[2018] JMSC Civ 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV01328

BETWEEN	**GEORGETTE SMITH**	**CLAIMANT**
AND	**JAMAICA DEFENCE FORCE CO-OPERATIVE CREDIT UNION**	**DEFENDANT**

IN CHAMBERS AND HEARD ON PAPER

Ms. Lisa Mae Gordon & Mr. Raun Barrett, instructed by Malcolm Gordon, for the claimant.

Ms. Renee Freemantle instructed by Scott, Bhoorasingh & Bonnick, for the defendant.

HEARD: November 14, 2017, & March 9, 2018

STRIKING OUT APPLICATION – APPLICATION FOR AN ADMINISTRATIVE ORDER – APPLICATION FOR CONSTITUTIONAL REDRESS – APPLICATION FOR CONSTITUTIONAL REDRESS JOINED WITH OTHER CLAIMS IN TORT – WHETHER CLAIM FORM IS APPROPRIATE FORM FOR COURT PROCEEDINGS UPON THIS CLAIM – DEFENCE FILED OUT OF TIME – APPLICATION FOR AN EXTENSION OF TIME TO FILE DEFENCE – RELEVANT FACTORS TO BE CONSIDERED BY THE COURT IN RESPECT OF AN APPLICATION FOR AN EXTENSION OF TIME TO FILE DEFENCE – COURT'S GENERAL POWER TO CORRECT PROCEDURAL ERRORS – THE OVER-RIDING OBJECTIVE

ANDERSON, K. J

THE APPLICATION

[1] On November 2, 2017, the defendant filed an Amended Notice of Application for Court Orders and sought the following orders:

> 1. *That the Claim Form and Particulars of Claim filed on 24th April, 2017 be struck out for failure to comply with Rules 56.9(1) and 56.9(2) of the Civil Procedure Rules 2002.*
>
> 2. *In the alternative that the Defence filed on 10th July, 2017 be permitted to stand as filed.*
>
> 3. *Costs to the Defendant.*
>
> 4. *Such further or other reliefs as the Court may deem fit.*

The main grounds on which the defendant sought those orders are that: (i) the court has the power, pursuant to **rule 26.3(1)(a) of the Civil Procedure Rules 2002**, ('**C.P.R**'), to strike out a statement of case or part of a statement of case for non-compliance with a rule of court; (ii) the claimant failed to comply with **Part 56 of the C.P.R**, in several respects, in respect of her claim for damages as a consequence of that which she has alleged, were committed by the defendant, breached her constitutional rights; (iii) **rule 10.3(1) of the C.P.R** grants this court with the power to extend time for the filing of a defence, in that, the defendant was served with the claim on April 25, 2017 and filed its Acknowledgement of Service on May 9, 2017 and served same on May 10, 2017; (iv) The defence was filed on July 10, 2017, and was thus filed out of time, but was not wilfully filed out of time.

[2] The defendant's said amended application is supported by four affidavits and no evidence was relied on, by the claimant, or filed by the claimant, in opposition to the defendant's amended application. The four supporting affidavits are as follows: (i) the affidavit of Renee Freemantle, filed on June 9, 2017; (ii) the affidavit of Renee Freemantle, filed on June 27, 2017; (iii) the affidavit of Renee

Freemantle, which was filed on November 2, 2017; and (iv) the affidavit of Patricia Tomlinson, filed on November 8, 2017.

[3] When this matter came up for hearing before me in chambers on November 14, 2017, the court file for this matter, was not then in my possession, as the Registrar was unable to locate same, prior to that hearing. In the circumstances, this court then ordered that the defendant's said amended application, be heard on paper and also ordered that a judge's bundle be filed and that the parties file and serve submissions and authorities as regards the said amended application. Those orders were subsequently complied with and I can also now report that the file for this matter had been found and is now in the Registrar's possession.

THE BACKGROUND TO THE DEFENDANT'S APPLICATION

[4] The claimant, in or about November, 2013, entered into a loan agreement with the defendant to purchase a motor vehicle. The said vehicle was purchased with the funds loaned to the claimant by the defendant and was in fact used as security for the loan. The claimant subsequently defaulted on the repayments and fell into arears, and the defendants instituted a court claim for the debt owed. The claimant admitted that she owed the debt and judgment on admission was entered in favour of the defendants.

[5] The claimant failed to satisfy the sums owing under the judgment debt, and consequently, the claimant was incarcerated at the Duhaney Park lock-up. In her Particulars of Claim, the claimant averred that she was at home on May 16, 2016, when she was visited at her home by a bailiff, acting on behalf of the defendant. That bailiff, the averments continued, informed the claimant of the total sums she owed to the defendant, but the claimant is disputing that total sum.

