



[2023] JMCC Comm 06

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2020CD00512

BETWEEN	GENERAL SATELITE NETWORK COMPANY LIMITED	CLAIMANT
AND	JAMAICA CABLE VISION LIMITED	DEFENDANT

HEARD WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2020CD00513

BETWEEN	GENERAL SATELITE NETWORK COMPANY LIMITED	CLAIMANT
AND	CABLETRON NETWORK SYSTEM LIMITED	1st DEFENDANT
AND	HOMETIME ENTERTAINMENT LIMITED	2ND DEFENDANT

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Roxanne Bailey instructed by Roxanne A. Bailey & Co. Attorneys-at-Law for the Claimant

Zara Lewis and Zoya Edwards instructed by Zara Lewis & Co. Attorneys-at-Law for the Defendants

Heard: 13th December 2022 and 3rd February 2023

Application for extension of time to file defence – Application for defence to stand – Whether there is an arguable case – Length of delay – Reasons for delay – Prejudice to the claimant – CPR Rules 26.1(2)(c) and 10.3(9)

BROWN BECKFORD J

BACKGROUND

[1] On June 2, 2021 the Applicants/Defendants, Jamaica Cable Vision Limited, and Cabletron Network System Limited and HomeTime Entertainment Limited, in claims SU2020CD00512 and SU2020CD00513 respectively, filed a Notice of Application for Court Orders to Set Aside Judgment and for Stay of Execution of the Proceedings. The applications in both claims were ordered to be heard together.

[2] The Defendant, Jamaica Cable Vision Limited, in Claim No. SU2020CD00512 sought the following orders:

1. That the time for filing the Defendant's Defence be abridged;
2. Alternatively, that the Defendant be allowed an extension of time within which to file a Defence;
3. That Judgment in Default of Defence entered against the Defendant on April 27th 2021 be set aside pursuant to **Rule 19.3** of the **Civil Procedure Rules 2002**;
4. That there be a Stay of Execution of the said Judgment pending the determination of this Application;
5. That all proceedings flowing from the Judgment in Default be set aside;
6. That the Defence filed on June 2nd 2021 be deemed duly filed.
7. That the Applicant be granted relief from sanction;
8. Costs to be costs in the application; and
9. Such further and/or other relief that this Honourable Court deems fit.

[3] The Defendants, Cabletron Network System Limited and HomeTime Entertainment Limited, in Claim No. SU2020CD00513 sought the following orders:

Cabletron Network System Limited

1. That Interlocutory Judgment in Default of Acknowledgment of Service entered against the 1st Defendant on January 26, 2021 in Binder No. 776 Folio No. 84 be set aside pursuant to **Rule 13.2** of the **Civil Procedure Rules 2002**;
2. That there be a stay of Execution of the said Judgment pending the determination of this Application;
3. That all proceedings flowing from the Judgment in Default be set aside;
4. That the Acknowledgement of Service filed on May 12, 2021 be deemed duly filed;
5. Costs to be costs in the application; and
6. Such further and/or other relief that this Honourable Court deems fit.

HomeTime Entertainment Limited

1. That Interlocutory Judgment in Default of Acknowledgment of Service entered against the 1st Defendant on April 27th 2021 be set aside pursuant to **Rule 13.2** of the **Civil Procedure Rules 2002**;
2. That there be a stay of Execution of the said Judgment pending the determination of this Application;
3. That all proceedings flowing from the Judgment in Default be set aside;
4. That the Acknowledgement of Service filed on May 12, 2021 and Defence filed on 2nd June 2021 be deemed duly filed;
5. That the Applicant be granted relief from sanction;
6. Costs to be costs in the application; and
7. Such further and/or other relief that this Honourable Court deems fit.

BACKGROUND

[4] An Interlocutory Judgment in Default of Acknowledgment of Service, dated 26th January 2021, was obtained by the Respondent/Claimant, General Satellite Network Company Limited, against the Defendants in both claims.

[5] At the hearing of the applications, Counsel for the Claimant argued that the applications to Set Aside Default Judgment and for a Stay of Execution were not proper

applications before the Court as the Default Judgments had already been set aside by Laing J. Counsel further contended that the proper application to be made before the Court was an Application for an Extension of Time to File the Defence.

[6] The parties agreed with the court's record which showed that by Order of Laing J dated 27th April 2021, the Default Judgment in the matter against Jamaica Cable Vision Limited was set aside on the basis that the Default Judgment was irregularly obtained since the claim was one for a specified and ascertainable sum of money apart from costs and interests. Additionally, the Defendant had filed an Acknowledgment of Service; therefore, the Default Judgment was irregularly obtained on that basis also. With respect to the Defendants Cabletron Network System Limited and HomeTime Entertainment Limited, the Default Judgment was also set aside on the basis that it was irregularly obtained since that claim too was for a specified and ascertainable sum of money including costs and interests.

