ORAL JUDGEMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2012 HCV 03504

BETWEEN	**RASHAKA BROOKS JNR.**	**CLAIMANT**
	(A MINOR) BY RASHAKA BROOKS SNR.	
	(HIS FATHER AND NEXT FRIEND)	
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**WESTERN REGIONAL HEALTH HEALTH AUTHORITY**	**2ND DEFENDANT**

Mr. Jason Jones instructed by Nigel Jones and Company for the claimant

Ms. Marlene Chisholm instructed by the Director of State Proceedings for the defendants

HEARD: November 12, 19, 28, 30 and December 05, 2012

Application to enter judgement in default of acknowledgement of service and defence – Application for acknowledgement of service filed out of time to stand – Application for an order extending time for filing a defence pursuant to rule 10.3 (9) – Application to abridge time for service – Rules 10. 3(9), 11.11 (3), 12.3 (1) and 26.1 (2) (c) of the Civil Procedure Rules

IN CHAMBERS

MASTER VIVENE HARRIS (AG.)

[1] There are two applications before me. The first was filed by the claimant from as far back as July 18, 2012 seeking permission to enter judgement in default of acknowledgement of service against the 1st defendant pursuant to rule 12.3 (1) of the

Civil Procedure Rules (the CPR) and for a date for assessment of damages to be set. An amended application was filed by the claimants on November 01, 2012 seeking permission to enter judgement in default of acknowledgement of service and defence against the defendants and for a date for assessment of damages. In both applications the claimants have also requested that the cost of the applications is to be awarded to the claimant in any event.

[2] The second application was filed by the defendants on November 09, 2012 for orders to allow the acknowledgement of service filed out of time on July 23, 2012 to be allowed to stand, that they be permitted to file a defence on or before November 30, 2012 and that time be abridged for the service of their application.

[3] The claimant is objecting to the defendants' application on the ground that no proposed defence has been exhibited to the affidavit filed by Ms. Marlene Chisholm in support of her application to file a defence out of time and this is required as the defendants must show that their case has merit. The claimant has also requested that the court gives permission to them to enter judgement in default of acknowledgement of service and defence against the defendants in accordance with Part 12 of the CPR.

[4] The defendants, on the other hand, are saying that their application is brought pursuant to rule 10.3 (9) of the CPR and this rule is subject to the court's case management powers to abridge or extend the time for compliance with any rule of the court even if the application is made after the time for compliance has passed. They have submitted that this rule, unlike that of 13.3, is silent as to the procedure to be adopted.

The Proceedings

[5] The claim was filed on June 22, 2012 and is for damages for negligence and breaches of the statutory and contractual duties of the defendants. The redress that is sought is damages. The particulars of claim allege that the infant claimant, who was born on July 18, 2010, was admitted as a patient at the Cornwall Regional Hospital on May 25, 2011. His blood type is A-Negative. He was diagnosed with a medical condition that required blood transfusion and received several transfusions. The claimant further

alleges that the incorrect blood type (A-Positive) was used in at least four of the transfusions that he received. The infant claimant was on June 4, 2011 airlifted to a hospital in the USA in a critical state and was hospitalized for months. As a consequence, he is alleging that he has suffered pain, injuries, loss, damage and incurred expenses as a result.

[6] This matter progressed quite quickly through the Court. On June 26, 2012 the claim form was served on the 1st defendant. An acknowledgement of service was due on July 10, 2012. When this was not forthcoming, the claimant filed a notice of application for permission to enter judgement in default of acknowledgement of service against the 1st defendant on July 18, 2012. This application was served on the same day it was filed. An acknowledgement of service was filed on July 23, 2012, out of time and after the request for judgement in default was filed. An amended notice for permission to enter judgement in default of acknowledgement of service and defence was filed and served on the 1st defendant on November 01, 2012. The defendants countered by filing an application on November 09, 2012 seeking orders which would allow their acknowledgement of service that had been filed out of time to stand, to extend the time for the filing of their defence and to abridge the time for the service of their application.

Relevant provisions of the Civil Procedure Rules (the CPR)

[7] Rule 10.3 (9) of the CPR provides that a defendant may apply for an order extending the time for filing a defence. Rule 10.3 (1) states that as a general rule the period for filing a defence is forty-two (42) days after the date of service of the claim form. Rule 11.11 (3) allows the court to abridge the time for the service of any notice of application for court orders. Since the claim is against the state, the court's permission is required as a precondition of an entry of default judgement by virtue of Rule 12.3 (1). Rule 26.2 (2) (c) permits the court to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for extension is made after the time for compliance has passed.