[6] The claimant has further averred that, in addition to disputing the total sum, she requested verification of the sum by the defendant before she could be required to pay it. The bailiff, the averments continued, instead requested that she accompany him, in his vehicle, to the defendant's office, whereas the claimant

was instead taken to the Duhaney Park police station lock-up. She was subsequently released on May 18, 2016.

[7] On April 24, 2017, the claimant filed a claim, seeking damages for breach of contract, negligence, false imprisonment, deceit, and breach of constitutional rights. The claim was brought by way of Claim Form along with a Particulars of Claim, both filed together. The claimant's averments were particularized in her Particulars of Claim, though this court has noted that, as regards the alleged particulars of breach of constitutional rights, that was set out under the heading 'Particulars of False Imprisonment' and stated the following:

> *'That the agents of the Defendant high handedly and unnecessarily detained the Claimant, on an unlawfully obtained warrant and that the Claimant suffered loss and damage for constitutional breaches for which the ordinary measures of damages, remedies and redress are inadequate. The Claimant was deprived of her fundamental rights and freedom as a citizen of Jamaica to which she is and was guaranteed by the Constitution of Jamaica.'*

The Claim Form was served on the defendant on April 25, 2017, and a defence was due to be filed within forty-two (42) clear days after that date pursuant to **rule 10.3(1) of the C.P.R**, that is, by June 7, 2017. The defence was instead filed on July 10, 2017 which was in fact, out of time.

The Defendant's Submissions

[8] Ms. Freemantle, counsel for the defendant, submitted that, pursuant to **rule 26.3(1)(a) of the C.P.R**, the court may strike out a statement if case or any part of it, where it appears to the court that there has been a failure to comply with a rule of court. Counsel continued that, pursuant to **rule 56.1(1)** and **rule 56.1(2)**, applications for administrative orders, include applications for relief under the Constitution. Additionally, under **rule 56.9(1)**, an application for an administrative order must be made by Fixed Date Claim Form and both **rule 56.9(2)** and **rule 56.9(3)** direct that there must be evidence in support on affidavit.

[9] Counsel posited that it was clear from the foregoing that the claimant has failed to commence proceedings in accordance with the **C.P.R**. Further, she argued, the claimant did not set out the particular provisions of the Constitution which were allegedly breached by the defendants. Ms. Freemantle also made the argument that a claim relating to an application for administrative orders must be served on the Attorney General. There was no evidence to indicate that the claimant has in fact done so.

[10] Counsel also submitted that **rule 56.10(1) of the C.P.R** makes provision for an applicant to join any other reliefs together with an application for administrative orders, where not prohibited by substantive law. This rule, counsel argued, does not assist the claimant as it permits joinder of other causes of action in an application for administrative order, which application, the claimant has not made.

[11] It is the contention of Ms. Freemantle, that, as there is no proper application for administrative order in the proper format, there is then, no application for administrative order, and the claim ought to be struck out. Alternatively, Ms. Freemantle submitted, if the court is not minded to strike out the entire claim, then an order to strike out those aspects of the claim relating to constitutional redress, may be made pursuant to **rule 26.3(1)(a) of the C.P.R**.

[12] Counsel continued that, if the court is not minded to strike out any portion of the claimant's claim, then the defendant seeks an order for the defence filed on July 10, 2017 to stand. The court's power to extend time, she said, is found in **rule 10.3(9)**, and further governed by **rule 26.1(2)(c)**. Counsel placed reliance on **Philip Hamilton (Executor in the Estate of Arthur Ray Hutchinson, deceased, testate) v Frederick Flemmings, et al,** [2010] JMCA Civ 19, and **John Ross Ricketts v David Williams, et al,** [2013] JMSC Civ 152, and made the submission that there was both a good reason for the delay in filing the defence, and that the defence has a realistic prospect of success.

The Claimant's Submissions

[13] Counsel for the claimant, in opposing the defendant's said amended application, submitted that, according to **rule 26.3(1)(a) of the C.P.R**, the court may strike out a party's statement of case or any portion of it. This rule gives to the court a discretionary power to strike out a party's statement of case. That power must be used sparingly and as a last resort. The rationale behind this, counsel submitted, is so that a party would not be denied of their right to trial and to encourage parties to strengthen their case by the other variety of court procedures such as a request for information.

[14] Counsel posited that the claim does not solely consist of a constitutional claim as there are also claims for breach of contract, negligence, false imprisonment and deceit. Counsel continued that **rule 1.1 of the C.P.R** speaks to the overriding objectives which are aimed at enabling the court to deal with cases justly, such as, ensuring that a case is dealt with expeditiously and fairly. Counsel cited **Keene v Martin and another** [1999] ALL ER 1207, and made the submission that the over-riding objective would more likely be furthered where the court actively manages cases brought before it, rather than to simply strike it out.

