[2024] JMSC Civ. 56

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2022CV00195

BETWEEN	**JAIRZENHO BAILEY**	**CLAIMANT**
AND	**THE BOARD OF MANAGEMENT OF THE COLLEGE OF AGRICULTURE, SCIENCE AND EDUCATION (CASE)**	**DEFENDANT**

IN CHAMBERS

Georgia Hamilton, Attorney-at-Law, instructed by Georgia Hamilton & Co., Attorneys-at-Law for the Claimant/Respondent

Lemar Neale & Ayana Worgs, Attorneys-at-Law, instructed by Jacobs Law, Attorneys-at-Law for the Defendant/Applicant

Heard: December 11, 2023, February 8, 2024 and May 8, 2024

Breach of Rules 9.3(1) and 10.3(1) of the Civil Procedure Rules (CPR) - Whether a default judgment has been entered against the defendant, and if so, whether the court should set it aside and/or stay its execution - Application for extension of time to file defence - Whether the length of the defendant's delay is inordinate - Whether the defendant had a good reason for not filing and serving its defence and acknowledgment of service within the time prescribed - Whether the pre-litigation communication dated May 12, 2021 from the defendant to the claimant was 'without prejudice' and is therefore inadmissible re the application before the court now - Whether the defendant has a real prospect of successfully defending this claim - Whether the degree of prejudice to the defendant would be oppressive should the court allow the defendant an extension of time in which to

file and serve its defence - Whether it is in the interest of justice for the court to allow the defendant to file and serve its defence - Whether the court should grant an extension of time in order for the defendant to file and serve its defence - Whether the court should permit the defendant's acknowledgment of service to stand as filed and served within time - Whether the claimant's application for interim payment, should be granted.

ANDERSON K. J

BACKGROUND

The application before the court

[1] The claimant, Jairzenho Bailey, claims that he was temporarily employed to the defendant, College of Agriculture, Science and Education ('CASE'), in the capacity of lecturer in the department of Plant, Soil Sciences and Engineering. He further claims that he served the college since January 2002, then took a break from this post in or about 2010. He has averred that he returned as lecturer to the college in 2014 and that from January 2018 to June 2019, he was employed by the college on fixed term contracts. He has further averred that when the January 2018 to June 2019 period ended, he continued to work at the college without any breaks beginning in September 2019, and that he was compensated up to March 2021 for his service.

[2] He alleges that his attorneys-at-law wrote to the defendant challenging the purported termination of his services. He further alleges that by letter dated May 12, 2021, he was advised by the defendant's attorneys-at-law that, inter alia, the defendant intended to continue to pay him until his services were terminated. He asserts that, among other things, he has still not received any portion of the salary, which is to be paid to him by the defendant since April 2021. The claimant commenced proceedings, by way of claim form and particulars of claim, filed on January 24, 2022, against the defendant for damages and/or other relief for the alleged termination of his lecturing duties by the defendant, via email notice dated January 20, 2021.

[3] The affidavit of service filed by the claimant on March 29, 2022, indicates that the claimant's process server had served the claim form, particulars of claim and

accompanying documents on the defendant on February 8, 2022. However, the defendant did not acknowledge service of the aforementioned documents fourteen (14) days after it was served with the relevant documents per ***rule 9.3(1) of the Civil Procedure Rules (CPR)***. Further, the defendant did not defend the claim forty-two (42) days after it was served with the aforesaid documents per ***rule 10.3(1) of the CPR***. Instead, the defendant filed its acknowledgment of service on May 16, 2022, out of time, and subsequent to the claimant having filed his request for judgment in default of acknowledgment of service on March 8, 2022.

[4] *On April 27, 2023, the defendant filed a notice of application for court orders seeking the following orders, inter alia:*

'1. The default judgment be set aside.

2. The execution of the judgment be stayed pending the outcome of the application to set aside the default judgment.

3. The time within which to file and serve a defence be extended to 14 days from the date of the order of the court.

4. Costs of this application to be costs in the claim…'

The grounds on which the defendant is seeking the orders are as follows:

'1. Pursuant to rule 13.3(2) of the Civil Procedure Rules, 2002 (as amended) ('the CPR'), the court has the power to set aside a default judgment.

