[2019] JMSC Civ 133

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2014HCV04947

BETWEEN	**CLEMENT DESLANDES**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**1ST DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Mrs. Saverna Chambers instructed by George G. Soutar QC for the Claimant.
Mrs. Carian Freckleton-Cousins instructed by the Director of State Proceedings for the Defendants.

Heard July 1, 2019 and July 16, 2019.

Civil procedure – Application by defendant to extend the time within which to file defence – Civil Procedure Rules, rule 10.3 – Application by claimant to strike out defendants' statement of case – CPR rule 26.3(1) – considerations for the Court.

MASTER N. HART-HINES

[1] There are two applications for the consideration of the Court. The first application is that of the defendants, filed on September 14, 2017, to extend the time within which to file their defence, pursuant to **rule 10.3** of the Supreme Court of Jamaica Civil Procedure Rules 2002 (hereinafter "CPR"). The second application is that of the claimant, filed on September 28, 2018, for the defendants' application and statement of case to be struck out pursuant to **rule 26.3(1)** of the CPR.

Background and Chronology

[2] The Claim Form and Particulars of Claim indicate that the claimant is owner

of a 1983 Yamaha fiberglass boat with three engines and bearing serial number MX37030M83D and registration number GB 02417. The claimant alleges that *"the first named defendant through his servants and/or agents have unlawfully detained or arrested"* the said boat. The second defendant is sued by virtue of the Crown Proceedings Act. The claimant seeks an order for the return of the boat, or alternatively, he claims damages in the sum of USD$30,000, representing the cost of the boat, or alternatively, damages for conversion along with interest and costs.

[3] The claimant alleges that on January 3, 2014, he journeyed to Nassau, Bahamas, where he bought the Yamaha fiberglass boat from one David Knowles. As proof of his ownership of the boat, he relies on a Bill of Sale dated January 3, 2014, a Registration Certificate, and a document headed "Condition of Licence", all of which he said he received at the time of purchase. The Bill of Sale states that the boat was sold to the claimant by David Knowles for USD$30,000. The Registration Certificate states that the boat is owned by David Knowles, with an expiry date of March 31, 2014.

[4] The claimant further alleges that on his return to Jamaica on January 7, 2014, he encountered engine problems, and he received assistance from a fisherman, Ian Grey, who he left with the boat while he attempted to obtain the services of a mechanic. He claims that on January 11, 2014, Ian Grey informed him that police officers were seen on the boat. Since that date, the police have detained the boat and have refused to return it to him, despite written demands for its return on February 13, February 21 and March 7, 2014, and despite the aforementioned documents being furnished to the police.

[5] Consideration of these applications necessitates an examination of the chronology of the events which are as follows:

1. On January 11, 2014 the boat was detained by police officers attached to the Marine Division, Bowden, St. Thomas.

2. On January 30, 2014 the documents were supplied to a Detective Corporal attached to the Morant Bay Criminal Investigation Branch.

3. On February 13, February 21, and March 7, 2014 the claimant, through his Attorney-at-Law, made formal written demands to the Marine Police for the boat to be released.

4. On October 22, 2014 the Claim Form and Particulars of Claim were filed.

5. On October 28, 2014 the Claim Form and Particulars of Claim were served on the 2nd defendant.

6. On November 14, 2014, the 2nd defendant filed a Request for Information.

7. On December 19, 2014 the claimant filed Answers to the defendants' Request for Information, pursuant to rule 34.4 and rule 59.2 of the CPR. This was served on the the 2nd defendant on December 22, 2014. The claimant's Answers indicate that the boat was detained by a Sergeant attached to the Marine Division, Bowden, St. Thomas, and that the aforementioned documents were supplied to a Detective Corporal attached to the Morant Bay Criminal Investigation Branch on January 30, 2014.

8. On May 20, 2015 an Acknowledgement of Service and proposed defence were filed on behalf of both defendants. These were signed by an Attorney-at-Law instructed by the Director of State Proceedings, on behalf of the defendants.

9. On July 31, 2015 another proposed defence was filed on behalf of the 2nd defendant.

10. Between May 2015 and September 2015 there was communication between the parties.

11. On September 14, 2015 a letter was sent from the Attorney General's Chambers to Mr. George Soutar QC informing counsel that instructions had been received from the police that one David Leigh R. Knowles of the Bahamas had made a claim in respect of the boat.

