



[2021] JMCC Comm 50

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00059

BETWEEN	PHYTOVIA SERVICES (INTERNATIONAL) INC.	CLAIMANT/RESPONDENT
AND	JAMAICA DAIRY DEVELOPMENT BOARD	DEFENDANT/APPLICANT

IN CHAMBERS

Ms. Charmaine Patterson instructed by Charmaine Patterson & Associates for and on behalf of the Claimant/Respondent

Mr. Nickardo Lawson instructed by DunnCox for and on behalf of the Defendant/Applicant

Dates Heard: February 22, March 4 and June 8, 2021

Civil Practice and Procedure – Application to file defence out of time – Rules 10.3 and 26.1 of the Civil Procedure Rules – Overriding Objective – Rules 1.1 and 1.2 of the Civil Procedure Rules

PALMER HAMILTON, J.

BACKGROUND

[1] By Claim Form filed on the 17th day of February, 2020 the Claimant/Respondent initiated a claim against the Defendant/Applicant for breach of contract and to recover monies which represent the amount due and owing pursuant to an agreement between the parties.

- [2] It is the Claimant's/Respondent's case that they would provide services to the Defendant/Applicant pursuant to the agreement entered into on or about the 27th day of March, 2018. The Claimant/Respondent provided those services and the Defendant/Applicant failed and/or neglected or otherwise refused to effect payment to the Claimant/Respondent.
- [3] The Defendant/Applicant was served with the Claim Form and the Particulars of Claim on the 3rd day of March, 2020 and they filed an Acknowledgment of Service, within the stipulated time, on the 13th day of March, 2020. However, the Defendant/Applicant failed to file a Defence within the stipulated time.

THE APPLICATION

- [4] This is what led to the filing of the Notice of Application for Court Orders to File Defence Out of Time filed on the 23rd day of June, 2020. The Application sought the following Orders:
- (1) The Defendant be given permission to defend the Claim herein.*
 - (2) The time limited for filing the Defendant's Defence be extended to June 23, 2020 and that the Defence filed on that date be permitted to stand.*
 - (3) Costs of this Application be costs in the Claim.*
 - (4) Such further or other reliefs as this Honourable Court deems just.*
- [5] The Defendant/Applicant set out extensive grounds which I do not at this time propose to set out in its entirety. Dr. Derick Deslandes, who was at all material times the Chairman of the Defendant/Applicant, set out the challenges it faced in providing instructions to its Attorneys-at-Law as well as showing that they have a good prospect of successfully defending the claim.

ISSUE

- [6] The main issue for my determination is whether the Court should extend the time for the filing of a Defence pursuant to Rule 10.3(9) and Rule 26.1 (2) of the CPR.

SUBMISSIONS

- [7] I wish to thank Counsel for their submissions and supporting authorities which provided valuable assistance to the Court in deciding the issues. They were thoroughly considered. However, I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

LAW & ANALYSIS

- [8] Rule 10.3 of the CPR deals with the period for filing defence and it states that the general rule is that the period for filing of a defence is the period of 42 days after the date of service of the Claim Form. A defendant may apply for an Order extending the time for filing a defence under rule 10.3(9). Rule 26.1 (2) (c) of the CPR further provides that, *“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 is made after the time for compliance has passed.”* These are the rules that the Defendant/Applicant relied on in asking the Court to exercise its discretion to extend the time for filing its defence.
- [9] As submitted by Learned Counsel for both parties, the rules do not provide any guidance in the exercise of its discretion to extend time. Therefore, I must turn to case law. There have been several cases which provide guidance as to how the Court is to exercise its discretion.

[10] Panton JA gave the following guidance in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** Civil Appeal No. 12 of 1999 -

"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 time table, the Court has a discretion to extend time.*
- (3) In exercising its discretion, the Court will consider –*
 - i. the length of the delay;*
 - ii. the reasons for the delay;*
 - iii. whether there is an arguable case for an appeal and;*
 - iv. the degree of prejudice to the other parties if time is extended.*
- (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."*

[11] I also wish to adopt the dictum of Lightman J in **Commissioners of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** (2000) Times, 7 March on the question of what the Court should consider in granting an application to extend time. This has been adopted and applied in our jurisdiction. Lightman J stated:

*"The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. **It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account.** In particular, regard must be given,*

*firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties. **emphasis mine***

[12] I wish to note here that even though some of the cases relied on throughout this judgment do not deal directly with an application for extension of time to file defence out of time, the principles emanating from them are equally applicable to such an application.