[7] On that basis the Defendant in Claim No. SU2020CD00512, Jamaica Cable Vision Limited, did not pursue submissions in respect of the orders sought in the Notice of Application seeking to set aside the Default Judgment. On behalf of Cabletron Network System Limited and HomeTime Entertainment Limited, Defendants in Claim No. SU2020CD00513, Counsel made an oral application to amend the Notice of Application in order to seek an extension of time to file the defence, which was granted.

[8] In the Amended Notice of Application, the Defendants in Claim No. SU2020CD00513, Cabletron Network System Limited and HomeTime Entertainment Limited, seek the following orders:

1. That the Acknowledgement of Service filed on May 12, 2021 be deemed duly filed;
2. That the time for filing the Defendants' Defence be extended.
3. That the Defence of the 1st Defendant filed on the 21st June, 2021 and the Defence of the 2nd Defendant filed the 2nd June, 2021. be deemed duly filed;
4. That the Applicants be granted relief from sanction;

5. Costs to be costs in the application; and
6. Such further and/or other relief that this Honourable Court deems fit.

SUBMISSIONS ON BEHALF OF THE DEFENDANT (CLAIM SU2020CD00512)

[9] Counsel Ms. Lewis submits that the reason for the delay in filing the defence was that the son of the Managing Director of the Defendant Company, Ms. Deborah Yapp, had committed suicide approximately a month before the claim had commenced. To this end, Ms. Yapp was not in the right frame of mind to properly instruct Counsel.

[10] It was further contended that Ms. Yapp was only made aware of the Judgment entered against her when she was informed by the Claimant's attorneys-at-law on the 20th day of April 2021 that an envelope had been left at one of her commercial offices. Thereafter, she made inquiries with her staff and was able to locate the envelope.

[11] Further, Counsel submits that Ms. Yapp contacted her attorneys-at law but was unable to properly instruct Counsel for the preparation of the Application and Defence as she was still mourning the loss of her son.

[12] It is the contention of Counsel that the Defendant has a good defence as the Claimant has not properly particularized their claim and have not proved that the Defendant defaulted on its payment.

[13] Counsel Ms. Lewis further submits that the Claimant breached the agreement with the Defendant when it provided a faulty inauthentic headend system. As a result of this, the Defendant started experiencing loss of customers and as such discontinued business with the Claimant in mid-2016.

[14] Lastly, it was contended that the Defendant denies the amount being claimed by the Claimant and puts the Claimant to strict proof.

SUBMISSIONS ON BEHALF OF THE CLAIMANT (CLAIM SU2020CD00512)

[15] Counsel Ms. Bailey's submissions for Claim SU2020CD00512 are mirrored to those of Claim SU2020CD00513. Therefore, I will refrain from repeating said submissions save and except for those submissions contained only in SU2020CD00512.

[16] Counsel contends that it was stated in the Affidavit of Deborah Yapp, dated June 2, 2021, that the Defendants had admitted to being indebted to the Claimant in the amount alleged. However, they had intended to make a counterclaim for the monies owed to them as a result of the losses sustained due to the defendant's breach of contract. However, it was contended that the counterclaim, which is the basis of the Defendant's defence, is blank and as such does not show a good defence with merits. Counsel relies on **Stuart Sime in A Practical Approach to Civil Procedure (18th Edition)** to the effect that a denial of an allegation in a particulars of claim must be substantiated by reasons. She also relied on **Rule 10.5 of the CPR** for the requirements of a proper defence.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS (CLAIM SU2020CD00513)

[17] Counsel Ms. Zara Lewis, submits that the application was not served on the Defendants. In relation to the 1st Defendant, Counsel submits that Viannie Bedward-Morgan was not personally served as she was sick and out of office. However, Ms. Morgan conducted checks with the employees who indicated that no documents bearing the Supreme Court Seal or bearing the words "*Claim Form*" or "*Particulars of Claim*" were left at their place of business or their registered address. In relation to the 2nd Defendant, Counsel maintains that the office in which service was effected was not the registered address of the business and that the 2nd Defendant has never conducted business at said address.

[18] Counsel submits that the delay in bringing the application was not inordinate as the defendants maintain they were not served. However, as soon as they became aware of the claim they instructed their Attorneys-at-Law to act on their behalf. In furtherance of this, Counsel contends that a lack of explanation, or an inadequate explanation, for the

delay should not defeat the application, in this instance where there was a reasonable prospect of defending the claim. To this end she relied on **Thorn plc v. MacDonald TLR** (1999) CPLR 660 .

