

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2016-01971

BETWEEN

DANE DURHAM

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE M. DEAN-ARMORER

APPEARANCES

Mr. Gideon Mc Master, Advocate instructing Mr. Joel Roper, Attorneys-at-Law for the Claimant
Ms. Elena Da Silva Advocate instructing Mr. Sean Julien, Attorneys-at-Law for the Defendant

JUDGMENT

Introduction

1. By his Claim Form filed on the 9th June, 2016, Dane Durham sought damages against the Attorney-General, for assault, battery, unlawful shooting and malicious prosecution, at the hands of named officers.
2. Eight (8) months later, on the 20th February, 2017, the Claimant moved this Court for an Order for Judgment in default of defence.
3. Some two (2) weeks later on the 9th March, 2017 the Attorney-General filed a Notice of Application seeking an extension of time to have the defence filed.
4. Accordingly, in the course of this Judgment, the Court considered two (2) applications:

- The Application of the Claimant for Judgment in default of defence¹
- The Application of the Defendant/Attorney-General to have time extended for filing of a defence².

The Evidence

5. Both applications were supported by affidavits. The Claimant, in his application for judgment in default, relied on the affidavit, which was sworn by attorney-at-law Joel Roper who recounted the undisputed history of these proceedings.³
6. The Defendant/the Attorney-General relied on the affidavit of State Solicitor Ryanka Ragbir, whose affidavit was filed on the 9th March, 2017.⁴ By her affidavit, Ms. Ragbir told the Court of the difficulties attorneys-at-law for the Defendant were experiencing in obtaining instructions, which were necessary for the drafting of the defence.

Facts

7. The facts begin, of course, with the filing of the Claim on the 9th June, 2016. The Claim was initiated against three (3) named Police Officers and the Attorney-General. This was followed by a request on the 12th July, 2016, on behalf of the Defendant/Attorney-General for further and better particulars of the Claimant's case. This request was made pursuant to Rules 35.1 and 58.4 of *the Civil Proceedings Rules 1998 (CPR)*⁵.
8. The Claimant responded to the request for particulars on the 18th August, 2016, and on the 15th September, 2016, the Defendant/Attorney-General filed a Notice indicating his satisfaction with the particulars, as supplied by the Claimant.

¹ Notice of Application filed on the 20th February, 2017

² Notice of Application filed on the 9th March, 2017

³ Affidavit of Joel Roper filed on the 20th February, 2017

⁴ Affidavit of Ryanka Ragbir filed on the 9th March, 2017

⁵ The Civil Proceedings Rules 1998 (CPR)

9. After having received the particulars of the Defendant, the Claimant discontinued the Claim against the named Police Officers. However, the Claim continued against the Attorney-General.
10. An Appearance was entered on behalf of the Attorney-General on the 15th September, 2016. However, learned attorney-at-law for the Attorney-General obtained the consent of learned Attorneys-at-law for the Claimant, for an extension of time for the filing of the defence to the 28th January, 2017.
11. No defence having been filed by the extended deadline, the Claimant sought the Court's permission, on the 20th February, 2017, for Judgment in default of defence.
12. This was swiftly followed by an Application on behalf of the Attorney-General for yet another extension of time for filing of the defence.⁶
13. By her supporting affidavit, learned instructing attorney-at-law, Ms. Ragbir alluded to problems arising with staffing in her department. This led to the request for a further extension of time and to the agreement between learned attorneys-at-law, Mr. Roper on behalf of the Claimant and Mr. Julien on behalf of the Defendant, that time be extended for filing of the defence to be the 28th January, 2017.
14. Ms. Ragbir recounted the efforts of Attorneys-at-law for the Defendant to obtain instructions from the 12th January, 2017 to the 6th March, 2017, when attorneys-at-law for the Attorney-General received the Claimant's Application for Judgment in default of defence.
15. Ms. Ragbir deposed that she received information from Acting Superintendent Mark, Investigating Officer in this matter that the Investigator's file was at the Professional Standards Bureau. In response, Ms. Ragbir sent a memorandum to the Legal Unit of the

⁶ Notice of Application filed on the 9th March, 2017

Office of the Deputy Commissioner of Police requesting that a copy of the Investigator's file be forwarded urgently to the Chief State Solicitor's Department.