[13] The Application and the submissions will therefore be considered against these principles in order to make a determination as to whether the Court should exercise its discretion and grant an extension of time to file defence.

A. *Length of the delay*

[14] In **Sydney Malcolm v Metropolitan Management Transport Holdings Ltd and Glenford Dickson** (unreported) Claim No. C.L. 2002/M225 delivered on the 21st day of May, 2003 Mangatal J in dealing with an application to set aside default judgment, held that a period of delay of approximately two (2) months between entry of the default judgment and the filing of the application to set aside was not considered to be inordinate and as such did not cause excessive prejudice to the plaintiff. Mangatal, J further stated at paragraph 20 while making reference to the case of **McDonald v Thorm**, TLR, October 15, 1999, 691 that: “...*the question of delay, and whether reasons are or are not given is but another factor to be put in the scale when the Court considers how best to exercise its discretion.*”

[15] I must note that in **Shauana Smith and Aayana Bent (a minor, by her mother and next friend Shauana Smith) v Gladstone Shackelford and Eugene Polson** [2018] JMSC Civ 123 I was of the view that the discussion of Mangatal, J in **Sydney Malcolm** with respect to the setting aside of the default judgment was influenced by the overriding objective of doing justice between the parties (rule 1.1 of the CPR). I still remain of this view. Phillips JA in **Rohan Smith v Elroy Hector**

Pessoa and Nickeisha Misty Samuels [2014] JMCA App 25 held that a period of four (4) or five (5) months delay even in light of the history of the matter ought not to be regarded as inordinately long. Phillips JA was faced with a scenario of a four (4) months delay with respect to an application for relief against default judgment.

[16] Learned Counsel Mr. Lawson submitted that the delay in filing the Defence was not inordinate. Learned Counsel relied on the case of **Shauana Smith and Aayana Bent**. In that case, I found that the delay of four (4) months was not inordinate having considered several cases. Therefore, applying the principle as stated by me in that case, the delay of one (1) month and nine (9) days was not inordinate. Learned Counsel further submitted that the delay was not intentional and despite the Defendant's/Applicant's best efforts it could not have been avoided.

[17] It was submitted by Learned Counsel Ms. Patterson that the delay was in fact inordinate as nothing was done until over two (2) months after the appointed date as the Defendant/Applicant had 42 days from the date of service of the Claim Form to file the Defence, that date being April 14, 2020.

[18] The Defendant/Applicant was served on the 3rd day of March, 2020 and an Acknowledgment of Service was filed within the stipulated time, on the 13th day of March, 2020. The Defendant/Applicant did not admit liability on the whole or part of the claim for both an unspecified amount of money and a specified sum of money, nor did the Defendant/Applicant intend to defend the claim only as to the amount of damages. In fact, the Defendant/Applicant said that it intended to defend the whole claim. Having been served on the 3rd day of March, 2020, the Defence should have been filed in April. However, the Defence was not filed within the 42 days from the date of service and was instead filed on the 23rd day of June, 2020.

[19] There is also some contention between the parties as to whether or not there was an agreement to an extension of time pursuant to rule 10.3(5) of the CPR. If the Defendant's/Applicant's position is to be accepted, then the Defence was filed one

(1) month and nine (9) days out of time and therefore the delay would not have been inordinate. On the other hand, if the Claimant's/Respondent's position is to be accepted then the Defence was filed a little over two (2) months out of time and would amount to an inordinate delay.

[20] To my mind, the period of delay from the date of service to the date of the filing of the Defence ought not to be considered as inordinate in light of the case law. I see no need to make a finding as to whether or not the parties agreed to an extension of time. Whether the Defence was filed one (1) month and nine (9) days out of time a little over two (2) months out of time, I would still be of the view that the period of delay was minimal and ought not to be considered as inordinate.

[21] The length of the delay is not determinative of the issue and it ought not to be considered independently of the other factors. Rattray J stated in **Devon Davis v Karen Marajah** [2019] JMSC Civ. 7 that-

"The length of the delay is a consideration that strongly goes against granting the Application for an extension of time, without some valid and/or reasonable explanation being advanced for the delay. However, the mere fact of a delay ought not to be the determining factor, as the Court must also consider all the other factors as a whole."