SUBMISSIONS ON BEHALF OF THE CLAIMANT (CLAIM SU2020CD00513)

[19] Counsel Ms. Bailey contends that the Claim Form and Particulars of Claim were properly served. She submits that the company is a separate legal entity from its directors or managing directors, therefore personal service need not be effected on the Managing Directors, Mrs. Viannie Bedward-Morgan and Mr. Andrew Graham, as service was effected at the registered business address. Said address was confirmed by both Defendants as the business address.

[20] Counsel further contends that Mrs. Viannie Bedward-Morgan and Mr. Andrew Graham have not proffered any evidence to ground their argument that the documents were not served. In this respect Counsel submits that the 6 months which would have elapsed since the service of the Claim Form and Particulars of Claim would have lent itself to the lapse of memory of staff or the change in staff. To this end, the Managing Directors had failed to provide an affidavit that the individuals employed in December 2020 are the same individuals on staff.

[21] It is Counsel's contention that the 5 months delay in filing a defence is inordinate. She notes that though the defendant's agent, in her affidavit, purported to having sought legal representation on April 21st 2021, still, no defence was filed at the date of the Assessment of Damages hearing on April 27th 2021.

[22] Counsel contends that in light of the fact that the defendants were able to seek legal advice in April 2021, then the defendants were capable of providing Counsel with detailed instructions at this time. This instance was distinguishable to that 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, where a defence was not put forward and it was established that in dealing with multi-agencies access to the necessary information was circuitous.

[23] It was further contended that granting an extension would be prejudicial to the Claimant, as the Claimant would be barred from taking the necessary steps to *'realize the fruits of its judgment'*, and the award of costs would not remedy such prejudice. Reliance was placed on **Peter Haddad v Donald Silvera** (unreported) Court of Appeal, Jamaica, SCCA No. 3/2003 delivered 31 July 2007. Further, the Court has a duty to regulate the pace of litigation. Therefore, the Court must safeguard the rules in order for there not to be a hindrance to dispensation of justice. Reliance was placed on **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co.** (unreported) Court of Appeal, Jamaica, SSCA No. 18/2001 delivered 11 March 2002.

[24] For all the aforesaid arguments put forth, Counsel submits that judgment should be entered for the Claimant and damages be assessed. To this end she relied on **Lorraine Whittingham v Odette McNeil et ux** [2018] JMSC Civ. 5

Chronology of Events

[25] As further background to these applications it is useful to set out the relevant chronology of events.

Claim No. SU2020CD00512

1. Claim Form and Particulars of Claim were filed on December 10th 2020.
2. Claim Form and Particulars of Claim served on December 30th 2020.
3. Acknowledgement of service filed January 25th 2021.
4. Interlocutory Judgment in default of Acknowledgement of Service filed January 26th 2021.
5. Notice of Assessment of Damages filed April 1st 2021.

6. Interlocutory Judgment in default of Acknowledgement of Service and Notice of Assessment of Damages served on April 16th 2021.
7. Interlocutory Judgment in default of Acknowledgement of Service set aside by Order of Laing J on April 27th 2021.
8. Defence and Counterclaim filed June 2nd 2021.
9. Notice of Application for Court Orders to Set Aside Judgment and for Stay of Execution of the Proceedings, with accompanying affidavit and the proposed defence annexed, filed June 2nd 2021.

Claim No. SU2020CD00513

1. Claim Form and Particulars of Claim were filed on December 10th 2020.
2. Claim Form and Particulars of Claim served on December 29th 2020.
3. Interlocutory Judgment in default of Acknowledgement of Service filed January 26th 2021.
4. Notice of Assessment of Damages filed April 1st 2021.
5. Interlocutory Judgment in default of Acknowledgement of Service and Notice of Assessment of Damages served on April 19th 2021.
6. Interlocutory Judgment in default of Acknowledgement of Service set aside by Order of Laing J on April 27th 2021.
7. Judgment in Default of Acknowledgement of Service filed April 28th 2021.
8. 1st and 2nd Defendant's Acknowledgement of service filed May 12th 2021.
9. Notice of Application for Court Orders to Set Aside Judgment and for Stay of Execution of the Proceedings, with accompanying affidavit and the proposed defence of 2nd Defendant annexed, filed June 2nd 2021.

10. Defence and Counterclaim filed June 21st 2021.

11. Notice of Application for Court Orders to Set Aside Judgment and for Stay of Execution of the Proceedings, with accompanying affidavit and the proposed defence of 1st Defendant annexed, filed June 21st 2021.

12. Amended Notice of Application for Court Orders filed December 13th 2022.

ISSUE

[26] The main issue to be determined in this matter is: whether the Defendants may be granted an extension of time to file their defence. Intertwined in the discussion of this issue are the questions: (i) whether the Defendants were validly served and (ii) of what effect is the Acknowledgement of Service filed by them.

