Ltd.) and Anor v Delroy Howell** [2013] JMCC Comm. 4, Mangatal J said that: -

“[12] ...the Defence having been filed on October 29 2012, was filed within 42 days (given that time did not run during the long vacation, and therefore calculating 42 days not from the date of service on the 23rd of August 2012, but from the beginning of the Michaelmas Term on the 17th September 2012-see Rule 3.3(a) of the CPR).

...

[17] ...Time fails to run during the long vacation only in respect of the time prescribed for the filing and serving of any statement of case other than the claim form or the particulars of claim contained in or served with the claim form-see Rule 3.5(1), as amended in November 2011. This means that whilst it is true that the time for filing a defence did not run, the time for filing an acknowledgment of service as set out in Rule 9.3(1) continued to run.”

[22] Similarly, in the case of **Liyasu M Kandekore v COK Sodality Co-Operative Credit Union Limited** [2016] JMCA Civ. 23, Phillips JA noted that: -

*“[76] In the long vacation, therefore, time does not run in respect of the filing and service of the defence, the latter being a “statement of case” pursuant to the definition section 2.4 of the CPR. Morrison JA (as he then was) in **Minister of Finance and Planning & Public Service et al v Viralee Bailey-Latibeaudiere** made that very clear when, in paragraph [108] of the judgment (in reference to the unamended rule), he noted that rule 3.5 of the CPR states that the time for filing any statement of case does not run during the long vacation. In paragraph [114] he pointed out that “the amended rule thus makes it clear that the long vacation does not affect any time prescribed for the filing of a claim form or the particulars of claim contained in or served with the claim form”. So, from that comment, it is clear, that the general rule remains the same and time does not run in the long vacation for all other statements of case, including the defence. But time does run in the long vacation in respect of the claim form and particulars of claim.*

[23] In counting the forty-two clear days for the filing of her Defence, one would begin on the 16th September, 2017, the usual commencement day of the Michaelmas Term. However, when that day falls on a Saturday or Sunday, the Michaelmas Term would begin on the following Monday, which in this case would be the 18th September, 2017. Therefore, the Defendant’s Defence ought to have been filed on or before the 31st October, 2017, being forty-two clear days from the 18th September, 2017.

[24] In calculating the length of delay in making the Application for an extension of time, the period would start from the 31st October, 2017, to the 9th May, 2018, the date

on which the Application was actually filed. The delay in filing the Application was over seven months, which in my view is inordinate in the circumstances. Further, there was also delay on the part of the Defendant in filing her Defence, which was eventually done on the 7th May, 2018, some seven months out of time. However, I am of the view that her Defence is not properly before the Court, as she needs the permission of the Court to have it stand. The Defendant filed her Acknowledgement of Service on the 13th September, 2017. Subsequently her Attorneys-at-Law filed Notice of Appointment of Legal Representation on the 19th October, 2017. Since that time, nothing was done until the Application for Extension of Time was filed on the 9th May, 2018.

[25] In the case of **David Wong Ken v National Investment Bank of Jamaica Limited and Ors** [2013] JMCA App 14, the Applicant, David Wong Ken, sought an extension of time within which to file Notice and Grounds of Appeal against a judgment handed down on the 16th March 2012. Brooks JA, in refusing the Application said at paragraph 11: -

*“Although Sykes J’s decision was handed down on 16 March 2012, and the company’s notice of appeal was filed in April 2012, the formal order of the judgment was not served on Mr Wong Ken’s attorneys-at-law until 12 September 2012. His application was filed over 7 months later, on 24 April 2013. **There is no doubt, therefore, that the delay was indeed, lengthy.** The rules stipulate that a notice of appeal must be filed within 42 days of the service of the formal order of the judgment. **The delay, by itself, will not, however, be determinative of the application.**”*

[Emphasis supplied]

[26] Harrison JA in **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6 indicated: -

*“[25] ...that time requirements laid down by the rules are not mere targets to be attempted but they are rules to be observed. In achieving the overriding objective, litigants are entitled to have their cases resolved with reasonable expedition otherwise such delay as has been shown to have taken place in the instant case will indeed cause prejudice to the other party involved in the litigation, (see **Mortgage Corporation Ltd.(supra)**).”*

[27] The length of the delay is a consideration that strongly goes against granting the Application for an extension of time, without some valid and/or reasonable explanation

being advanced for the delay. However, the mere fact of a delay ought not to be the determining factor, as the Court must also consider all the other factors as a whole.