B. *Reasons for the delay*

[22] Smith JA in **Peter Haddad v Donald Silvera** (unreported) Civil Appeal No. 31/2003 delivered the 31st day of July, 2007 said that –

"...in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules."

[23] In **Carlton Williams v Veda Miller** [2012] JMCA App 39 Harris JA stated at paragraph 32 that –

*"The reason for the failure of the applicant to comply within the requisite time is highly material. **Some reason for the delay must be advanced.**"*

Even in the absence of a good reason, the court may nonetheless grant an extension, if the interests of justice so require. In *CVM Television v Tewarie* the appellant advanced a reason for the delay which was not considered “altogether adequate”, but was treated as not “entirely nugatory” **[emphasis mine]**

[24] Harris JA maintained this view in **Attorney General of Jamaica v Roshane Dixon and Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ 23.

Harris JA stated that:

*“The further question now arising is whether the excuse given by the appellant for the delay can be treated and accepted as satisfactory. It is perfectly true that this court, has in cases, including **Fiesta**, and **Haddad v Silvera**, pronounced that some reason for the tardiness must be given, even if it is insufficient. **The proposition that the inadequacy of a reason does not in itself prevent the court from assisting a tardy applicant does not mean that the court will look with favour upon such an applicant in all cases.** Failure to act within the requisite period is a highly material criterion, as Smith JA stated in **Haddad v Silvera**. The weaker the excuse, the less likely the court will be inclined to countenance a tardy applicant who seeks the court’s aid to extend time.” **[emphasis mine]***

[25] Learned Counsel Mr. Lawson submitted that the delay in filing the Defence was not inordinate and the Defendant/Applicant had very good reason for the delay. Learned Counsel Mr. Lawson submitted that the Defendant’s/Applicant’s need to verify and obtain records was not unreasonable. The Affidavit of Dr. Deslandes speaks to well known facts about disruptions in the work place which occurred during the relevant period in 2020. The Covid-19 pandemic restrictions prevented persons from entering and leaving the parish of Saint Catherine and as a result they were unable to attend the office to conduct the necessary search. Mr. Lawson directed the Court to paragraphs 3-7 of Dr. Deslandes’ Affidavit, which is summarized below.

[26] Dr. Deslandes sought to explain why the Defence was filed out of time. He was appointed Chairman of the Defendant/Applicant Company a short while before the Claim was filed. As a result of that he was not directly aware of nor did he oversee any transactions or endeavours of the Defendant/Applicant prior to his date of engagement. Therefore, in order to instruct the Defendant’s/Applicant’s Attorneys,

he would have to locate the records relating to the alleged agreement between the parties since that is the crux of the Claimant's/Respondent's Claim. Dr. Deslandes stated that, he along with the majority of the nine (9) member senior board and management member teams were unable to locate the records within the period prescribed by law for the filing of the Defence. This he further states, was as a result of the Covid-19 pandemic restrictions that were mandated by the Government. These restrictions which included Work From Home Orders and parish wide quarantine of the parish of Saint Catherine forced the senior board and management team to work remotely for over 2 months during the currency of the period for the filing of the Defence. Dr. Deslandes further stated that the delay was unavoidable despite his best efforts.

[27] Learned Counsel Ms. Patterson submitted that the Defendant/Applicant has not proffered any good reason at all for the delay. The reason given for the failure to file his Defence in time is not satisfactory as it does not provide the Court with any information as to the nature and/or extent of the difficulties that was faced in locating the documents. This is compounded by the fact that the Defendants/Applicants have not yet found the documents but have been able to prepare a Defence which they are now seeking to present. The reason proffered is therefore not valid as the documents were not necessary for the drafting of a defence and no information has been provided to the Court as to how these documents would assist in the preparation of a Defence. It is also not an acceptable reason for Dr. Deslandes to say that he was not in a position to deny or admit the existence of the contract and is not in a position to defend the Claim. Learned Counsel further submitted that the Defendant/Applicant is asking the Court to exercise its discretion by extending the time for the Defendant to file its Defence in the absence of a good explanation and the Court ought not to allow the Defence to stand.

[28] I find merit in the reasons put forward by the Defendant/Applicant that during the time prescribed by law for the filing of the Defence, the management team of the

Defendant/Applicant were physically unable to attend the office to conduct the necessary searches which resulted in the delay of the filing of the Defence. With the novelty and uncertainty of the pandemic in 2020, I am of the view that the explanation given by Dr. Deslandes is a reasonable one.