THE LAW

[27] The Court firstly reminds itself of the framework as interpreted by the Courts touching the issue under consideration.

[28] **Rule 10.3(1) of the Civil Procedure Rules 2002 (as amended on the 3rd of August 2020) (“the CPR”)** prescribes that the period for filing a defence is 42 days after the date of the service of the claim form. The **CPR** provides that where this rule is not complied with, then the “...[d]efendant may apply for an Order extending the time to file a Defence. See **Rule 10.3(9)**. Further, under the Court’s general case management powers, pursuant to **Rule 26.1(2)(c) of the CPR**, the Court is empowered to “... extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application is made after the time for compliance has passed.”

[29] In the **Attorney-General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23 (“**Roshane Dixon**”), an appeal from the refusal of a Master to exercise her discretion to extend the time for filing a defence, Harris JA relied on the guidance given by Panton JA (as he then was) in the oft cited case of **Strachan v The**

Gleaner Company (unreported) Court of Appeal, Jamaica, Motion No.12/1999 delivered 6 December 1999 ("**Strachan**").¹ Panton JA detailed the considerations which a court ought to have in exercising its discretion for an extension of time with respect to the filing of an appeal. These considerations have been applied consistently by our courts in deliberations on whether to extend time to a litigant. The considerations are enumerated below:

- 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.

[30] These considerations were reaffirmed in **Austin (Dale) v The Public Service Commission and the Attorney General of Jamaica** [2016] JMCA Civ 46 ("**Dale Austin**") another case where the question of an extension of time to file a defence was being considered. F. Williams JA relied on the dictum of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** [2001] EWHC Ch 456 for the relevant factors to be taken into account in the Court's deliberation.² Lightman J stated:

In deciding whether an application for extension of time was to succeed...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 to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice.

¹ [2013] JMCA Civ 23, para 17

² [2016] JMCA Civ 46, para 38

These factors are similar to the factors outlined by Panton JA (as he then was) in **Strachan**. Each of the factors as adumbrated in **Strachan** are discussed below.

LENGTH OF DELAY

[31] In **Roshane Dixon** Harris JA discussed the effect of delay on the parties and on the administration of justice generally. She stated:³

In an application for an extension of time, the delay and the reasons therefor are the distinctive characteristics to which the court's attention is initially drawn. It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.

Harris JA further noted that the question of inordinate delay must be considered in light of the defendant's overall conduct.

[32] In **Roshane Dixon**, the defendants failed to file their defence within 42 days of the service of the fixed date claim form and again failed to file by the date ordered by the Full Court. The Court of Appeal found that in Dixon's case, where the application for extension of time was filed approximately one month after the time given by the court for filing the defence had expired, the delay was not long. In Dockery's case, more than seven months had elapsed before the appellant sought to make his application for an extension of time. This delay was found to be inordinate. However, the Court pointed out that the length of the delay was not determinative of the issue in either case. In fully examining the issue of delay, the Court had to consider the cause of the delay.

³ [2013] JMCA Civ 23, para 18

REASONS FOR THE DELAY

[33] The applicant who seeks an extension of time to file a defence has the burden to prove that there exists a good reason for the delay in filing the defence. In the case of **Peter Haddad v Donald Silvera SCCA 31/2003 Motion 1/2007 (“Peter Haddad”)**, the importance of advancing a good reason for the delay was recognized. Smith JA said:⁴

As has already been stated the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But since 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 favoured factor. As the successful party is entitled to the fruits of his judgment the party aggrieved must act promptly. The court in my view should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application.

The dicta of Smith JA highlights that the cause of the delay must be considered within the context of the interests of justice in the particular case. To this end, the Court should not take an inflexible stance where a discretion is given.

[34] Harris JA in **Fiesta Jamaica Ltd. v National Water Commission** [2010] JMCA Civ. 4 (**“Fiesta Jamaica”**), made it clear that the applicant must supply a reason for the delay for the consideration of the Court. She stated that:⁵

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 its defence in the time prescribed by Rule 10.3 (1) of the Civil Procedure Rules (C.P.R) but also that the proposed defence had merit.

It follows then, that it is only on examination of the supporting affidavit(s) that the Court can properly assess whether the reason proffered justifies the favourable exercise of the

⁴ SCCA No. 3/2003, para 12

⁵ [2010] JMCA Civ. 4, para 16

Court's discretion. In **Fiesta Jamaica**, the Court found that the existence of the injunction against the appellant could not be considered a good reason for the delay, as the injunction would not have precluded the appellant from seeking to have the time extended for it to file its defence.