[15] Counsel made further submissions that, **rule 10.3(5) C.P.R** provides that the parties may agree to extend the period for filing a defence, yet the defendants did not make any such arrangement with the claimant. The defendants filed an Acknowledgement of Service on May 9, 2017 and served the claimants on May 10, 2017 and in that document, have specified that they were served with the claim form and particulars of claim and the requisite accompanying documentation on April 25, 2015. The defendant's defence was filed on July10, 2017.

[16] Counsel then placed reliance on **Norma Hines-Brissett v Lennox Roxroy Brissett** [2015] JMSC Civ. 41, and made the submission that there was no justification of the delay to file the defence out of time, and that it would be prejudicial to the claimant, if the defence were to be allowed to stand.

ISSUES

[17] The issues for my determination are: (i) whether the claimant's entire statement of case, or any portion thereof, should be struck out, arising from the claimant's alleged failure to utilize the correct procedure to pursue a claim for constitutional redress, and (ii) If not, whether an extension of time should be granted for the defendant's defence, filed out of time, to be allowed to stand.

LAW AND ANALYSIS

[18] The defendant has sought an order striking out the claimant's case in its entirety for failure to comply with **rule 56.9(1) and 56.9(2) of the C.P.R**, this in so far as the claimant has claimed 'breach of constitutional rights' by way of claim form. The defendant also sought, in the alternative, an order to strike out those portions of the claim alleging breach of constitutional rights. The legal burden is therefore on the defendant to adduce evidence to the required standard, that is, on a balance of probabilities, to prove that the orders being sought, ought to be granted.

[19] **Rule 56.9(1) and of the C.P.R** states as follows:

> *1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for –*
>
> *(a) judicial review;*
>
> *(b) relief under the Constitution;*
>
> *(c) a declaration; or*
>
> *(d) some other administrative order (naming it),*
>
> *and must identify the nature of any relief sought.*
>
> *2) The claimant must file with the claim form evidence on affidavit.*

It is clear, by the above-cited rule, that claims for relief under the constitution are referred to as 'administrative orders,' and an application seeking that order must ordinarily be instituted before this court by means of Fixed Date Claim Form. That Fixed Date Claim Form should identify the nature of any relief sought. Additionally, that application must be supported by evidence on affidavit, served on all persons directly affected, and the Attorney General pursuant to **rule 56.11(1) and 56.11(3) of the C.P.R**.

[20] Consequent upon those directions in the **C.P.R**, I agree with Ms. Freemantle that there was no evidence that those steps were done by the claimant when the claim was commenced against the defendant. The failure however, of an applicant to initiate its claim, using the correct form does not, by that failure alone, warrant the court to exercise its powers to strike out that claim and thereby deprive that litigant of access to a court of law, for the purpose of seeking redress for an alleged violation of that litigant's constitutional rights.

[21] It is, for that reason, that the **C.P.R** outlines at **rule 25.1**, that the court must further the over-riding objective, of dealing with cases justly, by actively managing the cases brought before it. This include: '*fixing the timetables or otherwise controlling the progress of the case*' (**rule 25.1(g)**); '*consider whether the likely benefits of taking a particular step will justify the cost of taking it*' (**rule 25.1(h)**); '*direct a separate trial of any issue*' (**rule 26.1(g)**); and '*try two or more claims on the same occasion*' (**rule 26.1(h)**).

[22] Further to those general powers of the court to manage cases, the court is also empowered by virtue of **Rule 26.9**, to rectify matters where there has been a procedural error. This rule only applies where a consequence of failure to comply with a rule has not been specified by any rule, practice direction or court order. It is undisputed that the claimant did not comply with **Part 56** in initiating her claim for breach of constitutional rights. It is also very clear that **Part 56** does not specify any consequence for failure of a claimant or applicant to comply with Part 56, in initiating a claim for an 'administrative order.' It is therefore my view, that

the court is then empowered to exercise its general powers of case management, to set matters right where a claimant has initiated a claim for alleged breach of constitutional rights, or in other words, 'an administrative order,' using an incorrect procedure or form.

[23] Further, pursuant to **rule 26.9(2) of the C.P.R**, an error of procedure does not invalidate any step taken in proceedings unless the court so orders. Additionally, where there has been an error of procedure, the court may make an order to put matters right (**rule 26.9(3)**), and the court may make such orders on or without any application by a party (**rule 26.9(4)**). In light of the wide-ranging powers of the court, I am of the view, that striking out the claimant's claim for initiating a claim for constitutional redress by way of claim form would not be furthering the over-riding objective of dealing with cases justly **(rule 1.1(1)**). The final and draconian sanction of striking out, must be viewed as a measure of last resort in light of the wide-ranging powers of the court to manage cases brought before it and to correct procedural errors.