16. Ms. Ragbir told the Court that the Police Legal Unit responded by way of a letter dated the 13th January, 2017 and indicated that a response would be sent within "*a reasonable time*".
17. The Chief State Solicitors Department received the file on the 13th February, 2017 and Ms. Ragbir proceeded to schedule meetings with all Police Officers, against whom allegations had been made.
18. On the advice of Counsel, Ms. Ragbir forwarded another memorandum to the Police Legal Unit, in an effort to obtain further instructions.
19. On the 28th February, 2017, WPC Cummings, of the Police Legal Unit contacted Ms. Ragbir in order to inform her of difficulties which the Police Legal Unit was experiencing.
20. Ms. Ragbir testified that WPC Cummings informed her that of the seven (7) Police Officers, of whom instructions were required, one could not be contacted and three (3) were on suspension.
21. Learned attorneys-at-law filed written submissions.

Law

Provisions of the CPR

22. A Defendant is required to file a defence within twenty-eight (28) days of service of the Claim. Where the Defendant is the State, a defence must be filed within forty-two (42) days. See Part 10(3)(3) of the ***CPR***⁷.
23. Part 12.2(2)(a) of the ***CPR***⁸ requires an application for judgment in default of defence first to obtain the Court's permission, if judgment is being sought against the State.

⁷ The Civil Proceedings Rules 1998

⁸ The Civil Proceedings Rules 1998

24. Part 1.1 of the *CPR*⁹ identifies the overriding objective in these terms:

“(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, so far as it is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

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

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

By Part 1.2 of the *CPR*¹⁰, the Court is required to give effect to the overriding objective when it –

“(1) exercises any discretion given to it by the Rules...”

25. A Defendant including the Attorney-General may, by Part 10.3(5) of the *CPR*¹¹ apply for an order extending the time for filing a defence.¹²

Discussion

26. As stated above, two applications engage my attention:

⁹ The Civil Proceedings Rules 1998

¹⁰ The Civil Proceedings Rules 1998

¹¹ The Civil Proceedings Rules 1998

¹² Part 10.3(5) of the Civil Proceedings Rules 1998

- An application to enter judgment in default of defence.¹³
- An application to extend time for the filing of the defence.¹⁴

27. It is my view that the Application for an extension of time must necessarily be considered first. If this application is unsuccessful, there would be no good reason for refusing the application for judgment in default. This approach had been adopted by the Honourable Justice Boodoosingh and endorsed by the Court of Appeal in Civil Appeal No. 44 of 2014, ***Roland James v. The AG***¹⁵.

28. In considering the application for an extension of time, the Court exercises powers conferred by Part 10.3(5) of the ***CPR***¹⁶. The Court is therefore required to exercise its discretion, having regard to the overriding objective. See ***Roland James v. The AG***¹⁷, where Mendonça JA had this to say at paragraph 20:

*“Unlike Rule 26.7, Rule 10.3(5) does not contain a list of criteria for the exercise of the discretion it gives to the Court. The question then arises how the Court’s discretion is to be exercised. I think because no criteria is mentioned in Rule 10.3(5) it was intended that the Court should exercise its discretion having regard to the overriding objective...”*¹⁸

29. In ***Shadea Cruickshank v. The AG***¹⁹ Justice Pemberton, as she then was underscored that each case should be dealt with *sui generis* against the background of furthering the overriding objective of the ***CPR***²⁰, which is to enable the Court to deal with matters justly.

¹³ Notice of Application filed on the 20th February, 2017

¹⁴ Notice of Application filed on the 9th March, 2017

¹⁵ See Civil Appeal No. 44 of 2014, per Mendonça, JA at paragraph 13

¹⁶ Civil Proceedings Rules 1998 as amended

¹⁷ See Civil Appeal No. 44 of 2014, per Mendonça, JA at paragraph 13

¹⁸ Civil Appeal No. 44 of 2014

¹⁹ *Shadea Cruickshank v. The Attorney-General of Trinidad and Tobago* CV 2011-00674