2. Pursuant to rule 26.2(c) of the CPR, the court may 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.

3. Pursuant to rule 10.3(9), the defendant may apply for an order extending the time for filing a defence.

4. The defendant has a real prospect of successfully defending the claim.

5. The defendant has applied to the court as soon as is reasonably practicable after finding out that judgment has been requested/entered.

6. There is a good explanation for failure to file a defence.

7. The defendant will be severely prejudiced if the claimant were to enforce the judgment.

8. It is in keeping with the overriding objectives and in the interest of justice that the default judgment be set aside.'

[5] The matter came before me on February 8, 2024 and I made the following orders:

1. *'The hearing of the claimant's application for interim payment, which was filed on September 23, 2022, is to take place on paper and is being presided over by K. Anderson, J. and the ruling on that application is reserved.*

2. *The hearing of the defendant's application to set aside default judgment is being presided over by K. Anderson J. and the ruling of that application is reserved.*

3. *The court stays the claimant's request for default judgment, which was filed on March 8, 2022, and that stay shall remain in place, until this court has adjudicated on the defendant's said application to set aside default judgment, which was filed on April 27, 2023.*

4. *The defendant's said application stands amended in the orders as sought, by adding as number 6, the following:*

   "The acknowledgement of service filed by the defendant on May 16, 2022, shall be deemed as if having been filed and served within time."

5. *Ground 6 of the defendant's application stands amended with the addition of the words "and acknowledgment of service".*

6. *The costs of today shall be costs in the respective application for court orders as referred to herein and shall be divided in such proportion as the court shall think fit.*

7. *The claimant shall file and serve this order.'*

[6] The following issues are now before the court for determination:

1. Whether a default judgment has been entered against the defendant, and if so, whether the court should set it aside and/or stay its execution.

2. Whether the length of the defendant's delay is inordinate.

3. Whether the defendant had a good reason for not filing and serving its

defence and acknowledgment of service within the time prescribed per the rules of court.

4. Whether the pre-litigation communication dated May 12, 2021 from the defendant to the claimant was 'without prejudice' and inadmissible.

5. Whether the defendant has a real prospect of successfully defending its claim.

6. Whether the degree of prejudice to the defendant would be oppressive should the court allow the defendant an extension of time in which to file and serve its defence.

7. Whether it is in the interest of justice for the court to allow the defendant to file and serve its defence.

8. Whether the court should grant an extension of time in order for the defendant to file and serve its defence.

9. Whether the court should permit the defendant's acknowledgment of service to stand as filed and served within time.

10. Whether the claimant's application for interim payment should be granted.

LAW AND ANALYSIS

The Defendant's Submissions - A Summary

[7] It is the defence's case that it had retained the services of Jacobs Law, its previous attorneys-at-law, to defend its claim, and that they had believed that the matter was being handled, after having provided counsel with full instructions on how to proceed. The defence have asserted that the associate, who had conduct of the matter, had requested the claimant's consent to file a defence out of time. The President of CASE, Derrick Deslandes, in his affidavit, which was filed on April 27, 2023, asserted

that he provided the claimant with a copy of his draft defence on August 30, 2022, in response to the claimant's request for same. Further, the defendant claims that, on September 9, 2022, the claimant refused to consent to have the defence filed out of time. In addition, the defendant's previous attorneys-at-law, in an affidavit deponed by John Jacobs, principal attorney of Jacobs Law, claimed that since their former client, CASE, is a government institution, it took them some time to complete instructions. In paragraph 5 of said affidavit, Mr. Jacobs averred that he was ***'****experiencing challenges in getting full instructions based on the channels within the defendant's institution****'***.

[8] The defence have proffered that sometime in 2022, the defendant's previous attorneys-at-law had relocated their Kingston office and that during the firm's relocation, the files concerning the matter at hand, were dislocated within their new office. This move, the defence claim, contributed to their delay in filing their defence and that the delay was not intentional. Further, they claim they have a good reason for the delay.

[9] The defence have asserted that they have a real prospect of succeeding the claim because the claimant was, at all material times, a contract officer, and that the emoluments and benefits afforded, were duly paid to him in full for his services. The defence maintain that the claimant had worked as a contract officer on a fixed term contract from 2002 to 2010, and that his status had never changed from contract officer to temporary member of staff. They maintain that the claimant had taken a break and returned to work, on contract from 2014 to 2019, when his contract ended, but that he was not provided with a new written contract due to oversight.