[24] An appropriate order in this matter, therefore, may be an order to 'set matters right,' so as to ensure that the case progresses towards its resolution by this court in a timely way and also, in a manner which ensures that it is dealt with by this court, in a manner which is fair to all parties concerned and which does not result in it being allotted a disproportionate share of this court's severely limited resources. It would be inappropriate to require the claimant to file two separate sets of claim documents related to the same set of underlying allegations. It was among these reasons that the following provision was made at **rule 8.3 of the C.P.R**, which states:

> *'A claimant may use a single claim form to include all, or any, other claims which can be conveniently disposed of in the same proceedings.'*

[25] By addressing the allegations within the ambit of a single claim, it will allow for the said allegations to be heard and addressed by this court at the same time, utilizing less of this court's resources to do so and also, sparing the litigants,

expense in doing so, since undoubtedly, if the litigants had to address the underlying allegations in separate proceedings, it would cause them to have to incur greater legal expense to do so.

[26] In any event, this court disagrees with the contention of the defence counsel that no claim for an administrative order has been made, since such claim was not made using the correct form of procedure. In other words, since that claim was instituted by means of Claim Form, rather than Fixed Date Claim Form as the rules of court require, no claim for an administrative order has been made.

[27] It is this court's view that a claim for an administrative order has been made by the claimant, albeit that same was made, utilizing an incorrect legal form. Additionally, it is proper, pursuant to **rule 56.10(1) of the C.P.R** to join other causes of action in that claim and for all of those causes of action to be instituted using a single Claim Form document, or a single Fixed Date Claim Form document. It could hardly be otherwise, since claims for tortious wrongs and breach of contract, ought ordinarily to be instituted by means of Claim Form, rather than Fixed Date Claim Form. **Rule 56.10(1) of the C.P.R** states:

> *'56.10 (1) The general rule is that, where not prohibited by substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –*
>
> *(a) arises out of; or*
>
> *(b) is related or connected to,*
>
> *the subject matter of an application for an administrative order.'*

[28] The defendant had also contended, in their application to strike out the claimant's claim or portions thereof, that the claimant had failed to particularize her claim for constitutional redress. I do not accept that contention, as there was in fact particularity, and it is set out under the particulars of false imprisonment. A perusal of the claimant's particulars of claim revealed, that the claimant is in fact seeking redress under the constitution for a breach of her constitutional rights, in

addition to damages in tort. The particularization of the claimant's constitutional claim is as follows:

> *'That the agents of the Defendant high handedly and unnecessarily detained the Claimant, on an unlawfully obtained warrant and that the Claimant suffered loss and damage for constitutional breaches for which the ordinary measures of damages, remedies and redress are inadequate. The Claimant was deprived of her fundamental rights and freedom as a citizen of Jamaica to which she is and was guaranteed by the Constitution of Jamaica.'*

[29] This particularization, to my mind, demonstrates inelegant drafting as it was not framed in the usual style of setting out that particularization under a separate heading dealing with constitutional redress, but instead, particularized the claim for constitutional redress, under the particulars of the claim for false imprisonment. Inelegant though that drafting was, by itself, it still served to disclose to the defendant that the claimant also intends to seek redress under the constitution as part of its claim, and that the alleged violation of the claimant's constitutional rights arose as a consequence of her alleged unlawful detention by the defendant.

Delay in filing defence

[30] It is critical to highlight, at this juncture, that since this court is not minded to strike out the claim, either in its entirety or in part, this court will next go on to consider the defendant's application for extension of time to file defence. If that application is successful, then it would be open to this court to make the appropriate order to set matters right. If, however, that application is unsuccessful, it would then mean that the claim is undefended. The order that may be needed, 'to put matters right' in circumstances wherein the claim is undefended would be different from that which may be needed, in circumstances wherein the claim is a defended one. Furthermore, where the claim is undefended, it may very well be unnecessary to make any order at all, to 'to put matters right.'

[31] The second order pursued by the defendant was an order seeking to permit the defence filed out of time, to stand. As stated earlier, the claimant's statement of case was served on the defendant on April 25, 2017, and an acknowledgment of service was filed on May 9, 2017 wherein the defendant indicated that it intends to defend the claim. The defence was due to be filed within forty-two (42) clear days of that date, as required pursuant to **rule 10.3(1) of the C.P.R**, that is, by June 7, 2017. The defence was instead filed on July 10, 2017, thirty-three (33) days, out of time.