WHETHER THE DEFENDANT HAS A DEFENCE WITH MERIT

[35] There must be material placed before the court to enable the Court to assess whether it should allow the matter to further consume judicial time and court administrative resources. In **Marline Clarke v Enos Clarke and Anor** [2017] JMSC Civ 195, Master A. Thomas (as she then was), in considering whether to extend time for filing a defence, endorsed the dicta of Sykes J. (as he then was) in **Hubert Edwards v Milton Kelly and Anor** (unreported), Supreme Court, Jamaica, Claim No. 2008 HCV 00303, delivered 2 November 2009 ("**Hubert Edwards**"). Sykes J indicated that:⁶

Unless there is a real prospect of success then the extension of time within which to file a defence should not be granted because it would a waste of the court's resources to entertain a hopeless case.

He further stated:⁷

The interest of the administration of justice is multifaceted. It is always in the interest of justice that litigation is pursued within the rules and within the intended time frame. It is also in the interest of the administration of justice that so far as possible, matters be disposed of on the merits. The interest of the administration of justice also suggests that litigants who proceed with alacrity and do what is required of them should reap the reward of their efforts.

The Court is required to consider whether the proposed defence "*raises proper answers to the respondent's claim.*"⁸ In other words, "*there is some substantiate to the defence.*"⁹

⁶ [2017] JMSC Civ 195, para 18

⁷ Ibid, para 89

⁸ [2013] JMCA Civ 23, para 24

⁹ Ibid, para 27

LIKELY PREJUDICE TO THE CLAIMANT

[36] **Rule 1.1(1) of the CPR** sets out of the overriding objective of the then new procedural code. It reads as follows:

The overriding objective

1.1 (1) *These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*

(2) *Dealing justly with a case includes -*

(a) *ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;*

(b) *saving expense;*

(c) *dealing with it in ways which take into consideration -*

(i) *the amount of money involved;*

(ii) *the importance of the case;*

(iii) *the complexity of the issues; and*

(iv) *the financial position of each party;*

(d) *ensuring that it is dealt with expeditiously and fairly; and*

(e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

[37] Harrison JA explained the importance of the time constraints set out in the **CPR** in achieving the overriding objective. In **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6 (“**Arawak Woodworking**”) he stated:¹⁰

...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

¹⁰ [2010] JMCA App 6, 25

the instant case will indeed cause prejudice to the other party involved in the litigation...

Further, it is important to note that prejudice cannot always be remedied by an award of costs. Harris JA in the case of **Roshane Dixon** adopted the dicta of Smith JA in the case of **Peter Haddad**. She stated:¹¹

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.

[38] In **Ameco Caribbean Inc v Ferguson (Seymour)** [2021] JMCA Civ 53 (“**Ameco**”), an appeal concerning a refusal to set aside a default judgment, Edwards JA reviewed the decision of the trial judge in weighing the likely prejudice to each party. The learned judge considered that if the judgment was set aside, then the respondent’s cause of action would have been statute barred and he would have been left without a remedy. On the other hand, if the judgment was not set aside, then the appellant would be made to pay damages for a claim in which it may not be liable. Ultimately, notwithstanding the existence of a good defence, after taking into account the unreasonable delay by the respondent, the Court held that the prejudice to the respondent would be greater if the judgment was set aside. The appeal was dismissed.

[39] It seems then that the earlier the stage in the proceedings, the more likely it is that any prejudice occasioned to the other party could be ameliorated by an order for costs.

¹¹ [2013] JMCA Civ 23, para 31

THE APPLICATIONS

[40] Against this background the Court now considers the application in respect of each Defendant in turn.

(1) Jamaica Cable Vision Limited (SU2020CD00512)

ISSUE OF SERVICE

[41] The Defendant contends that it was not served as the correct name of the company was Jamaica C. V. Limited. The Defendant however filed an Acknowledgment of Service in which it indicated its intention to defend the claim. For reasons set out in the discussion as it relates to the Defendant, HomeTime Entertainment Limited, Jamaica Cable Vision Limited is to be taken as having waived any irregularity relating to service of the claim.

LENGTH OF DELAY

[42] Jamaica Cable Vision Limited, after being served with the claim, should have filed its defence by February 11th 2021. The Defendant contended that it was only made aware of the claim against it on the 20th of April 2021, upon being informed that the Claimant had brought a claim against Cabletron Network System Limited. Upon inquiries she was informed that an envelope with documents was delivered to the Company's registered office in December 2020, and was thrown in the garage bin. The Affidavit of Service of Dave Quest indicates that the Claim Form together with the required attending documents were served on the 30th December 2020 at shop 6-8 Spain (Spanish) Village Plaza, Twickenham Park, Spanish Town, in the parish of St. Catherine. The Claimant had in fact filed an Acknowledgement of Service on the 25th January 2021 indicating that it had received the Claim Form and related documents on the 30th December 2020. An amended Acknowledgment of Service filed June 2nd 2021 changed only the name of the Defendant. Time therefore for the purpose of calculating the delay runs from the 11th February 2021 to the 2nd of June 2021. The period of delay being 3 months and 24 days whilst could be considered long was not inordinate.