The reason for the delay

[28] Harris JA in the case of **Carlton Williams v Veda Miller** [2012] JMCA App 39 opined at paragraph 32 that: -

*“The reason for the failure of the applicant to comply within the requisite time is highly material. **Some reason for the delay must be advanced. Even in the absence of a good reason, the court may nonetheless grant an extension, if the interests of justice so requires.**”*

[Emphasis supplied]

[29] The reason advanced by the Defendant for the failure to file her Defence in time, can be gleaned from the Affidavit of Mr. Rogers, where he deponed that: -

*“8. Subsequent to entering into a retainer with the Defendant I advised the Defendant of the need to obtain documentary evidence to form the basis of her defence. I have been informed and do verily believe that the Defendant has been undertaking her searches for these documents but that **she has faced severe difficulties in locating most of the requisite information.***

*9. That as soon as this information was obtained a substantive Defence and Counterclaim were filed herein on the 7th May 2018. I exhibit herein and mark **“PR1”** a copy of the Defendant’s Defence and Counterclaim.”*

[Emphasis supplied]

[30] Mrs. Dixon-Frith argued that not only has the Defendant has not proffered any good reason for the delay, she further maintained that the Defendant has not offered any reason at all. She contended that the Defendant has given this Court absolutely no material upon which it can exercise its discretion to extend time. In those circumstances, Counsel insisted that the Court ought not to allow the Defence to stand. In support of her submissions, Mrs. Dixon-Frith cited the case of **Peter Haddad v Donald Silvera** SCCA No. 31/2003, Motion 1/2007, a judgment delivered on the 31st July, 2007, where Smith JA opined at page 8: -

“...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**) (supra). The question is: In what circumstances should the court extend time for compliance with a rule?..."*

[31] The learned Judge of Appeal continued at page 11: -

"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."

[32] It would appear from the evidence of Mr. Rogers, that the reason for his client's failure to file her Defence in time, was due to the fact that she had *difficulties* locating documents that would form the basis of her Defence. In my view, this Court cannot and ought not to accept that as a satisfactory explanation. It does not provide the Court with any information as to the nature and/or extent of the difficulties she allegedly faced in locating the documents. Mr. Rogers has not explained to the Court what were the specific difficulties faced by his client, and the Court cannot and will not speculate in order to ascertain what they were.

[33] In addition, no information has been provided to the Court as to the nature or description of the documents being sought. This Court is being asked to exercise its discretion by extending time for the Defendant to file her Defence. In order for the Court to do so, a good explanation ought to be provided explaining the reasons for her default, as well as some reference to the documents being sought. In the absence of a good explanation being proffered, the Court should be and is reluctant to exercise its discretion in the Defendant's favour. Furthermore, it cannot be ignored that the Defendant has not even taken the time to depone to an Affidavit in support of her Application for an extension of time. Neither has any reason been given on her behalf for her failure to file such an Affidavit.

[34] In the case of **Attorney General of Jamaica v Roshane Dixon and Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ. 23, Harris JA expressed the following sentiments: -

*“[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.”