[10] Further, Mr. Jacobs deponed, in paragraphs 7 - 9, that the associate, who had conduct of the matter, had subsequently left the firm toward the end of the year. Additionally, Mr. Jacobs deponed that the issue of the failure to file a defence, was not brought to his attention until about March of 2023, when they were notified by the court, through a Minute of Order, that the claimant had applied for interim payment. Mr. Jacobs has deponed that the failure to file the defence ought not to be attributed to the defendant but to its attorneys-at-law, being Jacobs Law.

[11] The defence have also asserted that the claimant's post as lecturer does not form part of the defendant's establishment, because he is a contract officer and not a temporary or permanent employee of the college. Current defence counsel have further maintained that, while there was a delay in filing their defence and in making an application to the court for an extension of time to file same, the case of ***Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited [2016] JMCA Civ 39 at para. 82*** reveals that a delay, without more, is not fatal to their application.

[12] The defendant's present counsel have asserted that in order for the claimant to become a temporary member of the academic staff, he would have to go through the process to be so appointed, and if successful, he would be issued a letter of temporary appointment. The defence have proffered that the claimant has not been issued such letter but that, he was engaged by the defendant strictly on a semester basis, on contract, as needed. The defence have also proffered that since the defendant had informed the claimant, via email sent on January 20, 2021, that there were no teaching duties to be assigned to him for the semester of January 2021 to May 2021, his engagement would have been determined at the end of that semester.

The Claimant's Submissions - A Summary

[13] It is the claimant's case that the defendant acknowledged service of the claim and attendant documents out of time. Further, it is the claimant's case that more than a year (approximately 14 months later) has passed since he served the defendant with his application for default judgment, yet the defendant has just now applied for an extension of time to file and serve their defence.

[14] The claimant claims that the ***Civil Procedure Rules*** do not set out the criteria that an applicant relying on either ***rule 10.3(9)*** *or* ***rule 26.1(2)*** needs to satisfy, but our courts have consistently followed the approach of the Court of Appeal in considering applications for extension of time. The claimant contends that Mrs. Justice A. Pettigrew-Collins (Ag.) (as she then was), approached an application for extension of time to file a defence in the unreported decision of ***Adrian Samuda v James Davis & Anor [2017] JMSC Civ. 156***, as follows:

*‘Neither **rule 26.1** nor **rule 10.3** speaks to the relevant factors that a court should take into account when considering whether an extension of time should be granted to a defendant to file a defence. One must therefore look to case law for guidance…In **Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockery [2013] JMCA Civ. 23**, Harris JA cited the considerations enumerated in **Strachan v The Gleaner Company Motion No. 12/1999 delivered on the 6th of December 1999**. In the latter case, Panton JA outlined certain factors which should be taken into consideration when a court is exercising its discretion whether or not to grant an extension of time. The factors include:*

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.

*…whether a defendant should be allowed to file a defence out of time, is expressed as whether the defendant has a defence with merit…Harris JA pointed out in **Roshane Dixon** that “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” and she warned that the court must, in applying the overriding objective “be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties” **(paragraph 19** of the judgment).’*

It must be noted, however, that the Privy Council case of ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) [2011] UKPC 37*** has included a fifth factor that a court should consider when exercising its discretion whether or not to grant an extension of time. The court stated: ‘*v. Whether it would be in the interest of justice to grant an extension of time’.* This court will take all five factors into consideration to determine whether the defendant should be allowed an extended time to mount its defence.