[29] However, what is paramount, is whether I am satisfied that the Defendant/Applicant has an arguable case and if I so find then the absence of a good explanation does not prevent me from exercising my discretion to grant the extension. The overriding principle is that justice must be done.

C. *Whether the Defendant/Applicant has an arguable case*

[30] Pettigrew-Collins J (Ag.) noted in **Adrian Samuda v James Davis and Frania Smith** [2017] JMSC Civ 156 that this consideration as outlined in **Leymon Strachan**, that is whether there is an arguable case for an appeal, bears no direct relevance to an application for extension of time to file defence out of time, but the analogous principle relating to whether or not a defendant should be allowed to file a defence out of time is expressed as whether the defendant has a defence with merit. Therefore, I will examine the Defence as filed in order to determine whether it discloses an arguable defence to the Claimant's/Respondent's Claim.

[31] The essence of the Defendant's/Applicant's Defence is that they have no records that the services were performed by the Claimant/Respondent and the Claimant/Respondent is therefore not entitled to the sums claimed. The records of the Defendant/Applicant do not reflect the existence of any agreement having been entered into by the Defendant/Applicant. The Defendant/Applicant further stated that the Claimant/Respondent is not entitled to the quotations and the schedule of payment as outlined in the Particulars of Claim.

[32] Learned Counsel Mr. Lawson submitted that the Defence has merit and in order to make a determination on merit, the Court is permitted to examine the Defence. The evidence confirms that the Defendant/Applicant was unable to locate any

records of the purported contract or its alleged performance by the Claimant/Applicant and was forced to do the best it could in seeking to defend the Claim. The Court was also directed to paragraph 8 of the Affidavit in Support which says that the Defendant has a reasonable prospect of defending the Claim and lists the reasons as follows:

- i. The Defendant is unable to locate records of the purported consultancy agreement that the Claimant seeks to enforce;*
- ii. The purported consultancy agreement appears to have been entered into in breach of the procurement guidelines which bind the Defendant;*
- iii. The Defendant has denied the validity and/or enforceability of the purported agreement;*
- iv. The Defendant has no record of ever having negotiated the terms of the purported contract;*
- v. There is no record that the terms of the contract were performed, and the Claimant has not exhibited any documentary records of its performance;*
- vi. Based on the foregoing, the Claimant is not entitled to be paid the sum reflected in the purported agreement, as pleaded;*
- vii. There are no or insufficient particulars of losses which the Claimant alleges to have incurred; and*
- viii. The Claimant is therefore not entitled to the reliefs sought.*

[33] Learned Counsel Mr. Lawson argued that the former Chief Executive Officer of the Defendant lacked the requisite authority to bind the Defendant given the nature of the contract and it is a live issue whether the purported contract is valid and/or enforceable in the absence of the necessary procedures being followed by the former Chief Executive Officer. If the Court is to find that the purported agreement is valid and enforceable, the performance of the said agreement is a question of fact to be established with evidence at the trial of the matter. Mr. Lawson further submitted that it is well settled that a claimant may not claim compensation under a contract where they are unable to show performance thereof. No documentary

evidence was exhibited certifying performance of the terms of the contract, whether in accordance with its provisions or at all.

- [34] On the other hand, Learned Counsel Ms. Patterson submitted that there is no defence as the Defendant/Applicant cannot simply just admit or deny the Claim. To allow this type of defence would be an injustice and abhorrent to the overriding objective of dealing with matters expeditiously and fairly and allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases. The Defendant/Applicant having not found the documents cannot state definitively the steps which he says have not been followed in procuring the agreement. The Defendant/Applicant is intimating that a breach has occurred in the procuring of the said agreement and that in and of itself is an admission to the existence of the agreement. The theme throughout the entire Defence is that the Defendant/Applicant neither admits nor denies the contents.
- [35] I bear in mind, the dicta of Sykes J in **Sasha-Gaye Saunders v Michael Green and Others** (unreported) Claim No. 2005HCV2868 delivered on 27th February, 2007 where he stated, in considering the merits of the defence, that the test of 'real prospect of success' is higher than the test of an arguable defence. The defence must carry some degree of conviction (see **ED & F Man Liquid Products Ltd v Patel and Another** [2002] EWCA 1550 and **Sydney Malcolm**). The Defendant/Applicant at this stage is not required to show that their case will probably succeed at trial. It is therefore sufficient for the Defendant/Applicant to show some chance of success. Before any determination is made, I also bear in mind that I must exercise care in not embarking on a mini trial (see **Swain v Hillman** [2001] 1 All ER 92).
- [36] In my opinion, the Defendant/Applicant has an arguable case as the Defence that was filed on the 23rd day of June, 2020 raises issues that ought to be determined at a trial. The Defendant/Applicant is saying that there is no evidence of the services under the contract being performed. In accordance with the alleged agreement the Claimant/Respondent was to submit a final summary report. The