The Issue

[8] Since it is agreed that rule 10.3 (9) does not stipulate the criteria that "ought to be utilised in the exercise of the power to enlarge time", in light of the submissions that have been made by counsel for the parties, this is the main issue to be resolved.

Analysis

[9] The CPR is silent on the factors that are to be considered when an application is made under rule 10.3 (9), an examination of any relevant case law on this issue will therefore, in my view, be instructive. The case of **Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v. Frederick and Gertrude Flemmings** [2010] JMCA Civ 19, a procedural appeal delivered on May 18, 2010 provides guidance. The appellant in that case made an application requesting that the time for filing his defence be extended and that the defence be filed and served on the respondents within 14 days from the date of the order. Judgement against the appellants had not yet been entered and although there was a request for judgement this application had not been served on the other side and no arguments were presented on this application.

[10] At paragraph 36 of the **Philip Hamilton** case Phillips J.A. said, "it is clear that neither rule 10.3 (9) or 26.1 (2) (c) contain the criteria that ought to be utilized in the exercise of the power to enlarge time. The principle governing the court's approach in determining whether to grant or refuse an application for extension of time was summarized by Lightman J in an application for extension of time to appeal in the case of **Commissioner of Customs and Excise v. Eastwood Care Homes (Ilkeston) Ltd. and Others** 2001 EWHC Ch 456 which has been endorsed in this court in **Fiesta Jamaica Ltd v. National Water Commission** [2010] JMCA Civ at [15]. In the latter case, the issue related to the filing of a defence out of time. In her judgement Harris J.A. referred to the dictum of Lightman J which set out the principles, thus:

> "In deciding whether an application for extension of time was to succeed under rule 3.1 (2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application is 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 there to be observed and the resources of the parties which might in particular be relevant to the question of prejudice."

[11] I have to determine therefore if there is sufficient material before me which could provide a good reason for the delay in failing to comply with rule 10.3 (1) of the CPR **and also** (emphasis supplied) if there is any information to satisfy me that there is merit in the case. (Per Phillips J.A. at [37] of the **Phillip Hamilton** case).

[12] In the **Fiesta** Case Harris J.A. at [16] said, "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." (Emphasis supplied)

[13] It is clear to me based on these two authorities that before I can exercise my discretion to grant the defendants' application to extend the time for filing their defence, there must be evidence before me that satisfactorily provides a good reason for the delay in failing to comply with Rule 10.3 (1) of the CPR and also that there is merit in their case.

[14] The affidavit of Miss Marlene Chisholm which supports the defendants' application does not contain any evidence which could be said to remotely serve the purpose of satisfying the court that the defendants' case has merit. A proposed defence was not exhibited. Her affidavit seeks to provide an explanation for the defendants' non-compliance with the Rules 9.3 (1) and 10.3 (1) of the CPR and to declare that the

claimants are unlikely to be seriously prejudiced by the delay, without more. So while I can assess the evidence to determine if the defendants have provided a good reason for the delay, I am unable to determine if there is merit in their case. My understanding is that these two conditions in addition to those stated by both Harris JA in the **Fiesta** case and Phillips JA in the **Philip Hamilton** case must be satisfied before the court can exercise its discretion under rule 10.3 (9).

[15] I will readily say that the delay in this matter has not been inordinate. The claim form was served on the 1st defendant on June 26, 2012. The acknowledgement of service was due on July 10, 2012, but was not filed until July 23, 2012. The defence was due within 42 days of the date of service. However, during the long vacation which commenced on the 1st August (rule 3.4 (1)), the time prescribed by the rules for filing and serving any statement of case does not run (See rule 3.5 (1)). The Michaelmas term commenced on September 16 (see rule 3.3). However, since the 16th of September this year was a Sunday, the term commenced on the following Monday which was September 17 (rule 3.3 (c)). Therefore the defence should have been filed by September 24, 2012. The date of the application to extend the time for filing the defence was made on November 09, 2012. The defence, by that time, was overdue for a little over a month and a half.

[16] Even if I am wrong on this account and time of the breach is calculated to be from July 10, 2012, the date that the acknowledgement of service was due to be filed, that period of delay would be approximately four months. It is my view that the delay of four or one and a half months is not inordinate. In the **Fiesta** case approximately six months had elapsed from the date of the breach of rule 10.3 (1) of the CPR to the date that the application for leave to file defence out of time was made. Harris J.A. said at [21], “I would not regard the delay in making the application inordinate.”