[32] The legal issues pertaining to the defendant's application for the defence which was filed out of time, to stand, are now to be addressed. In **Fiesta Jamaica Ltd. v National Water Commission** [2010] JMCA Civ. 4*,* Harris JA, at paragraph 16 stated:

> *'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.'*

[33] It follows then, as expounded by Harris JA, that I am required to pay special attention to all of the affidavit evidence supporting the defendant's application to satisfy myself that there was/were good reason(s) for their failure to have complied with **rule 10.3 (1) of the C.P.R**, which states the general rule for the filing of a defence as 42 clear days after that date of the service of the claim form, that is June 7, 2017. The defence was filed on July 10, 2017, that is, thirty-three (33) days out of time. Also, I must satisfy myself that the proposed defence has merit. Of course, if the proposed defence has no merit, then it would be unjust to the claimant in particular, and not at all in the overall interests of justice, for that proposed defence to be allowed to stand.

[34] Also, if there is no good reason shown to the court, for the delay in having filed the requisite document, the defendant's application for an extension of time, as a general rule, cannot succeed. There are thus, two hurdles which the defendant must overcome, if their application for an extension of time for the filing of their defence, is to succeed, so as to allow for the defence filed out of time, to stand.

[35] Paragraph 5 and 6 of the Affidavit of Renee Freemantle filed on June 09, 2017, stated the following: *'the Defendant has failed to file a defence in time as we were unable to complete our instructions in time. The failure to file the defence in time was not wilful.'* Again, in another affidavit filed on November 02, 2017, Ms. Freemantle repeated those reasons for the late filing of the defence, but also added at paragraph 15 and 16:

> *'15. Given the nature of the allegations made in the Claim, (which includes allegations concerning court proceedings in the Saint Catherine Parish Court, alleged arrangements concerning the servicing of the Claimant's loan and allegations concerning the execution of a warrant), we required instructions from the office of the Bailiff for the parish of Saint Catherine as well as from the Recovery Unit Collection Agency Limited who conducted proceedings on the Defendant's behalf in the Parish Court.*
>
> *16. Our instructions were completed in July 2010 and the defence was filed on 10th July 2017.'*

[36] Additionally, paragraphs 8 to 9 of the affidavit of Patricia Tomlinson, the defendant's representative, stated that, in order for the defendant to sufficiently instruct their attorneys:

> *'8. … the defendant had to undertake thorough examination of (among other things), the files, records and emails concerning the claimant's loan with the defendant. Furthermore, our attorneys required instructions from the office of the Bailiff for the parish of Saint Catherine as well as from the Recovery Unit Collection Agency Limited who conducted proceedings on our behalf in the Parish Court.'*
>
> *9. We completed our instructions in July 2017 and the defence was filed on 10th July 2017.*

[37] I must pause here to state an observation. An initial examination of paragraph 16 of Ms. Freemantle's affidavit filed on November 02, 2017, showed that the defendant's instruction to their attorneys, as regards their required response to this claim, was completed in July, 2010. However, I find that that date predated the incident that led to the filing of this claim, as the alleged causes of action for this matter arose on May 16, 2016. This was further clarified by Ms. Tomlinson in her affidavit at paragraph 9 where she confirmed that the instructions were completed in July, 2017.

[38] For my part, I have accepted the evidence of Ms. Tomlinson as set out in paragraph 9 of her affidavit as regards when it was that defence counsel's instructions were completed. However, there was no evidence given in any of the affidavits of Ms. Freemantle, or in the affidavit of Ms. Tomlinson, as to when was it that the instructions were first given to the law firm of Scott, Bhoorasingh & Bonnick, by the defendant – their client, to take the necessary steps on the defendant's behalf, to defend this claim.

[39] As I have said earlier, the burden of proof rests with the defendant to show good reasons for the delay of thirty-three (33) days in filing their defence. For the defendant to show 'good reasons' in this context, they must adduce sufficient evidence, on a balance of probabilities, to demonstrate whether they acted with reasonable expedition in the particular circumstances of this particular case. This, to my mind, can be done by the defendant showing clear timelines, in its evidence, of dates on which it: (i) retained the said law firm, (ii) commenced issuing its instructions to its attorneys, and (iii) completed those instructions. Failing these, the court would be left uncertain, even on a balance of probabilities, as to whether there exists any good reason for the delay of the defendants in filing their defence within time.

[40] In other words, did the defendant retain its attorneys, Scott, Bhoorasingh & Bonnick, before June 7, 2017, and if so, on what date? That would be crucial to ascertain the length of time that the attorneys had at their disposal to complete

their instructions, and to assess how the difficulties faced by the defendant's attorneys, were coped with, from a time perspective, from as of the date when they were retained, as compared with the date when their instructions were completed and also, as compared with the date when the defence was filed.