[15] The claimant has suggested that if the defence has substantial contradictions, then that may be an indication that the prospect of success is not real and, that further, documentary and/or expert evidence may make it very difficult for the defence to

succeed. The claimant has further suggested that, in spite of the greater relaxation of the rules, it would be a grave mistake to think that a defendant, without much thought, can simply cobble a defence and all will be well. The claimant has relied on the case of ***Sasha-Gaye Saunders v Michael Green & Ors [2005] HCV 2868*** and particularly, the approach of Mr. Justice Sykes, which is instructive on whether there is a defence with merit or a real prospect of succeeding. In that case, His Lordship noted that: ***'****The test of real prospect of successfully defending the claim is certainly higher than the test of arguable defence (see ED&F Man Liquid Products v Patel & ANR [2003] C.P. Rep 51). Real prospect does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted, that did not mean that a defendant was free to make any assertion and the judge must accept it.****'***

It is the claimant's case that, although the defendant deponed that the claimant was retained by the defendant under fixed term contracts, as needed, the defendant had stated, via a pre-litigation communication dated May 12, 2021, that the claimant was temporarily employed as a lecturer. The claimant further claims that, in that communication, the defendant promised that it would continue to pay him until his services were terminated by the Board. The claimant contends that the aforementioned is a substantial contradiction. The claimant has also relied on the case of ***Yvette Harriot v Jamaica Property Co Ltd & Anor [2015] JMSC Civ 137***. In that case, the 1st defendant made an application to withdraw an admission of liability made during proceedings. In considering the matter, His Lordship (Mr. Justice Sykes), examined the pre-litigation correspondence between the parties and found that, a statement made by an employee of the 1st defendant admitting liability for the claimant's loss, meant that the 1st defendant did not have a realistic prospect of succeeding on its defence, on the issue of liability, and accordingly dismissed the 1st defendant's application.

[16] The claimant further contends that the defendant and its previous attorneys-at-law have given contradictory reasons for their delay, in that, the defendant claims that it had given its former attorneys instructions on how to proceed, yet, the said attorneys

claim that they were ***'****experiencing challenges in getting full instructions based on the channels within the defendant's institution****'***.

[17] The claimant has proffered that he has been without his salary for more than two (2) years, and that financial hardship is unquestionably prejudicial, as he is facing dire financial straits. Further, it is the claimant's case that, the defendant had been negligent in not reissuing the claimant with fixed term contracts after June 2019.

The Court's Analysis:

Whether a default judgment has been entered against the defendant, and if so, whether the court should set it aside and/or stay its execution

[18] There is evidence before the court that the claimant had requested judgment against the defendant in default of acknowledgment of service on March 8, 2022. However, there is no evidence before the court to suggest that the default judgment, as requested by the claimant, was granted. Therefore, there is no need for the court to substantively delve into the relevant provisions of ***rules 9.2(1)(6),12(1)(a) and 12(4)(a) - (c) of the CPR***, for setting aside a default judgment in the circumstances. The defendant's application to set aside the default judgment and/or to stay the execution of the default judgment, must be and are, denied. On the other hand, the court needs to assess whether the defendant qualifies for an extension of time to file and serve its defence.

The Court's Analysis:

Whether the length of the defendant's delay is inordinate

[19] The case of ***Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4,*** *in* ***paragraphs 15*** *and* ***16*** *of the judgment****,*** enunciated that 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 an application for extension of time to appeal in the case of ***Commissioner of Customs and Excise v***

Eastwood Care Homes (Ilkeston) Ltd. And Ors. [2001] EWHC Ch. 456. He is reported to have outlined the principle as follows:

'*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 has to be granted. Each application has to be viewed by reference to the criterion of justice. 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 appeal, the effect of the delay on public administration, the importance of compliance 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…*

*The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant, not only to satisfy himself that the appellant had given good reasons for its failure to have filed a defence in the time prescribed by rule 10.3(1), CPR, but also that the proposed defence had merit.***'**

[20] The case of ***Anthony Brown v Dadrie Nichol [2023] JMCA App 40***, ***paragraph 7***, has affirmed that for an applicant to succeed in obtaining an extension of time within which to file an appeal, he or she must satisfy the court of the following primary factors:

- *i.* **'***the delay was not inordinate;*
- *ii.* *there are good reasons for the delay;*
- *iii.* *there is an arguable case for the appeal;*
- *iv.* *if the application is allowed, the degree of prejudice to the other parties is not oppressive; and*
- *v.* *it would be in the interests of justice to grant the application.***'**

The defendant's application will be assessed against the above requirements.

[21] The affidavit of service filed by the claimant on March 29, 2022, indicates that the claimant's process server had served the claim form, particulars of claim and accompanying documents on the defendant on February 8, 2022. Accordingly, the length of the delay from the date of service to May 16, 2022 is ninety-seven (97) days

(over 3 months), which is clearly in excess of the fourteen (14) days prescribed by ***rule 9.3(1) of the CPR***. To my mind, this is a significant delay.