REASON FOR DELAY

[43] Ms. Deborah Yapp, Managing Director of Jamaica Cable Vision Limited, in her affidavit dated June 2nd 2021 stated that there was a delay in filing the defence and counterclaim because her son had committed suicide on November 16th 2020. She explained that she was unable to instruct her attorney because she was consumed with funeral arrangements and was struggling to come to terms with the reality of the situation. One cannot truly fathom the mental state of someone who has lost a child, especially in such tragic circumstances as described in the pathology report dated February 12th 2021. In the Court's view, enduring such anguish and trauma so close to the commencement of this claim is a sufficiently good reason for the delay in filing a defence. Therefore, the length was not inordinate in the circumstances. This case is a good illustration of the principle that the circumstances of each case has to be examined to determine whether the period of delay was unreasonable.

MERIT OF DEFENCE

[44] The Claimant's claim for damages for breach of contract, entered into with the Defendant in about 2014, for the provision of cable channels which included supplying the Defendant with access to the Claimant's digital headend equipment with a fee charge to setup and configure the headend equipment and for the supply of settop cable boxes. The Claimant also avers that for the equipment and services mentioned above, the Defendant would pay certain agreed amounts. The Claimant further avers that it provided the equipment and services as agreed but that the Defendant has, since the 4th July 2016, failed to make payment as agreed.

[45] The affidavit of Deborah Yapp, Managing Director of the Defendant Company, at paragraph 18, indicates that they are not indebted to the Claimant in the amount alleged. The details of this assertion is given in the defence filed 2nd June 2021 and attached to her affidavit as an exhibit. In the defence, Ms. Yapp makes it clear that she was the company's representative who entered into the contract with the Claimant. She avers

that: (i) there was no agreement for payment for the settop boxes, and (ii) the monthly fee agreed was \$50,000.00 and not \$58,000.00. It is noted that Ms. Yapp's affidavit and proposed defence are deficient and incomplete as information which should be inserted has clearly been left out. However, the answers, as given in the defence, challenge the basis of the Claimant's claim for a specific sum. In the Court's view this raises an arguable defence.

PREJUDICE

[46] In light of the foregoing discussion, the Court, in considering the likelihood of prejudice to the Claimant must strike a balance between the interest of the parties in order to further the overarching objective of the Court. The prejudice the Claimant stood to face if the application for an extension of time is granted is obvious. The grant of the application would hinder the Claimant from expeditiously disposing of the claim. However, if the application was refused, the Defendant having presented an arguable defence would be shut out of the judicial process. This is inimical to the principle that, as far as possible, cases should be disposed of on their merits.

[47] The case of **Rushane Dixon** has recognised a difference where judgment had been entered. That is itself a thing of value of which the party would be deprived. Where judgment has not been entered, an award of costs has often been sufficient. In the Court's view, any prejudice to the Claimant can be addressed by an award of costs.

[48] In the instance of this Defendant, though the delay could be considered long, there being an arguable defence, a good reason for the delay and that any prejudice could be addressed by an award of costs, it is just that the Court exercise its discretion in the Defendant's favour.

(2) Cabletron Network System Limited (SU2020CD00513)

LENGTH OF DELAY

[49] Counsel, in written submissions, contended that Viannie Bedward-Morgan, the Managing Director of the first Defendant Company, only became aware of this claim on April 21st 2021 after she (Counsel) had sent Mrs. Bedward-Morgan the Interlocutory Judgment in Default of Acknowledgment of Service and Notice of Assesment of Damages. Mrs. Bedward-Morgan further indicated that after checks with employees of the Company it was indicated that no documents bearing the Supreme Court Seal or bearing the words “*Claim Form*” or “*Particulars of Claim*” were left at their place of business or their registered office. On this basis Counsel submits that the documents were not served.

[50] The Affidavit of Service of Dave Quest filed January 28th 2021 states at paragraph 5 that service of the Claim Form and Particulars of Claim was effected at “*Shop #4, Hendon Mall, Beckford Street, Savannah-la-mar (sic) in the parish of Westmoreland*”. It however appears that paragraph 5 of said affidavit is incomplete. As a consequence of this, the affidavit does not name to whom the documents were handed. Regardless of this deficiency, the Defendant did not dispute that the said address was the registered address of Cabletron Network System Limited.