I can only wholeheartedly adopt the above cited dicta of the learned Judge of Appeal, particularly with respect to her reference to the comment of Panton JA (as he then was) that *“...this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure.”*

Whether there is an arguable Defence and Counterclaim

[35] Another important factor for the Court’s consideration is whether the Defendant’s Defence and Counterclaim is an arguable one. Counsel Mr. Rogers in his Affidavit gave a general overview of his client’s Defence. At paragraph 10 he averred that: -

*“10. The Defendant not only has a good defence to the claim but also has a counterclaim for interests in the relevant property. The Defendant’s Defence as outlined in her Defence and Counterclaim **rests within the ambit of resulting trust** and it is based on the content thereof that I can absolutely say that this matter is one for which the Defendant may be successful if the Defence and Counterclaim is allowed to stand.”*

[Emphasis supplied]

[36] It is important to also highlight some of the relevant portions of the Defendant's draft Defence and Counterclaim wherein it is stated: -

"4. Paragraph 6 is admitted save and except the allegation that the house was furnished by the joint resources of the Claimant and his wife. The house was furnished from the joint resources of the Claimant and the Defendant with the Defendant expending monies from her salary as a Librarian and from her earnings from offering boarding to international high school student, towards the furnishing of the house... After the Claimant and the Defendant started their relationship the Defendant herself contributed indirectly to the construction of the home by assisting the Claimant in his several business so as to save the costs allocated with paying an employee and which also allowed him time from to see to the construction of the said home which was time consuming. That the Defendant also gave up her job in Spaulding to supervise the construction of the house.

5. Further in respect of paragraph 6. The Defendant says that she assisted directly by way of cash and indirectly in the design modifications done to the house and from her own resources saw to the furnishing of the said premises. All this was done on the basis of promises and undertakings made expressly and impliedly to her by the Claimant to the effect that the said structure was to be "their" home and that she had equity therein.

6. ...The Defendant will say that she did not contribute to the purchase of the land on which the house was built. The Defendant will say that while she did not contribute to the purchase price as the property was purchased prior to the parties herein meeting, her contribution to the construction of the house included but were not limited to the purchase of construction materials and making salary payments to the workmen who constructed the house. The Defendant will further say that these expenditures towards the construction of the house were separate and apart from any monies given to her by the Claimant for these purposes but were monies from her salaries earned as a Librarian and from her offering boarding to students. The Defendant attaches hereto and mark 'KM1' copies of receipts totalling \$468,004.84 evidencing her expenditure to the construction of the said property. The Defendant will further say she is only in possession of these receipts as the other receipts were destroyed over time as the Defendant was not minded to properly store those receipts in contemplation of any litigation concerning the property.

COUNTERCLAIM

1. The Defendant counterclaims against the Claimant for her share in the said property due to contributions made by the Defendant to the construction and maintenance of property being all that parcel of land being part of Dunrobin in the parish of Manchester registered at Volume 1113 Folio 272 of the Register Book of Titles, being civic address known as 4 Church Grove, Balnevie Heights, Mandeville in the parish of Manchester on the basis of a resulting trust.

...

14. As a result the Defendant claims:

I. A declaration that the Claimant and Defendant are each entitled to one half legal and beneficial interest in land in all that parcel of land being part of Dunrobin in the parish of Manchester...and being part of land formerly registered at Volume 1000 Folio 398 and being the land now comprised in Certificate of Title registered at Volume 1113 Folio 272 of the Register Book of Titles bearing civic address 4 Church Grove, Balvenie Heights, Mandeville in the parish of Manchester... or alternatively;

II. A declaration as to the full extent of the Defendant's share of the said property..."

[37] Counsel for the Defendant, Ms. McLeod submitted that the strength of her client's Defence and Counterclaim has not been tested. However, she argued that it is one in which her client could succeed, as it is not only an arguable Defence, but a case on its own that needs to be properly ventilated. Counsel contended that in her client's Counterclaim, she outlined that she was in a relationship with the Claimant, and that they jointly built the house, located on property solely registered in the Claimant's name. She submitted that her client is therefore seeking a declaration as to her interest in the said property.