[22] The defendant filed its application for an extension of time to file its proposed defence on April 27, 2023, which is in excess of the forty-two (42) days prescribed by ***rule 10.3(1) of the CPR***. It is important to note that, while the defendant's previous attorney-at-law deponed to having filed an acknowledgment of service on May 16, 2022, he said he became aware that the defence was not filed, in March 2023. Nonetheless, it appears that nothing was done by the previous firm to rectify the situation. The length of the delay, from service on February 8, 2022 to the application for court orders on April 27, 2023, is fourteen (14) months and two (2) weeks. I find this to be excessive. This would be tantamount to one (1) year and two and a half months. It is my view that a delay of this nature is inordinate. However, it is important to note that the court does not usually decide an application for extension on the basis of only the length of delay.

<u>The Court's Analysis:</u>

Whether the defendant had a good reason for not filing and serving its defence and acknowledgment of service within the time prescribed per the rules of court

[23] The defence claim they have a good reason or good reasons for their delay in filing their defence. The first reason provided by Derrick Deslandes, President of CASE, in paragraph 7 of his affidavit, is that he had believed the matter was being handled by their previous attorneys-at-law, as he had given them full instructions to proceed. Secondly, the said affiant claims that the associate, from the previous firm that had handled the matter, had requested the claimant's consent to file a defence out of time. Further, the defence contend that the claimant refused consent after they had requested same. Thirdly, the defendant averred that that his previous counsel had relocated their Kingston office and that the files for CASE were dislocated within the new office.

[24] The defendant appears to be claiming that he had done his part by providing his former attorneys with instructions on how to treat with the matter. However, it is my view

that the defendant had a responsibility to follow up with its counsel to ensure that the matter was proceeding as it should. A prudent and responsible client would ensure that he/she/it kept abreast of a matter of this gravity, since it carries legal, financial and other implications.

[25] It is must be noted that the claimant's letter to the defendant's former attorneys requesting their draft defence, was dated August 16, 2022. Additionally, the claimant's counsel had advised, in that letter, that she had already requested judgment in default but that she asked *'to see a draft defence as a matter of course in order to take instructions regarding such consent'*. Interestingly, at that point in time, the prescribed 42 days for the defence to file their defence would have expired from March 22, 2022. ***Rule 10.3 of the CPR*** states:

*(5) '**The parties may agree to extend the period for filing a defence…*

(6) The parties may not make more than two agreements under paragraph [5].

(7) The maximum total extension of time that may be agreed is 56 days.

(8) The defendant must file details of such agreement.'

There is no evidence before the court, aside from the correspondence between the parties mentioned above, that they had come to any agreement regarding consent to a defence filed out of time. In any event, it is important to note that 56 days from February 8, 2022 expired on April 5, 2022 and the ***rule 10.3(7***) above expressly allows for a total maximum extension of time of 56 days. It is my considered view that the parties had long exhausted 56 days by the time they exchanged the aforesaid correspondence in August 2022, pertaining to consent to extend the period for filing a defence. Consequently, if they had made such an agreement in August 2022, they would be acting contrary to ***rule 10.3(7)***, and that agreement could not be upheld by the court.

[26] Thirdly, the defence have submitted administrative inefficiencies or inadvertence, on the part of their former counsel, as a good reason for their failure to file their defence within time. In the Privy Council case of ***The Attorney General v Universal Projects (op. cit.)***, the court found that the defendant had not provided any good explanation,

within the meaning of ***rule 26.7(3)(b) of the CPR of Trinidad and Tobago**,* for the failure to serve a defence by March 13, 2009, and that was fatal to the defendant's case. The board found that ***'****a party cannot rely on such things as administrative inefficiencies, oversight or errors in good faith. A good explanation is one which properly explains how the breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith. Any other interpretation would be inconsistent with the overriding objective of dealing with cases justly and should therefore be avoided…****'* ***(paragraph 21*** *of the judgment****)***

Accordingly, in the case at bar, I must reiterate that administrative inefficiencies, oversight or errors in good faith are generally not tantamount to a good reason or reasons, for a defaulting party's failure to comply with either court or court rule imposed, limitations of time. Therefore, I am of the view that the preceding reasons do not amount to good reasons for the defendant's delay in filing its defence in the case at hand. I find that the defendant has not satisfied this requirement. However, it is important to note that, while any failure by the defendant to give a good reason, is not decisive, it is a factor to be taken into account.