12. On August 12, 2016 a Requisition was issued by the Supreme Court Registry indicating that the Defence had been filed out of time. It is not clear whether this Requisition was issued to both parties.

13. On March 31, 2017 a letter was received by the Registrar of the Supreme Court from the office of George Soutar QC referencing earlier correspondence in 2015 and requesting that a Case Management Conference be fixed.

14. On August 22, 2017 a further Requisition was issued by the Supreme Court Registry indicating that a Case Management Conference could not be fixed as the Defence had been filed out of time.

15. It is not clear whether the Requisition was issued to both parties. However, on September 14, 2017 a Notice of Application was filed on behalf of both defendants, along with an affidavit in support, seeking an order that the time within which to file their defence be extended.

16. On September 14, 2017 an Acknowledgement of Service was also filed on behalf of both defendants.

17. On November 9, 2017, an affidavit was filed on behalf of the claimant in response to the defendants' Application filed on September 14, 2017.

18. On September 28, 2018 a Notice of Application was filed on behalf of the claimant, along with an affidavit in support, seeking an order that the defendants' application and statement of case to be struck out.

19. The application was fixed for hearing on May 29, 2019. Insufficient time was allocated and the application was adjourned to July 1, 2019.

20. On July 1, 2019 the application was heard.

The Application to extend time to file defence

[6] The defendants' application indicated that the following orders are sought:

1. *That the Defence filed on July 31, 2015 be allowed to stand as filed.*
2. *That the Acknowledgement of Service filed on the 14th of September, 2017 be allowed to stand as filed.*
3. *Cost of this Application to be cost in the claim.*
4. *Such further or other relief as the Court deems just in the circumstances.*

The Application to strike out defendants' application and defence

[7] The claimant's application indicated that the following orders are sought:

1. *That the Notice of Application for Extension of time to file Defence, filed on September 14, 2017, not be heard and or granted.*
2. *That the Notice of Application for Extension of time to file Defence, filed on September 14, 2017, be struck out.*
3. *That the Acknowledgement of Service filed on the 14th day of September 2017, not be allowed to stand as if filed in time.*
4. *That the Defendants' Statement of Case (Acknowledgement of Service and Defence) be struck out.*
5. *Cost of this application to the Applicant.*
6. *Such further or other relief as the Court deems just in the circumstances.*

[8] The claimant's application does not expressly state that leave is sought to enter judgment in default against the Crown. However, such relief would be a natural consequence of an order refusing the defendants' application (see **rule 12.3** of the CPR).

Submissions on behalf of the Defendants

[9] Counsel for the defendants, Mrs. Freckleton-Cousins, first addressed the issue of the delay in filing the acknowledgement of service and their proposed defence. Counsel submitted that the delay was due to an error made by

counsel who previously had conduct of the matter, as to the calculation of the time in which to file these documents. Mrs. Freckleton-Cousins further revealed that counsel was under the mistaken belief that he was able to avail himself of **Part 59** of the CPR, which would have extended the time for filing the acknowledgement of service and defence.

[10] Mrs. Freckleton-Cousins submitted that there was no requirement for counsel who previously had conduct of the matter to swear to an affidavit explaining the delay, and she further submitted that Mrs. Fuller-Barrett was able to assess the reason for the delay from reviewing the file. Counsel further submitted that based on discussions between counsel for the parties and based on a request by counsel for the claimant for a hearing date for the Case Management Conference, it seemed apparent that neither party appreciated that the acknowledgement of service and defence were filed out of time.

[11] Counsel Mrs. Freckleton-Cousins posited that there was merit in the defence and relied on paragraphs 6, 7, 8 and 9 of the defence, which explained the reason for the initial detention of the boat, and the reason for the continued detention of the boat after the formal demand was made for its release to the claimant. In essence, the proposed defence is that there was reasonable and probable cause to detain the boat on suspicion that it was used in drug trafficking after knitted bags were observed being thrown from the boat. Further, the draft defence states that the police believed that the boat was under imminent threat of being looted and damaged and it was necessary to detain it to prevent this and prevent the possible destruction of potentially incriminating evidence. Subsequently, following the receipt of a certified affidavit from one David Leigh R. Knowles of The Bahamas claiming ownership of the boat, there was reasonable and probable cause to continue detaining the boat on suspicion that it was stolen.