[51] Further without any evidence before the Court disproving the service of the said documents, the Affidavit of Mr. Quest is accepted as evidence of service. Considering that the contention of Counsel was that service was not effected on Cabletron Network System Limited, Counsel could have opted to request that the process server be made available to be cross examined on the issue. As will be shown below, the Applicant was properly served at its registered office. Time therefore began to run from the date of service as identified in the Affidavit of Service of Mr. Quest. The period of delay in filing the defence was therefore 5 months and 11 days. This period must also be considered lengthy.

REASON FOR DELAY

[52] The reason given for the delay is that Mrs. Bedward-Morgan was not aware of the claim as the company was not served with the court documents. **Rule 5.7 of the CPR** speaks to service on a limited company. It states:

Service on limited Company

Service on a limited company may be effected –

- (a) by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;*
- (b) by leaving the claim form at the registered office of the company;*
- (c) by serving the claim form personally on any director, officer, receiver, receiver-manager, or liquidator of the company;*
- (d) by serving the claim form personally on a officer or manager of the company at any place of business of the company which has a real connection with the claim; or*
- (e) in any other way allowed by the enactment.*

S. 387 of the Companies Act 2005 (as amended on the 1st of January 2014) also prescribes that “[a] document may be served on a company by leaving it at or sending it by post to the registered office of the company.” She maintains that she first came to knowledge of the claim when served with the Interlocutory Judgment in Default of Defence and Notice in Assessment of Damages. In fact, on April 27th 2021 the 1st Defendant was represented by Counsel Ms. Kaydidia Hyman at the hearing at which Laing J set aside the default judgment.

[53] On her own account 2 months and 25 days had elapsed between the date of that hearing and the date on which the defence was filed. It is mind boggling that the urgency to act was not brought home to the Applicant having faced a default judgment. The 1st Defendant filed an Acknowledgment of Service on the 19th May 2021 and a Notice of Application to Set Aside Default Judgment and a Stay of Execution on the 21st June 2021. This is peculiar given that the Defendant was represented by Counsel at the hearing where the judgment in default was set aside. The 1st Defendant also filed a Defence and Counterclaim on the 21st June 2021. There is no indication in the affidavit sworn to by

Mrs. Bedward-Morgan, the authorized representative of the 1st Defendant, of the reason for the delay in making that application. Indeed an application for an extension of time to file defence or for the defence as filed to stand was only made at the hearing of the application in December 2022. The Court can discern no good reason for this delay. However, the considerations do not end here.

MERIT OF DEFENCE

[54] The Claimant similarly claims damages for breach of contract entered into with the 1st Defendant for the provision of cable channels and access to the Claimant's digital headend equipment with a fee charged to set up and configure this headend equipment. It was also agreed between them, the price to be paid for these services. The Claimant avers that the 1st Defendant breached the contract by failing to make the payment as agreed. The 1st Defendant through Mrs. Bedward-Morgan states that the Claimant did not satisfactorily execute the contract. In the Defence exhibited, the 1st Defendant further avers that (i) the Claimant breached this agreement by not providing the total number of channels agreed (ii) that there was no agreement to pay the fee to configure the headend equipment; and (iii) the Claimant failed to provide cable boxes as agreed. The 1st Defendant has therefore raised challenges to the substance of the Claimant's claim and has an arguable case.

PREJUDICE

[55] Considering that the defence of Jamaica Cable Vision Limited are mirrored to that of Cabletron Network System Limited, I find that the greater burden of prejudice would similarly lie with the 1st Defendant. Again, the 1st Defendant, having presented a meritorious defence, would be ordered to pay specified damages for a sum in dispute whilst the Claimant would be delayed in moving the matter along.

[56] The consideration for the Court is whether this Defendant had been served thereby occasioning the requirement to file a defence. Counsel in written submissions indicated that the documents were not served at the registered business of the HomeTime Entertainment Limited. Based on the company details obtained from the Companies Office, exhibited to the affidavit of Anthony Graham, the company's registered business address is "32 North Street, Black River in the Parish of St. Elizabeth". However, service was effected at "shop #4 Hendon Mall, Beckford Street, Savannah-la-Mar in the parish of Westmoreland". It was further contended that HomeTime Entertainment Limited has never conducted business at the address in which service was effected.

[57] As shown before, **Rule 5.7 of the CPR** provides that a company may be served at its registered office or "*personally on a officer or manager of the company at any place of business of the company which has a real connection with the claim. There was no challenge that the Company was not properly served.*"

[58] By virtue of the foregoing rule and the submissions of Counsel for HomeTime Entertainment Limited, it follows therefore that the company was not served with the Claim Form and Particulars of Claim.