[38] Mrs. Dixon-Frith in reply argued that even if there is some merit to the Defendant's Defence, that is not the only consideration that the Court must take into account. Counsel maintained that a party is not entitled to have time extended to file a Defence, if all the requisite criteria for an extension of time are not fulfilled. The Defendant she contended has not satisfied the remaining criteria, and as such the Court ought not to exercise its discretion in allowing the Defendant's Defence and Counterclaim to stand.

[39] In my view, the Defendant's Defence and Counterclaim may in fact raise an arguable case with a realistic prospect of success. She has made several assertions, which if accepted by the Court, may entitle her to the reliefs claimed in her Counterclaim. I must reiterate that the Defendant has stated that the reason for her delay in filing her Defence, was that she was trying to source documentary evidence to form the basis of her Defence. She has indicated that as soon as she obtained the said documentary evidence, her Defence was filed. However, no such documents are

attached to her Defence or Counterclaim, although at paragraph 6 of her Defence and Counterclaim, she purports to attach some receipts apparently evidencing monies spent on the construction of the said house.

The degree of prejudice to the parties

[40] On the issue of prejudice Mr. Rogers in his Affidavit stated that: -

“11. The delay in making this application is not so extended so as to cause the Claimant any irreparable harm in pursuance of this matter. That any harm suffered by the Claimant may be adequately assuaged by an award of costs as this Court is so empowered to do.

14. Further, the prejudice to be suffered by the Defendant if this application was to be denied would far outweigh that to be suffered by the Claimant if the application was to proceed and this is contrary to the principle that matters are to be dealt with fairly.”

[41] The Claimant in his Affidavit averred that: -

*“24...the Defendant commenced further legal proceedings against me in the Parish Court by way of Plaintiff No. 160/2016 in which the Defendant made an application for Protection and Occupation Order pursuant to the provisions of the Domestic Violence Act. By interim Ex Parte Order of Her Honour Miss Alleyne, dated 17th day of June, 2016, I was ordered to vacate the said land forthwith, with an inter partes hearing date set. A copy of this Ex Parte Order is hereby exhibited and marked “**DD 5**” for identity.*

25. In the latter proceedings, at the inter partes hearing, Her Honour Miss Alleyne directed that the matter be determined by this Honourable Court, as the Defendant has alleged an interest in the said land, citing a lack of jurisdiction to adjudicate on same. Accordingly, the Claimant and Defendant entered a Consent Order made on the 31st day of March 2017, the terms of which are as follows:

- 1. By consent, Ex Parte Occupation Order discharged.*
- 2. Both parties to occupy the premises in a manner to be described thereafter until such time as the Supreme Court makes a declaration as to their respective property interest if any.*
- 3. The manner of occupation would be that upstairs for exclusive use of Ms. Marajah. She will have access downstairs and one of the parking areas.*
- 4. Mr. Davis will have exclusive occupation of downstairs save and except the kitchen which will be shared by both parties...*

...

27. *Out of abundance of caution and for fear of false accusations by the Defendant, I do not currently reside at the said land, but I do have some furniture and other possessions there and I also visit the said land periodically. Accordingly, I have not lived at the property since June 2016 when the Ex Parte Order was made against me.*

28. *In or about August 2017, the house on the said land was broken into by thieves, and thereafter the locks were changed by the Defendant.*

29. *To date, the Defendant has not provided me with the new keys to the house. Therefore, currently, I do not have any keys to the house. Accordingly, when I visit the said land, I am unable to go into the house. I am not able to access the house on the said land. I am only able to access the yard by a side gate to the said land.*

...