[12] It was submitted that the proposed defence discloses two lawful bases for the detention, namely, it was detained (1) to protect the vessel from what the police perceived to be an imminent threat of looting and damage, and also (2) to prevent the possible destruction or loss of potentially incriminating evidence

of drug trafficking. Mrs. Freckleton-Cousins submitted that the issue of the ownership of the boat is one which ought to be resolved at a trial. Counsel submitted that in light of David Knowles' allegation that the boat was stolen from him, the ownership of the boat is in issue, and the claimant has not established that he has the right to the reliefs sought. Counsel further submitted that though the claimant might have been prejudiced by the delay in the filing of the acknowledgement of service and defence, any such prejudice might be adequately mitigated by the award of costs and by the matter being fixed immediately for Case Management Conference.

[13] Mrs. Freckleton-Cousins did not hypothesise as to the reason the affidavit of David Knowles was not appended to the defence, as it ought to have been, but instead submitted that it could still be so appended by an order of the court.

Submissions on behalf of the Claimant

[14] Counsel Mrs. Chambers submitted that the explanation given for the delay should not be accepted, as the alleged mistaken calculation referred to in paragraph 5 of Affidavit of Mrs. Fuller-Barrett could not extend to a period of three (3) years. Counsel observed that Mrs. Fuller-Barrett's affidavit did not indicate why the defendants only sought to remedy the procedural error made in 2015, on September 14, 2017. Mrs. Chambers observed that counsel for defendants could not rely on **Part 59** as the Request for Information was filed after the period for filing their Acknowledgement of Service had elapsed.

[15] Further, it was submitted that the defendants' defence does not contain any substance or merit. Counsel submitted that as the police have not produced any evidence of the alleged "drug running activities" and have not indicated the results of their investigations, the continued detention of the boat was wrongful. Counsel Mrs. Chambers posited that the reason the affidavit of David Knowles was not annexed to the defence was either (1) because it did not exist or (2) because it was not in conformity with **rule 30.4** of the CPR since it was said to be a certified affidavit rather than a sworn affidavit.

[16] Finally, counsel directed the Court's attention to the factors to be taken into

consideration in the exercise of its discretion, and submitted that the court should only exercise its discretion where it is satisfied that there is sufficient material before it which could justify it doing so. Counsel relied on the decision of ***Peter Haddad v Donald Silvera*** SCCA No. 31/2003.

The Law

[17] **Rule 10.3(9)** of the CPR provides for applications to be made for an extension of the time in which to file a defence and **rule 26.1** provides for extension or abridgment of time generally. However, these rules do not state the conditions which must be satisfied in order for the court to grant such an application.

[18] Rules **10.3(9)**, **26.1(2)(c)** and **26.3(1)** of the CPR provide:

> *"**10.3(9)** The defendant may apply for an order extending the time for filing a defence."*
> *"**26.1 (1)** …*
> *(2) 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."*
>
> ***26.3(1)** In addition to any other powers …, the court may strike out a statement of case or part of a statement of case if it appears to the court*
> ***(a)** that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings…"*

[19] The coming into effect of the CPR in January 2003 was expected to herald the end of an era of delay in litigation, through judge-driven case management. In ***Alcan Jamaica Company v Herbert Johnson & Idel Thompson-Clarke*** SCCA 20 of 2003 (delivered 30th July 2004) at pages 15 and 16, Cooke JA cited Panton J.A. in ***Port Services Limited v Mobay Undersea Towns*** SCCA No 18/2001 (delivered March 11, 2002) where he said at pages 9 and 10:

> *"In this country, the behaviour of litigants, and, in many cases, their attorneys-at-laws, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions…. "*
> *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."*

[20] Cooke JA went on to say at page 26:

> *"These rules are the antidote to the epidemic of delay against which Panton, J.A. so rightly inveighed."*

[21] Though the CPR is aimed at achieving greater efficiency in the administration of justice, Courts must always bear in mind the overriding objective of achieving fairness. Consequently, it has been repeatedly said in cases both here and in England, that Courts must be reluctant to deprive a litigant of the opportunity of having the case determined on the merits. Blackstone's Civil Procedure 2014: The Commentary at paragraph 1.27 states:

> *"The main concept in the overriding objective (CPR, r. 1.1) is that the primary concern of the court is to do justice. Ultimately the function of the Court is to resolve issues between the parties…. Shutting a litigant out through some technical breach of the rules will not often be consistent with this, because* ***the primary purpose of the civil courts is to decide cases on their merits****, not to reject them for procedural default." (My emphasis)*

[22] Likewise, in ***Biguzzi v Rank Leisure plc*** [1999] 4 All ER 934, Lord Woolf MR reiterated that the striking out of a litigant's statement of case must be a last resort. He said:

> *"Under r 3.4(2)(c) [the English CPR equivalent of rule 26.3(1)(a)] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. … In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."*

[23] In determining whether or not to grant the application to extend the time in which to file a defence, I am guided by the principles distilled in the cases of ***Leymon Strachan v The Gleaner Company Limited and Stokes*** (Motion No 12/1999, judgment delivered 6 December 1999, ***The Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockey*** [2013] JMCA Civ. 23, ***The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr by Brooks Snr (his father and next friend)*** [2013] JMCA Civ 16, and ***Peter Haddad v Donald Silvera*** S.C.C.A. No 31/2003 (delivered July 31, 2007). The Courts have considered several factors. In ***Strachan***, the Court of Appeal considered the factors relevant to an application to extend time to file an appeal, but at page 20,

Panton JA (as he then was) set out the principles that should guide the Court in considering an application to extend time generally:

> *"The legal position may therefore be summarised thus:*
> *(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 timetable, 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) … 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."*

[24] The cases of ***Roshane Dixon***, ***Rashaka Brooks*** and ***Peter Haddad*** have indicated that a defendant must offer a good explanation for the failure to file his defence within the requisite period, which **rule 10.3(1)** stipulates is 42 days. An applicant ought to demonstrate that there was no wilful intent to delay or default, and needs to proffer some explanation, which is reasonable in the circumstances, for the entire period of the delay. The period of delay should not be protracted or inordinate. The court must consider the prejudice, if any, caused to the claimant by the delay, and whether such prejudice might be appropriately dealt with by an order for costs. The Court must have regard to the overriding objective of ensuring that cases are dealt with justly. The court must consider the merits of the defence. The primary consideration is whether the defendant has a real prospect of successfully defending the matter. Where a defendant demonstrates that he has a good defence to the claim, the court hearing the application should allow the matter to be tried on its merits.

Analysis

[25] In coming to a determination of this matter, I will now have regard to the factors referred to in the ***Strachan*** case and consider the guidance given in case law.

The length of the delay

[26] I have considered the Court of Appeal decision in ***Anthony Lynch v The Attorney General of Jamaica*** [2015] JMCA Civ 35, which considered the delay by the defendant in filing the defence, despite receiving Answers to the

Request for Information. The response was received on 18 July 2011 and the defendant/respondent did not expressly inform the claimant/appellant of her dissatisfaction with the response received, but instead filed an acknowledgment of service on 28 July 2011. Despite having done so, no defence was filed. The respondent was not jolted into action until a notice of application for default judgment against the respondent was filed on 8 December 2011. The Court of Appeal noted that there was a seven-month delay from the receipt of the Answers, before the respondent sought a court order that the information provided was insufficient. The Court of Appeal was unsympathetic and found that by filing the acknowledgment of service the respondent must be deemed to have found the Answers satisfactory. At paragraph 31, Dukharan JA admonished:

> *"This court has said repeatedly that the CPR provides for timelines that should be adhered to, unless good reason is given for non-compliance. Litigants cannot abuse the process and expect the court to sanction such abuse."*

[27] I believe that the instant case is distinguishable from the ***Lynch*** case in that a proposed defence was filed following the receipt of the Answers to the Request for Information, albeit months later. However, the Request for Information was not filed within the 14 days stipulated by **rule 59.2(2)** and time must therefore run from the date of service, October 28, 2014, instead of the date of the receipt of the Answers to the Request for Information. This would mean that there was a delay of seven months to May 2015 when the first draft defence was filed, or a delay of nine months to July 2015 when the second draft defence was filed.