[41] On the other hand, did the defendant retain its attorneys after June 7, 2017? If so, there would then be a need for cogent evidence to be forthcoming from the defendant to explain the reasons for their failure to retain and instruct counsel prior to June 7, 2017, that is, during the forty-two (42) clear days stipulation of the C.P.R, and also, cogent evidence to explain the delay after June 7, 2017. Of course, if the defendant took a long time after having been served with the claim form, to hire their attorneys, and has provided no good explanation to this court for their delay in having hired them, then that delay would not have been proven to this court, as having been one in respect of which, there exists a good reason for.

[42] Careful consideration of all of the affidavit evidence adduced on the defendant's behalf, for purposes of their present application, has revealed no evidence of the precise dates when their attorneys were retained and instructed, or as to when the process of the defence counsel gathering the required information, began. There was further, no precise date given, as to when exactly it was, that defence counsel considered itself to be then possessed with sufficient information, so as to then have allowed for a proper defence to have been, properly drafted. Instead, what this court has been informed of, by means of affidavit evidence, is that, '*we completed our instructions in July 2017 and the defence was filed on 10th July, 2017'* (Para. 9 of the affidavit of Patricia Tomlinson which was filed on November 8, 2017). That assertion is not precise enough, for the purposes of the defendant meeting the requisite burden and standard of proof.

[43] Both affidavits contained general assertions as to the nature of the research which had to be done, in order to put forward a complete and proper defence, but neither affidavit outlined any or any sufficient evidence as to the timeline of those

searches. The defendants, by that omission, have left this court unable to properly assess the reasonableness of the delay and thus, have failed to prove, on a balance of probabilities, that the explanation proffered by them was a 'good explanation,' for that delay.

[44] Further to this, both affiants deponed that the late filing of the defence was, 'not wilful.' Whether the late filing of the defence though, was done wilfully or not, is of no moment, for the present purposes. It is of no moment, because, if the delay was caused for no good reason, albeit, neither wilfully, nor even negligently, the result will be the same, that being, that there is no good reason for the failure to file the defence within time.

[45] Without knowing precisely when it was that the law firm of Scott, Bhoorasingh & Bonnick, was first retained by the defendant, for the purpose of representing the defendant while defending this claim, it is unclear, even on a balance of probabilities, as to whether there exists good reason for the defendant's failure to have filed its defence within time. I accept that some delay in the filing of the defence may have been warranted by the amount of research that may have had to have been done, but as to whether that delay should have been over 42 clear days after defence counsel began their legal work in respect of this matter, is also unclear to me, even on a balance of probabilities.

[46] There are too many unanswered questions in terms of the timelines. Also, this court does not know, because no evidence was produced to it, as regards same, as to when it was that the law firm of Scott, Bhoorasingh & Bonnick, commenced carrying out the necessary preparatory work/investigative work with a view to properly preparing the defence. That may or may not have been at the same time as when the defendant retained that law firm.

[47] The burden of proof rests on the applicant who seeks an extension of time to satisfy the court that is hearing that application, that good reason has been shown for the delay in filing the requisite document, in this case, the defence. The standard of proof to be met in that regard, is proof on a balance of

probabilities. The defendant therefore did not prove on a balance of probabilities, that it had a good reason for the delay in having filed its defence, when it did. In the event though, that I am wrong in having reached that conclusion as regards that particular issue, I will next go on to consider whether there is merit in the proposed defence.

[48] It is not to be forgotten at this stage, that it is for the defendant to prove on a balance of probabilities, not only that they had good explanation or in other words, reason, for their delay in the filing of their defence, but also, that they have a meritorious proposed defence.

Merits of the defence

[49] The defence was to have been filed by June 07, 2017, but the proposed defence was filed by the defendant, on the July 10, 2017. This 'defence' which was filed by the defendant, out of time, is in reality, unless this court allows same to stand, only a proposed defence. That proposed defence must now be shown to be meritorious in order for this court to allow it to stand. How then should this court carry out that exercise of determining whether the proposed defence has merit?

[50] Guidance may be gleaned from the judgment of Morrison JA, as he then was, in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2. In that case, the requirement of an affidavit of merit on an application to set aside a judgment in default, was considered. From this case, even though it pertained to an application to set aside a default judgment, nonetheless, useful legal principles can be gleamed as regards what constitutes an, 'affidavit of merit' showing, in respect of a defendant against whom a default judgment has been obtained, that the said defendant has a *prima facie* defence, or other words, a defence which though as yet untested/unchallenged, 'on the face of it', appears to have merit.