33. *That I last visited the said property on the 26th day of February 2018 (after the proceedings in the Parish Court had concluded) and observed that the said land is unkempt, in that the grass and shrubs are overgrown, and there were dead leaves all over the yard. From my observance of the house from the outside, it is not well maintained and at the very least requires painting and upkeep. I further observed that the grill that was cut by the thieves in August of last year, which was at a side window to the house, has still not yet been replaced. In addition, the mesh which covered the window, which was also cut by the thieves, has also not been repaired and or replaced. Given the current circumstances, I have not been able to conduct repairs and or otherwise maintain the house due to the actions of the Defendant. I fear that the said land is at peril of being "run down", thereby reducing the value of the said land."*

[42] Counsel for the Defendant, Ms. McLeod argued that she is mindful that the Claimant has suffered prejudice in the late filing of her client's Defence. However, she contended that an Order as to costs could be granted to alleviate any prejudice caused to the Claimant. She further argued that the prejudice would be greater to her client than to the Claimant, if the Application for an extension of time was refused. She submitted that to deny the Defendant an opportunity to put forward her Defence would bring about a premature end to the matter. Counsel further submitted that the overriding objective of the **CPR** is to deal with matters justly, and as such her client's Defence and Counterclaim ought to be allowed to stand.

[43] The Claimant's Counsel Mrs. Dixon-Frith submitted that her client has suffered the gravest prejudice due to the delay of the Defendant. She contended that the prejudice to her client includes the fact that none of the parties currently reside at the house on the property, which is now unoccupied and unsecured, and the property is at

peril of simply going to waste. In fact, she argued that since 2017, thieves have apparently broken in on two occasions.

[44] Furthermore, Counsel submitted that there is also a Consent Occupation Order which hangs over the head of her client, pending the outcome of this matter. As such, she contended that it was imperative for the Defendant to act with alacrity in having her Defence put before the Court, so that there can be a final resolution to the matter. This the Defendant has refused to do. As to the issue of whether costs could reduce the prejudice faced by her client, Counsel cited the case of **Roshane Dixon and Sheldon Dockery** (supra), where Harris JA stated that: -

*“[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.”*

[45] It goes without saying, that the issue of prejudice would affect both the Claimant and the Defendant, depending on how the Court decides to treat with the Defendant's Application for an extension of time. The Claimant filed his claim on the 3rd August, 2017, and is desirous of having the matter resolved so that he can move on with his life. He is eager to have access to the house, so that he can secure it, and to make whatever repairs that may be necessary. The Claimant in his uncontroverted evidence contended that the house is in a state of disrepair, and is being vandalized by thieves. He fears that his property is at peril of being “run down” thereby reducing its value. Further, he has stated that he does not have access to the house, as the locks were changed by the Defendant, and to date he has not been provided with a copy of the keys. On the other hand, the Defendant wants an opportunity for her case to be heard, by having her Defence and Counterclaim allowed to stand. If the Court refuses her Application for an extension of time, her quest for justice would be at an end, as she would not be able to realise her interest in the said property, if any.

[46] I am satisfied that if the Orders sought by the Defendant were to be granted, the prejudice suffered by the Claimant cannot be remedied by an award of costs in his favour. Neither is there any evidence that the Defendant is in a financial position to pay any such Order, were one to be made. I am therefore not prepared to grant the Defendant an extension of time in circumstances where, in my view, on the evidence before the Court, the period of delay was inordinate, no satisfactory explanation has been provided for her delay, and where the delay has caused great and continuing prejudice to the Claimant. Harris JA noted in the previously cited case of **Roshane Dixon and Sheldon Dockery** stated that: -

*“[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.**”*

[Emphasis supplied]

[47] The Defendant in the present case, on whom the burden rests has failed to satisfy this Court on the balance of probabilities that the Orders sought ought to be granted. In the final analysis, the Court makes the following Orders: -

- a) The Defendant’s Notice of Application filed on the 9th May, 2018 to be granted permission for the Defence and Counterclaim to stand, as at the date of filing is refused;
- b) The Claimant’s Ex-Parte Notice of Application for Court Orders filed on the 12th March, 2018 is adjourned for a date to be fixed by the Registrar;
- c) Costs are awarded to the Claimant, such costs to be taxed if not agreed.