[28] I have also considered the delay between the filing of the defence in July 2015 and the filing of the application in September 2017. Though the affidavit of Mrs. Fuller-Barrett does not specifically explain this period of delay, paragraphs 10, 11 and 12 of the claimant's affidavit filed on September 28, 2018, provides some insight into what transpired after May 2015. It seems that between May 2015 and September 2015 there were discussions between counsel for the parties with a view to seeking a resolution of the matter. Thereafter, counsel for the claimant wrote to the Registrar of the Supreme

Court seeking a Case Management Conference date. A response only came from the Registry ten months later on August 12, 2016, in the form of a Requisition indicating that the Defence had been filed out of time. It is not clear whether this Requisition was issued to both parties, however this Requisition evoked no response from the defendants' counsel. A further Requisition was issued by the Supreme Court Registry on August 22, 2017. Three weeks later, on September 14, 2017 the Notice of Application was filed seeking an order that the time within which to file their defence be extended.

[29] I find that the total period of delay in this case appears inordinate. However, consideration must be given to the reason for the delay.

The reason for the delay

[30] It is accepted that the counsel with prior conduct of the matter made several mistakes. First, he failed to file and serve the Request for Information under Part 34 within the 14 days in which the defendants were required to file an Acknowledgement of Service. In such circumstances, the Request for Information could not stop time running against the defendants. The draft defence on which the defendants now seek to rely was filed by on July 31, 2015, which was nine months after the claim form and particulars of claim were served. The Request for Information having been filed out of time, and no Acknowledgement of Service having been filed within 14 days of the receipt of the claim form and particulars of claim, it was important for counsel to file an application for an extension of the time to file the defence, indicating why the defence could not be filed within the 42 days. However, counsel failed to promptly file and serve an application to extend the time within which to file the defence. That application was filed on September 14, 2017, along with the Acknowledgement of Service, nearly three years after with the claim form and particulars of claim were served.

[31] The explanation for the nine-month delay in filing the defence is that counsel with previous conduct of the matter made errors in the calculation of time for the filing of the Request for Information. There is no affidavit to that effect from said counsel. At best, this submission seems to be based on speculation or

an assumption that counsel in with conduct would not act deliberately, but rather in error. When the circumstances are examined further, it becomes apparent that the explanation proffered is inadequate. As the 2nd Defendant received the Answers to the Request for Information around December 19, 2014, some explanation ought to be supplied for the further period of delay thereafter, up to July 31, 2015. The explanation that a mistake was made at the outset in November 2014 cannot be relied on in respect of the seven-month delay between December 19, 2014 and July 31, 2015. Whilst it must be anticipated that additional time would be needed to take instructions from the police after the receipt of the Answers to the Request for Information, the reasons for the delay ought to be clearly stated.

[32] It is accepted that it is undesirable for counsel with conduct of a matter to swear an affidavit in that matter (see ***Casimir v Shillingford and Pinard*** (1967) 10 WIR 269). However, where counsel no longer has conduct of the matter, and where the reason for counsel's delay in filing the Acknowledgement of Service and defence falls squarely to be assessed by the court, it seems to me that said counsel ought to have filed an affidavit giving a first-hand explanation for the entire period of the delay.

[33] Ms. Chambers placed much reliance on dicta in the case of ***Peter Haddad v Donald Silvera*** S.C.C.A. No 31/2003 (delivered July 31, 2007), where the Court of Appeal considered an application for extension of time to file the record of appeal. His Lordship Smith JA said at pages 11, 12 and 13:

> *"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 objective of the rules. A question arises which has often been raised is whether a party who has substantially exceeded the time limit set by the rules for a step to be taken is entitled without proferring any reason for the delay to have the time extended if: (i) there is no evidence of likely prejudice,' and (ii) the defaulting party gives an undertaking to pay any extra costs occasioned by his delay?*
>
> *As has been already stated the absence of a good reason for delay is not sufficient in itself to justify the court in refusing to exercise its discretion to grant an extension. But <u>some</u> reason must be proffered. ... The guiding principle which can be extracted ... is that the Court in exercising its discretion should do so in accordance with the overriding objective and the*

reason for the failure to act within the prescribed period is a highly material factor."

[34] Though only a partial explanation has been offered for the period of the delay in this case, I have also given consideration to a principle approved in ***Thorn plc v Macdonald*** [1999] CPLR 660 that while any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, it is not always a reason to refuse to set aside a default judgment. I am also guided by dicta in ***Rohan Smith v Elroy Hector Pessoa and Nickeisha Misty Samuels*** [2014] JMCA App 25 where Phillips JA considered an appeal in relation to an application to set aside default judgment pursuant to rule 13.3 of the CPR, and said at paragraph 39:

> *"There is … no reason proffered by the respondents for what … was a four month delay… There are authorities to the effect that if there is no explanation for the delay, then no indulgence or relief should be granted… **However, the overriding factor is whether the defendants ... had a real prospect of successfully defending the claim**, and the consideration of whether the application was made timeously is merely a factor to be borne in mind, and ought not by itself to be determinative of the application."* (Emphasis mine)

Does the defence show a real prospect of success?