[51] Morrison JA, as he then was, in the **B & J Equipment Rental Limited v Joseph Nanco** case (*op. cit.)* stated the following at paragraphs 43, 44 & 47:

'[43] The best known source of the requirement of an affidavit of merit on an application to set aside a judgment in default is Evans v Bartlam [1937] AC 473, to which McDonald-Bishop J made specific reference. In that case, Lord Atkin said (at page 480) that one of the rules laid down by the courts for guidance in exercising the discretion to set aside a regularly obtained judgment in default is that "there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence.

[44] In ***Ramkissoon v Olds Discount Co (TCC) Ltd*** *(1961) 4 WIR 73, the application to set aside the judgment in default was supported by an affidavit sworn to by the defendant's solicitor, to which was attached a defence signed by counsel. The Supreme Court of Trinidad & Tobago (Appellate Jurisdiction) dismissed an appeal from the order of the judge in chambers dismissing the application, in part on the ground that no merit had been shown by the defendant. McShine CJ (Ag) pointed out (at page 75) that the solicitor's affidavit 'does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence'. The learned judge went on to say, further, "[s]ince the facts related in the statement of defence have not been sworn to by anyone, consequently there was not, in our view, any affidavit of merit before the judge nor before us.*

…

[47] In the instant case, rule 13.3(1) required the appellant to show 'a real prospect of successfully defending the claim'. In my judgment in Attorney General v McKay (with which the other members of the court agreed), after referring to the Evans v Bartlam requirement that the affidavit of merit should be sufficient to demonstrate a "prima facie defence", I observed as follows (at para. [23]):

> *The language in the CPR is obviously stronger, with the result that, as Mr Stuart Sime puts it in 'A Practical Approach to Civil Procedure' (10th edn, para. 12.35), 'the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits.'*

[52] It follows therefore that, as was set out by Morrison JA, as he then was, above, the affidavit of merit must demonstrate a 'prima facie defence.' This position was

followed in **Kimaley Prince v Gibson Trading & Automotive Limited (GTA)** [2016] JMSC Civ 147. There, McDonald J placed reliance on **B & J Equipment Rental Limited v Joseph Nanco**, *supra*, then stated the following at paragraph 22:

> *'Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence…'*

[53] Having regard to the judgments set out above, I am constrained to examine the evidence contained in the affidavits in support of the defendant's application, to consider the merits of the proposed defence. In other words, there ought to be evidence on affidavit, demonstrating that the proposed defence was sufficiently meritorious, showing, *prima facie,* a case with merit, for it to be ordered to stand. What then is the evidence before this court which purports to show the merits of the proposed defence? Paragraph 18 of the affidavit of Ms. Freemantle, filed on November 02, 2017, and paragraph 10 of the affidavit of Ms. Tomlinson, both stated as follows:

> *'I verily believe that the defence has a good prospect of success. By the said defence, we have pleaded that there was no agreement between the claimant and the defendant for the claimant's debt to be serviced in monthly instalments until 17th May 2016 therefore the Defendant was not in breach of an agreement by instructing the Bailiff to execute the warrant. Furthermore, the defendants have denied the allegations of false imprisonment, deceit and negligence and have indicated that the Claimant was taken into custody pursuant to a lawfully obtained warrant.'*

[54] Exhibited to both affidavits, was a copy of the proposed defence filed on July, 10, 2017. In that proposed defence, it was asserted that there was a 'lawfully obtained warrant.' There was however, no further evidence, either in the form of an exhibit or as an attachment to the proposed defence, that such a warrant was issued, authorizing the defendant, or any of its agents, to lawfully commit the claimant to prison, as distinct from authorizing police personnel, to do so.

[55] As a matter of law, it is only in very limited circumstances that a private individual can arrest any other person and ordinarily, a private individual cannot lawfully arrest someone, pursuant to an arrest warrant. Nothing more need be stated in that regard, for present purposes.

[56] The evidence as to the proposed defendant's defence consisted of little, if anything, other than the bald conclusion that the defendant's defence, has a good prospect of success, which could not properly, for present purposes, have been drawn by either of the respective deponents to affidavit evidence, in support of the defendant's present application, since any such conclusions, if they were to have been drawn, should only have been drawn by this court and not by those deponents. There, 'exists,' a lack of proof to substantiate the contents of the proposed defence, and in my view, the affidavit evidence relied on to support the defendant's application which is now under consideration, has not shown that proposed defence to be one that is meritorious and which, should be allowed to stand.