The Court's Analysis:

Whether the pre-litigation communication dated May 12, 2021 from the defendant to the claimant was 'without prejudice' and inadmissible

[27] The claimant has contended that the pre-ligation correspondence dated May 12, 2021, from the defendant to the claimant, should be considered by the court, as the contents could serve to defeat the defendant's prospect of success. However, the defendant is opposed to this proposed disclosure and has contended that the aforementioned communication should be treated as 'without prejudice' and inadmissible. The 'without prejudice' rule and legal professional privilege that arise for consideration form part of the branch of privilege in the law of evidence. As Adrian Keane noted in his useful text, ***The Modern Law of Evidence, seventh edition, chapter 20, page 596***, privilege operates to exclude relevant evidence not because it is unreliable or irrelevant to the facts in issue, but because of extrinsic considerations

which are held to outweigh the value that the evidence would have at trial. The well-established considerations that may operate to bar the admissibility of relevant evidence on the grounds of privilege are: ***'****(i) the rights of parties to be advised confidentially by their legal advisers ('legal professional privilege'); (ii) the rights of parties to enter into negotiations without being bound by what is said in the negotiation process ('without prejudice negotiations'); and (iii) the rights of parties to be free from being compelled to answer questions where to do so would be self- incriminating ('privilege against self-incrimination')****'***.

[28] In so far as 'without prejudice' communications (or negotiations) are concerned, the general rule is as stated in the online edition ***of Halsbury's Laws of England, Volume 12A (2015), paragraph 663***, that:

'*Written and oral communications made during a dispute between the parties, which are made for the purpose of settling the dispute, and which are expressed or are by implication, made 'without prejudice', cannot generally be admitted in evidence. The rule does not apply to communications which have a purpose other than settlement of the dispute; thus, it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed.****'***

In ***paragraph 664***, of the same text, the limits of the rule are explained thus:

'*The contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, or that an act of bankruptcy, or a severance of a joint tenancy, or a trigger for a rent review clause, has occurred, but generally speaking, they are not otherwise admissible… The consent of both parties to the dispute is required for the privilege to be waived, even if there has been only one communication… The critical question for the court as to admissibility is where to draw the line between the public policy of encouraging parties to resolve disputes without litigation, and wrongly preventing one or other party from putting their case at its best in litigation.****'***

[29] Based on the evidence before the court, I find that, at the time the defendant transmitted the aforesaid communication to the claimant, there was a dispute between

the parties, which the parties were attempting to settle. At the material time, the claimant had contended that he was only compensated up to March 2021 for his lecturing services at the college. He also alleged that his former attorneys-at-law had written to the defendant, challenging the purported termination of his services. However, there is no evidence that a binding agreement arose out of the aforesaid communication, nor is the court, at this time, considering whether the parties have arrived at an agreement. Therefore, there is no need to admit the aforesaid pre-litigation communication into evidence to show whether negotiations have taken place. In addition, it is clear that both parties to the dispute do not agree to the privilege being waived. The facts indicate that the defendant is opposed to admitting the said communication into evidence, as it considers said communication to be inadmissible per paragraph 10 of the defendant's draft defence. In the circumstances of this case, I find that the pre-litigation communication dated May 12, 2021, from the defendant to the claimant is inadmissible, for present purposes.

<u>The Court's Analysis</u>

Whether the defendant has a real prospect of successfully defending its claim

[30] The next step is to consider whether the defendant's proposed defence is arguable since, according to ***Dale Austin v The Public Service Commission and Another [2016] JMCA Civ. 46***, an applicant's failure to provide a good reason for the delay will not be treated as dispositive of his application. Pursuant to ***rule 10.5 of the CPR***, the defendant has a duty to set out his case as follows:

1. 'The defence must set out all the facts on which the defendant relies to dispute the claim…

3. In the defence the defendant must say -

(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;

(b) which (if any) are denied; and

(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

4*. Where the defendant denies any of the allegations in the claim form or particulars of claim -*

(a) the defendant must state the reasons for doing so; and

(b) if the defendant intends to prove a different version of events from that given by the claimant,

the defendant's own version must be set out in the defence.