²⁰ Civil Proceedings Rules 1998

30. In *Bernard Hosam v. Damian Hosam*²¹ Justice Pemberton (as she then was), alluded to the case of *Keron Matthews*²², where their Lordships approved the emphasis by Gobin J, on the issue of prejudice to the opposing side.
31. In considering an application for an extension of time, the Court is required to consider the explanation advanced. The Court is interested in a good, but not an infallible explanation. See *Rawti Roopnarine and Another v. Harripersad Kissoon and Others*²³.
32. Applying the above learning to these proceedings, I was mindful that, here, the Court was not concerned with an application for relief from sanctions or an application to set aside judgment, but one for an extension of time. As directed by the Court of Appeal in *Roland James v. The AG*²⁴, I exercised my discretion having regard to the overriding objective, and considered the explanation advanced by learned attorneys-at-law for the Attorney-General. The explanation advanced was essentially that attorneys-at-law for the Defendant were not being supplied by the instructions, which they required for settling the statement of defence. Moreover, there was no indication as to when, if at all, such instructions would be available. Thus, Ms. Ragbir indicated that four of the Officers concerned were simply beyond the reach of the Police Legal Unit. Ms. Ragbir, in her affidavit, offered no evidence as to when, or how, the Officers could be contacted to provide instructions. Attorneys-at-law were confronted with an open-ended situation.
33. I considered whether learned attorney-at-law for the Attorney-General had offered a good though fallible explanation. Ms. Ragbir carefully explained the delay which occurred between the agreed extension on the 28th January, 2017, and the Application which was filed

²¹ Bernard Hosam v. Damian Hosam CV2011-04355

²² The Attorney-General v. Keron Matthews [2011] UKPC 38

²³ Rawti Roopnarine & Another v. Harripersad Kissoon and Others Civil Appeal No. 52 of 2012

²⁴ See Civil Appeal No. 44 of 2014, per Mendonça, JA at paragraph 13

on the 9th March, 2017 for the Court's permission for an extension. Her inability to procure instructions constituted a good reason up to date of that Application. Tragically, however, learned attorneys-at-law were powerless to predict when, if at all, such information would be forth coming, and could not provide a date by which they would be committed to filing the defence. In this situation, the prejudice to the Claimant is obvious. The Claimant would be required to wait indefinitely while attorneys-at-law redoubled their effort at obtaining instructions. It would be contrary to the overriding objective to grant either an open-ended extension or an extended deadline, which the Defendant had no reasonable prospect of honouring.

34. In these proceedings, one finds hard working attorneys struggling to extract instructions out of the Police Legal Unit as one would attempt to extract blood from stone. The evidence placed before this Court has led me to believe that in spite of the brilliant diligence of state attorneys-at-law, their attempts at settling a defence, was a feckless exercise.
35. In my view, no useful purpose would be served by granting an extension of time for filing a Defence, since the evidence does not forecast the possibility of the Defendant obtaining instructions in the near future, or at all. The Application of the Defendant for an extension of time is refused²⁵.
36. I considered the argument on behalf of the Attorney-General that the application for permission to enter a default judgment was premature. This argument was based on the fact that an earlier Application for an extension of time to file the defence had not been determined.²⁶ In support of their submission, learned attorneys-at-law relied on the decision

²⁵ See the Notice of Application filed by the Defendant on the 9th March, 2017

²⁶ See the Application by Consent filed on the 29th November, 2016

of the Court of Appeal in *Dr. Steve Smith v. Bartholomew*²⁷, in which Justice of Appeal Breaux held that an application for default judgment was inappropriate, in the face of a long subsisting application for an extension of time to file a defence.

37. In my view however, these proceedings are distinguishable from those which obtained in *Dr. Steve Smith v. Bartholomew*²⁸. In *Dr. Steve Smith v. Bartholomew*²⁹, Justice of Appeal Breaux considered an application for the extension of time which had been “actively” engaging the Court.³⁰ In these proceedings, by contrast there was an application for an extension of time which had received the consent of the Claimant. Because it was an application by consent, it could not be described as either subsisting or engaging the attention of the Court. One would have expected that, pursuant to that application, the Defendant would have proceeded to file the defence by the agreed date. This was not done because of the dearth of instructions which were necessary for the preparation of the defence. Learned attorneys-at-law, recognising this, proceeded to file the Notice of Application of the 9th March, 2017, which application has here engaged my attention. Accordingly, it was in my view, the argument of prematurity was artificial, since the consent application was overtaken by the later application of the Attorney-General for an extension of time.
38. Accordingly, it was my view that the Claimant is entitled to judgement in default of defence. Damages to be assessed by a Master in Chambers.

Dated this 25th day of July, 2017.

M. Dean-Armorer
Judge

²⁷ Dr. Steve Smith v. Bartholomew C.A.CIV.135/2012

²⁸ Dr. Steve Smith v. Bartholomew C.A.CIV.135/2012

²⁹ Dr. Steve Smith v. Bartholomew C.A.CIV.135/2012

³⁰ Ibid at page 3 of the Transcript.