[35] It is well settled that in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case, and whether there is a good defence on the merits. Consequently, **rule 13.4** provides that the application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed defence. However, in considering the issues of the case while hearing the application, the court is not to conduct a mini trial. **Rule 10.5** of the CPR requires that the defence filed should state the facts relied on to dispute the claim. The proposed defence must not be a bare denial of the claim, but instead, state the facts relied on. In ***Swain v Hillman*** [2001] 1 All ER 91 at 92, Lord Woolf MR said *"the words '… real prospect of succeeding' ... direct the court to the need to see whether there is a "realistic" to as opposed to a fanciful prospect of success*". It must be more than a merely arguable case. It must be a good defence in fact or in law, or both.

[36] The claim is an action for the wrongful detainer of personal property by the 1st defendant. In assessing the merits of the defence, a brief review of the law on detinue seems warranted. Sykes J (as he then was) aptly summarised the law on detinue at paragraph 25 in ***Anwar Wright v The Attorney General of Jamaica*** Claim No. 2875 of 2009 (judgment delivered on November 26, 2010):

> *"To ground the tort, the claimant, in the usual case has to establish that (a) he has an immediate right to possession; (b) the chattel in question is in the possession of the defendant; (c) an unconditional demand was made and (d) the defendant refused to hand over the chattel without lawful excuse (see **George and Branday Ltd v Lee** (1964) 7 W.I.R. 275 (Court of Appeal of Jamaica) and **Alicia Hosiery v Brown** [1970] 1 Q.B. 195). … In **Francis v Marstam** (1965) 8 W.I.R. 311 (Court of Appeal of Jamaica) Lewis J.A. stated that while at common law the police undoubtedly have the power to seize and detain property which may be used as evidence of the crime, there was no power in the police to seize and detain property indefinitely. … What the police are required to do is to keep the property either to be used as an exhibit in a pending trial, or on completion of the investigation, if it is determined that the property is not going to used for any purpose then it ought to be returned. It is clear law that the police are under an affirmative duty to return property not being used in any criminal proceedings or being kept for further examination. The failure to return the property when there is no reason to detain the property is a wrongful detention."*

[37] In the instant case, the defendants allege that the boat was initially detained for the purposes of preserving potential evidence and to prevent it from being looted. They also allege that the continued detention is based on the existence of a conflicting claim of ownership made by David Knowles, who alleges that the boat was stolen from him. I have also noted that the Registration Certificate states that the boat is owned by David Knowles and that the claimant did not produce a title issued in his name.

[38] Mr. Knowles' affidavit is not exhibited to the draft defence. The explanation proffered is that the said affidavit did not conform with **rule 30.4** of the CPR. It would have been appropriate for the affidavit to be annexed to the defence where it is a document the defendants consider necessary to their defence. Notwithstanding, I am satisfied that the defendants have demonstrated that they have a real prospect of successfully arguing their case, and that the draft defence has essentially met the requirements set out in **rule 10.5** of the CPR.

Prejudice

[39] In the English Court of Appeal case of ***Finnegan v Parkside Health Authority***

[1998] 1 WLR 411 Hirst LJ, in considering the exercise of the court's discretion in deciding applications for extension of time plainly stated that prejudice is a factor to be considered. At pages 421-422 he said:

> *"...clearly prejudice forms part of the overall assessment, and is a factor which needs to be taken into account in deciding how justice is to be done.... But of course that is not the end of the case, since each application must be judged on its own fact and where, as here, there is a very considerable delay, with no explanation of the critical period, the court will apply the guidelines laid down in Mortgage Corporation Ltd. v. Sandoes, The Times, 27 December 1996 including guideline 1 stressing that the rules are to be observed."*

[40] In ***Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Fredrick Flemmings & Gertrude Flemmings*** [2010] JMCA Civ 19, at paragraph 41, Phillips JA accepted the views expressed in ***Finnegan v Parkside Health Authority*** [1998] 1 W.L.R. 411, that a litigant ought not to be denied access to justice on account of a procedural default, "even if unjustifiable, and particularly where no prejudice has been deponed to or claimed".

