



[2014] JMSC Civ 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2002 CLS 00206

BETWEEN	BEVERLY SPENCE-CHIN	CLAIMANT
AND	MUNAIR BADALOO	1 ST DEFENDANT
AND	LANCE SAMUEL	2 ND DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	3 RD DEFENDANT
AND	HUBERT PICKNEY	4 TH DEFENDANT

John G. Graham instructed by John Graham & Company for the Claimant

Ms. Suzette Campbell instructed by Campbell & Campbell for the 1st and 2nd Defendants

Ms. M. Chisholm instructed by the Director of State Proceedings for the 3rd and 4th Defendants

Heard: September 26, October 28, December 20, 2013 and January 6, 2014

AN APPLICATION TO SET ASIDE A DEFAULT JUDGMENT
THE REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM
INORDINATE DELAY

Lennox Campbell QC., J.

[1] On the 13th January 2003, the claimant served a Writ of Summons and Endorsement on the third defendant. On the 6th December 2006, the Particulars of Claim was served. On the 18th January 2007, the time for filing Defence expired, that is 42 days after the service of the Particulars of Claim. On the 31st May 2011, the claimant

was granted permission to enter Judgment in Default of defence against the third defendant.

[2] The third defendant submitted that, the Notice of Application was filed on the 10th June 2011 that is, ten days after Court granted permission to enter Default Judgment. The third defendant had acted as soon as reasonably practicable after finding out about the judgment.

[3] The explanation for the delay was that the attorney-at-law for the third defendant, with conduct of the matter, had been assigned to another department of the public service. The case file was not reassigned to another attorney-at-law. As a result, a Notice of Application filed on the 15th December 2006 to strike out the claimant's claim was not pursued. The attorney-at-law, who had conduct, having returned, filed a Notice for an extension of time within which to file a defence. Further, the third defendant was busy exploring whether the claimant was in compliance with the 'transition rules' in the Civil Procedure Rules (CPR).

[4] Mr. John Graham, computes the delay incurred by the third defendant as being from the time, the Particulars of Claim was filed on the on the 6th December 2006, to the date when a proper notice was filed (i.e. with supporting affidavit), on the 11th May 2011. The earlier notice filed on the 10th February 2009, seeking extension of time to file defence was adjourned when it came up for hearing on the 28th October 2009 due to the failure to file supporting affidavit. A period, he calculates as four years and four months.

[5] I make the observation that this matter in the absence of the attorney-at-law, to whom it was originally assigned, remained unassigned in the third defendant's Chambers for well over two years. On the 10th February 2009, the third defendant filed a Notice seeking an extension of time within which to file a Defence. Counsel for claimant, makes the point, with which I agree that this demonstrates a reversal of the third defendant's position, in seeking to strike out the claimant's case for want of cause.

[6] The sum effect of the third defendant's actions was to reduce the force of the third defendant's argument, that they had a "real prospect of successfully defending the claim." In any event, on the 25th May 2011 when the defendants' application for extension of time came before Simmons J (Ag.), (as she then was), the learned judge also heard an application for entry of Judgment in Default of Defence by the third defendant.

[7] The learned judge refused the third defendant's application on the ground that there was no explanation for the failure to file a Defence two years after first receiving instructions. Mr. Graham argued that the delay occasioned by the third defendant in seeking instructions, in respect of a driver with the Ministry of Works, was unreasonable. He submitted that on the material before the court, the third defendant would be contributory negligent.

[8] I find that the delay occasioned by the conduct of the third defendant was inordinate. That in the circumstances, of this case, the application to set aside was not done as soon as reasonably practicable. The failure of the third defendant to offer any good explanation, has caused the court to consider all the circumstances outlined in accordance with the overriding objective, and find myself unable to exercise the court's discretion to set aside the Default Judgment.