Claimant/Respondent has claimed that they submitted same after completing the work under the contract and expected that the Defendant/Applicant would have paid the total sum outstanding. No payment was made by the Defendant/Applicant. The Defendant/Applicant was not able to admit or deny those averments by the Claimant/Respondent and once again made reference to the fact that it has no records that the services were performed. The Claimant/Respondent has also failed to exhibit evidence that the services were performed. I find merit in Learned Counsel Mr. Lawson's submission that, the performance of the said agreement is a question of fact to be established with evidence at the trial of the matter.

[37] The Defendant/Applicant has also called into question the validity and/or enforceability of the purported agreement. Respectfully, I find no merit in Learned Counsel Ms. Patterson's submissions. The fact that the Defendant/Applicant is intimating that a breach has occurred does not in and of itself show an admission to the existence of the agreement. The Defendant/Applicant made it clear that they arrived at that position upon reviewing the purported agreement that was exhibited to the Particulars of Claim. I also do not agree that the theme throughout the entire Defence is that the Defendant/Applicant neither admits nor denies the contents of the Particulars of Claim. The Defendant/Applicant, in my view, did put forward an arguable Defence but was still unable to either admit or deny the contents of the Particulars of Claim.

[38] Whether the Defendant/Applicant will succeed on its Defence is not an issue for me to determine. It is therefore my judgment that the Defendant/Applicant has shown that it has an arguable defence and the issues raised ought to be determined at a trial of the matter.

D. *Degree of Prejudice to the parties*

[39] I must also consider any prejudice real or substantial that the Claimant/Respondent may suffer as a result of the Defendant's/Applicant's delay. Prejudice has to be weighed against the likelihood of success of the defence.

- [40] Learned Counsel Mr. Lawson submitted that the Claimant/Respondent has not adduced any evidence that it would be prejudiced should the Court grant the extension and permit the Defence as filed to stand. It was submitted that Claimant/Respondent would suffer no prejudice if the Defendant/Applicant is permitted to file its Defence out of time. Greater prejudice would be occasioned by the Defendant/Applicant because the Defendant/Applicant would then be obliged to pay under an alleged contract the validity of which is a live issue, and in circumstances where the Claimant/Respondent has not pleaded particulars of performance of the contract at all and the Defendant/Applicant is unable to locate any records of the contract at all, or that it was performed.
- [41] On the other hand, Learned Counsel Ms. Patterson submitted that the issue of prejudice would affect both the Claimant/Respondent and the Defendant/Applicant depending on how the Court decides to treat with the Application. The Claimant/Respondent is desirous of having the matter resolved having filed and served its claim in February and March 2020, respectively. The value of the Jamaican Dollar has moved from 140 Jamaican Dollars to 1 United states Dollars and this can never be satisfied by any award of interest.
- [42] By the very nature of the application there would be some prejudice to the Claimant/Respondent if it is granted. However, in my view the Defendant/Applicant would suffer greater prejudice if the application is not granted. I believe that the prejudice that the Claimant/Respondent would suffer as submitted by Learned Counsel Ms. Patterson is one which can be taken into account at a trial when damages are being assessed.
- [43] Having found that the delay is minimal, the Defendant/Applicant gave satisfactory reason for the delay and has an arguable case, it is my view that the administration of justice requires that the application be granted.

ORDERS & DISPOSITION

[44] Having regard to the forgoing these are my Orders:

- (1) The Defendant is given permission to defend the Claim herein.
- (2) The time limited for the filing of Defendant's Defence is extended to June 23, 2020 and is permitted to stand.
- (3) Costs of the Application to the Claimant to be taxed, if not agreed.
- (4) The Case Management Conference is set for July 28, 2021 at 10:00 am for 1 hour.
- (5) Defendant's Attorneys-at-Law to prepare, file and serve the Orders made herein.