[57] In other words, the defendant, by its two affiants, has opted to simply exhibit a copy of a draft of the proposed defence, deny the allegations outlined in the claimant's claim, and state that the proposed defence has a good prospect of success. That was insufficient as the evidence adduced on behalf of the defendant ought to have disclosed facts which constitute a prima facie defence in support of the defendant's application for the defence which was filed out of time, 'to stand,' and that obligation has not been met by the defendant merely exhibiting a draft of the proposed defence to those affidavits and having stated in the affidavit evidence that that proposed defence has a good prospect of success.

[58] In addition, a mere denial of allegations, cannot properly be put forward in defence against a claim. See: **rule 10.5 of the C.P.R**. The proposed defence here, without the evidence on affidavit to speak to its merits, contained only

unsubstantiated denials of allegations. That was simply inadequate and inappropriate for present purposes.

Exercise of special discretion by this court

[59] Notwithstanding that the affidavit evidence lacked the necessary evidence to substantiate the proposed defence, the court may nevertheless make an order for the defence to stand. In **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks, et al** [2013] JMCA Civ 16, Brooks JA, with whom the rest of the court agreed, stated at paragraph 17, the following:

> *'[17] If, however, a draft defence is not available because the defendant's attorneys-at law are not seised with the requisite instructions by the time the defence is due, does it mean that the defendant has no hope of pursuing a successful application to extend time until he is able to file a draft defence? It would seem to me, on the application of the overriding objective, that in certain special circumstances, such a defendant, as long as he can satisfy the court that:*
>
> *a. the application is made within a reasonable time;*
>
> *b. there are good reasons for the delay;*
>
> *c. there is a good reason why the extension should be granted; and,*
>
> *d. there would be no undue prejudice to the claimant*
>
> *should be able to secure an extension of time.'*

The learned judge of appeal, however went further to qualify the above when he stated the following at paragraphs 20 to 21:

> *'[20] …We certainly would not wish to open the floodgates for applications without evidence of merit to be made in an attempt to cure the sloth of attorneys-at-law or the parties whom they represent.*
>
> *[21] For that reason, it is our view that it is only in special circumstances that such an application should succeed. A*

> *defendant who has not produced evidence of merit should only be successful if he were able to convince the court that it would be just to extend the time. The decision should lie within the discretion of the judicial officer hearing the application.'*

[60] The learned judge of appeal found support for that position in the Privy Council decision of **The Attorney General v Keron Matthews** [2011] UKPC 38. In that case, the attorney at law in the Attorney General's Chambers was having difficulty getting instructions from the state's prison officer who had been accused of assaulting the claimant Mr. Matthews. There was no draft defence in place and an extension of time was granted by the Judicial Committee of the Privy Council, which expressed no reservation about the regularity of the application.

[61] In the present case, the defendant, in addition to failing to provide evidence of the merits of the proposed defence, also failed to explain, to the satisfaction of the court, the efforts made to secure that evidence, and the reason for its absence. Furthermore, the defendant has provided as evidence to this court, in support of their application for an extension of time, no suggested special reasons why, in the interests of justice, when carefully balancing the interests of the respective parties, their proposed defence ought to stand.

[62] In any event though, no application has been made to this court, by the defendant, for their proposed defence to be allowed to stand, notwithstanding the absence of the existence of any affidavit of merit, as regards that defence. It is unsurprising that no such application was made, since by her own evidence, the defence counsel who appeared before me and submitted on paper, as regards the defendant's application for an extension of time, has made it clear that she is of the view that the defendant's defence, has a good prospect of success.

Conclusion

[63] In the final analysis, it is my view that the defendant's application to strike out the claimant's claim, or portions thereof, ought to be denied as the court has wide powers of case management to set matters right, if necessary to do so. Further,

the defendant's application for an extension of time ought also to be denied, as the defendant has failed to adduce sufficient evidence on a balance of probabilities, to satisfy this court that it had good reasons for the delay in filing its defence within the requisite time, and in addition, as a consequence of the defendant's failure to adduce evidence, to the satisfaction of this court, on a balance of probabilities, that there is merit to the proposed defence.

[64] Of course too, with there not now being considered by this court, as existing, any defence filed by the defendant, which should be allowed to stand, it would, to my mind, be inappropriate for this court to strike out the claimant's claim, on a procedural ground.

[65] Orders

1) The defendant's application to strike out the claimant's statement of case, or portions thereof, is denied.

2) The defendant's application for extension of time is denied.

3) Judgment in default of defence is granted in favour of the claimant with damages to be assessed.

4) The Registrar is to set a date and time for assessment of such damages and make the requisite case management orders, pertaining to that assessment of damages hearing.

5) The costs of the defendant's amended application for court orders, which was filed on November 2, 2017 shall be the claimant's costs in any event and shall be taxed, if not sooner agreed.

6) The claimant shall file and serve this order.

……

Hon. K. Anderson, J.