[17] The explanation given for the delay is to be found Miss Chisholm’s affidavit. She has stated that an acknowledgement of service was not filed in time because due to an administrative oversight the matter was not assigned to an attorney-at-law in the Attorney General’s Chambers when the claim form was served on the 1st defendant on June 26, 2012. In fact this matter was not assigned to her until July 23, 2012 and this

would have been after the claimant had filed an application seeking permission to enter judgement in default of acknowledgement of service on July 18, 2012. The acknowledgement of service was filed on the very day the matter was assigned to her – July 23, 2012, albeit out of time and after the request for default judgment was made.

[18] She further stated that during the months of July and August she sought instructions from the Ministry of Health and at the end of August 2012 she received some instructions but these were not adequate as none was received from the 2nd defendant's servants and /or agents who were responsible for the testing of the infant claimant's blood or in charge of the Blood Testing Unit. These instructions were not available when the defendants' application was made on November 09, 2012 but she believed that these would become available before the end of November. In conclusion she said that the failure to comply with the rules was not deliberate and the claimant would not be likely seriously prejudiced by the delay.

[19] I am unable to accept that the assignment of the matter to counsel in the Attorney General's chambers until almost one month after the claim form was served as a result of an administrative oversight provides a good reason for the delay. What was the nature of this administrative oversight? No details were provided. I am also unable to accept that the inability of the 1st defendant to obtain sufficient/complete instructions for more than four months after the claim form was served and almost three months after the case was assigned to Miss Chisholm is a good explanation for the delay in complying with the rules. No explanation has been offered as to the reason the first defendant has not been able to obtain the required instructions from its servants and/or agents. I am therefore unable to determine, borrowing a phrase from the case of **Hashtroodi v. Hancook** 2004 3 All E.R. (D) 530, if the defendants are "seeking the court's help to overcome a genuine problem that they have encountered or is seeking relief from the consequences of their own neglect." In any event I would have imagined that obtaining the required instructions would have been treated as a matter of extreme urgency, given the nature of the claim, the alleged facts and that counsel for the defendants would have been aware of the claimant's pending application for permission to enter judgement and the need to make their application that is now being considered.

[20] It is settled law that even where there is the absence of a good reason for delay, the court is not bound to reject an application for extension of time. (**Leymon Strachan v. Gleaner Co. Ltd et al** SCCA Motion No. 12/99 delivered December 06, 1999 and **Peter Haddad v. Donald Silvera** SCCA 31/2003 delivered on July 31, 2007) In the **Fiesta** case Harris JA at paragraph 21 of the judgement said, "Although no good explanation had been proffered for the delay, in the interest of justice, I think it is important that the proposed defence is examined in order to determine if it discloses an arguable defence to the claim." At paragraph 43 of the **Philip Hamilton** case, Phillips JA stated, "However, even if there was no good reason for the delay, in the interest of justice, the proposed defence would have to be examined in order to ascertain if there is any merit in the same."

[21] Although I have found that the explanation given for the delay was not satisfactory, this would not have been determinative of the matter, as the interest of justice would have required me to determine if the defendants' case is meritorious. This would have involved an examination of the evidence presented by the defendant on the merits of their case and their proposed defence. Unfortunately, I am unable to carry out this exercise because of the reasons stated in paragraph 13 above.

[22] I am well aware that litigants are not to be lightly deprived of having their cases determined on merit. However, while the claimant has complied with the rules and done all that is required to have their claim progress in a timely way through the Court, the defendants up to the time that their application was heard had not put themselves in a position to advance the merits of their case. I am consequently unable to assist them and the claimant's application therefore succeeds.

[23] For the reasons stated above, the defendants' applications to allow their acknowledgement of service filed out time to stand and to extend the time for filing their defence are denied. They are however, permitted to abridge the time for the service of their application filed on November 09, 2012. Permission is granted to the claimant to enter judgement in default of acknowledgement of service and defence against the defendants. The matter is to proceed to assessment of damages on a date to be fixed by the Registrar on the application of the claimant's attorneys-at-law. The defendants

are granted leave to appeal. The cost of the applications is awarded to the claimant and is to be taxed, if not agreed and finally, the claimant's attorneys-at-law are to prepare, file and serve the orders made.

Orders

1. Permission is granted to the defendants to abridge the time for the service of their application.
2. The defendants' applications for the acknowledgement of service that has been filed out of time to stand and to extend the time for filing a defence are refused.
3. The claimant is granted permission to enter judgement in default of acknowledgement of service and defence against the defendants.
4. The matter is to proceed to assessment of damages on a date to be fixed by the Registrar on the application of the claimant's attorneys-at-law.
5. The defendants are granted leave to appeal.
6. The cost of the applications is awarded to the claimant and is to be taxed, if not agreed.
7. The claimant's attorneys-at-law are to prepare, file and serve the orders made.