5. where, in relation to any allegation in the claim form or particulars of claim, the defendant does not -

(a) admit it; or

(b) deny it and put forward a different version of events,

the defendant must state the reason for resisting the allegation.

6. The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence.'

[31] I agree with defence counsel that the case of ***Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited [2016] JMCA Civ 39*** is instructive in this area of law. In ***paragraph 82***, the court stated:

'For there to be a real prospect of success, the defence must be ***more than merely arguable*** *(highlighted for emphasis) and the court, in exercising its discretion, must look at the claim and any draft defence filed. Whilst the court should not and must not embark on a mini-trial, some evaluation of the material placed before it for consideration should be conducted. The application must therefore be accompanied by evidence on affidavit and a draft of the proposed defence.'*

In the case at bar, I have considered the defendant's affidavit and the affidavit, which was deponed to, by the defendant's former attorneys, which were both filed on April 27, 2023. In addition, I have considered the defendant's draft defence as well as the defendant's affidavit, which was filed on May 12, 2023, in response to the claimant's affidavit. According to ***paragraph 84*** *of* ***Russell Holdings (op. cit.)***, the court said that the *'prospect of success must be real and not fanciful…The test is similar to that which is applicable to summary judgments.'* In ***Paragraph 85*** of that case, it outlined that a defendant could show that the defence had a real prospect of success by:

i. *'showing a substantive defence for example volenti non fit injuria, frustration; illegality etc.;*

ii. stating a point of law which would destroy the claimant's cause of action;

iii. denying the facts which support the claimant's cause of action; and

iv. setting out further facts which is a total answer to the claimant's cause of action for example exclusion clause, agency etc.'

From my reading of the pertinent documents filed by the defendant, I have found that, prima facie, the draft defence appears to have a real prospect of success. The proposed defence conforms to the provisions outlined in ***rule 10.5 of the CPR***. Further, in paragraphs 3 - 6, the defendant maintains that the claimant was, at all material times, employed as a contract officer, and that, although he was not provided with a new fixed term contract after June 2019, he had worked from September 2019 to January 2021 in the capacity of contract officer. In addition, the defendant maintains that the claimant was duly compensated for his services and that the post that he occupied was not one on the defendant's establishment. The defendant has also provided clarification on how a contract officer transitions to a temporary member of staff and that the claimant had never been issued a letter of temporary appointment. In paragraph 13 of the proposed defence, the defendant claims that it was not required to give notice of termination when the claimant's engagement came to an end, because each contract came to an end at the end of each semester, by the effluxion of time.

[32] Further to the preceding, in paragraph 10 of the defendant's affidavit in response to the claimant's affidavit, the defendant claims that working fourteen (14) hours or more per week does not make a worker a full-time staff member, as was the case of the claimant. In paragraph 23 of the said affidavit, the defendant averred that the claimant is not entitled to the benefit because all eligible persons have to make an application, which is subject to an approval process. Further, the defendant averred that the claimant had never made such an application.

[33] It is clear from the documents on which the defendant has relied, that his version of the facts is different from the claimant's. Also, I find that the point of law concerning the claimant's engagement by the defendant, is a sore point of contention in this case,

since it appears that the case turns on whether the claimant is an employee as opposed to a contract officer. Interestingly, the defendant has vehemently submitted that the claimant was retained under a contract for services, while, the claimant has contended that he had become a temporary member of staff. Having considered the primary point of law and facts raised in the defendant's affidavits and proposed defence, I have concluded that they fall within the ambit, which was so well-articulated in the ***Russell Holdings*** case ***(op. cit.)***. Therefore, I find that the defendants' defence is meritorious and that they have proven, on a balance of probabilities, that their defence has a real prospect of success.