[41] Delay may cause prejudice to the claimant because with the passage of time, memories fade, or it might be difficult to locate witnesses, or a witness might have died. The claimant's statement of case identified a potential witness, at least in relation to the condition of the boat. Had the claimant deponed that following the period of delay, he has been unable to locate his witness, the court might have been satisfied that actual prejudice was caused. The claimant has the burden of proving prejudice. At paragraph 17 of his Affidavit, the claimant merely said that the delay has caused him "serious prejudice and loss". However, no actual prejudice has been alleged.

[42] The claimant did not aver to what that loss or prejudice is. I find that the claimant has failed to show any prejudice flowing from the delay or any prejudice which would flow if the matter was allowed to proceed to trial.

<u>The overriding objective</u>

[43] The overriding objective of the CPR requires that the court dispense justice by resolving issues between the parties in a manner which saves time and

expense. This matter had not progressed for almost three years up to the date of the filing by the defendants of the Notice of Application for an extension of the time to file their defence on September 14, 2017. There was a further period of delay of approximately twenty months between the date of the filing of the application and the date the application was fixed for hearing. The speed at which dates are fixed for hearings depends entirely on the Registry and its resources. However, having regard to the earlier period of delay, both counsel for the claimant and the defendants could perhaps have pursued the Registry to ensure that the application was fixed for hearing more swiftly. **Rule 1.3** provides that it is "*the duty of the parties to help the court to further the overriding objective*" of enabling the court to deal with cases justly and expeditiously. Having regard to the limited resources in the Registry, it would have been desirable for counsel to indicate the urgency of the application when filing same, to ensure that an early hearing date was fixed. Notwithstanding, the delay in the progression of this matter is due in large part to the inaction of the previous attorney-at-law for defendants.

[44] I am guided by case law in addressing the issue of the delay caused by the inadvertent error or neglect of counsel. In ***Salter Rex and Co v Ghosh*** [1971] 2 All ER 865, Lord Denning MR, in considering an error made by counsel in the conduct of litigation on behalf of his client, said at page 866:

> *"So [the applicant] is out of time. His counsel admitted that it was his, counsel's mistake and asked us to extend the time. … If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time.* ***We never like a litigant to suffer by the mistake of his lawyers****. I can see no merit in [the applicant's] case.*" (Emphasis supplied)

[45] Likewise, in ***Merlene Murray-Brown v Dunstan Harper & Winsome Harper*** [2010] JMCA App 1 where Phillips JA said:

> *"In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended."*

[46] Brooks JA offered further guidance in the case of ***The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr.***

(a minor) by Rashaka Brooks Snr. (His father and next friend) [2013] JMCA Civ. 16, at paragraph 32:

> *"Ms. Chisolm attributed the initial delay to administrative oversight in her chambers. Such oversight has, more than once, been excused in these courts on the basis that a deserving litigant ought not to be shut out because of an error by his attorney at law. It is usually when the behaviour is grossly negligent that the litigant's position is imperilled."*

[47] Though the delay is inordinate in this case, it is in the interests of justice that the defendants have their case heard on the merits. In circumstances where there are two conflicting claims of ownership of the boat, and where the alleged vendor is alleging that the boat was in fact stolen, it is appropriate for this matter to be resolved at a trial. I find that there is no evidence of prejudice suffered by the claimant. Any actual prejudice caused by the delay in the progression of this matter might be adequately addressed by an award of costs to the claimant. In contrast, the defendants are likely to suffer an injustice if their application is refused and judgment in default entered against them.

Orders and Disposition

[48] The Court therefore makes the following Orders:

1. Order granted in terms of paragraph 2 of Notice of Application filed on September 14, 2017. The Acknowledgement of Service filed on September 14, 2017 is permitted to stand.
2. The defendants are permitted to file and serve their defence, with the affidavit of David Knowles annexed, by July 31, 2019.
3. Application filed on September 28, 2018 to strike out the defendants' statement of case is dismissed.
4. Mediation is ordered dispensed with.
5. Case Management Conference fixed for October 23, 2019 at 2 p.m. for half an hour.
6. Costs to the claimant to be agreed or taxed.
7. Attorney for the defendants to prepare, file and serve this order.