[59] Counsel for the Claimant conceded at the hearing that the defendant company was not properly served but submitted that the Defendant's Acknowledgment of Service filed on May 12th 2021 subjects him to the jurisdiction of the Court. The answer seems to be contained in the judgment of Morrison JA (as he then was) in the matter of **B & Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ. 2 where at paragraphs 23-24 he states:

In my view, the language of the rules themselves appears to compel this conclusion. However, it also seems to me that if, as the authorities predating the CPR held to be the case, non-service of a writ could be waived by the defendant's entry of an appearance, it should follow, subject to rule 9.6, the effect of which I will consider in a moment (see para. [24] below), that the filing of an acknowledgment of service, which must be taken as meaning what it says, would necessarily have the same effect. Brandon J (as he then was) observed in The Gniezno (at page 428) that the essential point is "that the requirements in the rules relating to service are requirements made for the protection or benefit of the defendant, and

that because of that, if the defendant wishes to waive any of those requirements, he can do so". Thus, he considered, a defendant was in principle entitled to waive the requirement of service, not only during the currency of a writ, but also after it expired, it already having been established by the Court of Appeal in Sheldon v Brown Bayley's Steelworks Ltd, to which I was also referred by the appellant in its reply, that "a writ which has expired is not a nullity; it is only invalid for the purpose of service by the plaintiff on the defendant" (page 427). (See also Warshaw and Others v Drew (1990) 38 WIR 221, 227, a case on appeal from this court, to which McDonald-Bishop J also referred, in which the Board considered it to be "well established that it is open to a defendant in an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service".)

McDonald-Bishop J also accepted the respondent's submission that the appellant, by filing an acknowledgment of service and not raising the matter of the respondent's non-compliance with rule 8.16(1) as a preliminary issue by way of challenge to the court's jurisdiction under rule 9.6, waived the irregularity and submitted unconditionally to the jurisdiction of the court. Rule 9.6(1) provides that a defendant who "(a) disputes the court's jurisdiction to try the claim; or (b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect". Such a defendant must first file an acknowledgment of service before making the application (rule 9.6(2)) and the application must be made within the period for filing a defence (rule 9.6(3)), supported by evidence on affidavit (rule 9.6(4)). A defendant who files an acknowledgment of service and does not make an application under this rule "is treated as having accepted that the court has jurisdiction to try the claim" (rule 9.6(5)).

The 2nd Defendant did not in his Acknowledgment of Service indicate his intention to challenge the jurisdiction of the Court. Instead, they indicated their intention to defend the claim. Therefore, the Court must consider their application for an extension of time to file its defence and for the defence as filed to stand.

[60] Time for filing the defence would run from the 20th April 2021, the day that the 2nd Defendant acknowledged receiving the claim form. The defence would be due by the 2nd June 2021, the date on which the defence of the 2nd Defendant was filed. Therefore, there is no need to grant to the 2nd Defendant an extension of time in which to file his defence.

CONCLUSION

[61] While the Court is of the view that the affidavits in support of the application are barely sufficient (and clearly in some instances incomplete) to establish a meritorious defence for Jamaica Cable Vision Limited (SU2020CD000512) and Cabletron Network System Limited (SU2020CD000513), they were adequate to establish that there was merit to the proposed defences. Despite the delay, the matters remain at an early stage. The Court will therefore exercise its discretion in favour of the Applicants/Defendants and grant their applications subject to the payment of costs to the Claimant, General Satellite Network Company Limited.

ORDERS

On Claim No.SU2020CD000512:

1. The Defendant is granted an extension of time in which to file its defence. The Defence and Counterclaim filed on June 2, 2021 is permitted to stand.
2. Costs of the Application agreed at Fifty Thousand Dollars **(\$50,000.00)** to be paid by the Defendant to the Claimant on or before the 28th of February 2023.
3. Parties are referred to Mediation to be completed with Ninety **(90)** days of this Claim Form.
4. Applicant's Attorney-at-Law to prepare, file & serve this Order.

On Claim No. SU2020CD000513:

1. The 1st Defendant is granted an extension of time in which to file its defence. The Defence and Counterclaim filed by the 1st Defendant on June 21, 2021 is permitted to stand.
2. The Defence of the 2nd Defendant filed on June 2, 2021 was filed in time.

3. Costs of the application of the 1st Defendant agreed at Fifty Thousand Dollars **(\$50,000.00)** to be paid by the Defendant to the Claimant on or before the 28th of February 2023.
4. No Order as to Costs in respect of the application of the 2nd Defendant.
5. Parties are referred to Mediation to be completed with Ninety **(90)** days of this Claim Form.
6. Case Management Conference is fixed for July 5, 2023 at 10 a.m. for 1 hour.
7. Applicant's Attorney-at-Law to prepare, file and serve this Order.

Brown Beckford J
Puisne Judge