<u>The Court's Analysis:</u>

Whether the degree of prejudice to the defendant would be oppressive should the court allow the defendant an extension of time in which to file and serve its defence

[34] If the court should grant the defendant an extension of time within which to file and serve its defence, I find that the claimant is not likely to suffer any undue prejudice. The claimant has submitted to the court that the defendant owes him outstanding sums of money for breach of his employment, but the court is yet to establish whether the claimant was hired under a contract for services or as an employee. Further, the court needs to establish whether the claimant has been duly paid by the defendant or not. This matter needs to be properly ventilated and this cannot be accomplished if the defendant is not afforded the opportunity to present its case, through its defence, to the court. As a result, I find that, although the claimant claims to be unquestionably prejudiced because he is in dire financial straits, the defendant will likely suffer undue prejudice and indeed, far greater prejudice than that which the claimant may be presently experiencing, if this claim at bar, is not determined on its merits.

<u>The Court's Analysis:</u>

Whether it is in the interest of justice for the court to allow the defendant to file and serve its defence

[35] It is important to consider ***rule 10.3(9)*** which allows a defendant to apply for an order extending the time for filing a defence. Further, **r*ule 26.1(2)(c) of the CPR*** states: *'Except where these Rules provide otherwise, the court may 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****.'* (Highlighted for emphasis)

I find that this is one of those cases where the interests of justice would be best served, if the court were to extend time for the defendant to comply with the rules as regards the filing and service of its defence, although the time for compliance has passed. ***Rules 1.1(1) and 1.1(2)(d) of the CPR*** provide that: ***'****These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. Dealing justly with a case includes - (d) ensuring that it is dealt with expeditiously and fairly****'***. I am of the view that the defendant should be allowed to present its defence to the court, so as to ensure that the matter is dealt with fairly and expeditiously as possible in the circumstances.

<u>The Court's Analysis</u>:

Whether an extension of time should be granted in order for the defendant to file and serve its defence

[36] In view of the foregoing, I will extend the time to allow the defendant to file and serve its defence, as it has discharged its burden of proof in the circumstances.

<u>The Court's Analysis:</u>

Whether the court should permit the defendant's acknowledgment of service to stand as filed and served within time

[37] In light of the fact that the defendant will be permitted to file and serve its defence, it is a matter of course that it should also be permitted to have its acknowledgment of service stand as filed and served within time.

<u>The Court's Analysis</u>

Whether the claimant's application for interim payment should be granted

[38] The sections of ***rule 17.6, CPR,*** which are relevant to this issue are as follows:

'17.6(1) *The court may make an order for an interim payment only if -*

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant…

(c) the claimant has obtained judgment against the defendant for damages to be assessed or for a sum of money (including costs) to be assessed…

(d) it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs…'

It is important to note that, in the case at bar, the defendant has not admitted liability to pay damages or some other sum of money to the claimant. Moreover, the claimant has not obtained judgment against the defendant, neither for damages to be assessed nor for a sum of money to be assessed. In this instance, the court cannot predict that, if this claim should go to trial, the claimant would obtain judgment against the defendant. Therefore, based on the rule above, the claimant's application against the defendant for interim payment, cannot succeed. In addition, it is clear that the defendant desires to and has taken steps to acknowledge and defend the claim. The court has evaluated the defendant's affidavits in support of notice of application to extend time to file and serve its defence, as well as its draft defence, and has found that the defendant has a real prospect of defending the claim. Thus, inexorably, the application for interim payment must fail.

Conclusion

[39] In the premises, the defendant failed to satisfy the requirements as regards the length of the delay and a good reason or good reasons for the delay. However, the defendant has proven that its defence has a real prospect of success. Hence, the court will exercise its discretion to enlarge the time to allow the defendant to file and serve its defence.

Disposition

[40] My orders are as follows:

1. The defendant's application to set aside the default judgment and/or to stay the execution of the default judgment, is denied, as there is no default judgment entered against the defendant.

2. The claimant's application to obtain an order for an interim payment to be made to him, by the defendant, is denied.

3. The pre-litigation communication dated May 12, 2021, from the defendant to the claimant, is declared inadmissible 'without prejudice' communication and therefore, will not be considered further, as regards any of the applications that are presently awaiting determination by this court.

4. The defendant is permitted to file and serve its defence within seven (7) days from today's date.

5. The defendant's acknowledgment of service, which was filed on May 16, 2022, is permitted to stand as filed and served within time.

6. Each party is to bear his/its own costs.

7. The defendant shall file and serve this order.

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Hon. K. Anderson, J