

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2023/0019

BETWEEN:

[1] RAMESH AMARNANI
[2] MOHAN AMARNANI
(By his lawful son and interested party Mahesh Amarnani)

Applicants

and

AEA COMPANY LIMITED

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Gennilyn Ettienne for the Applicants
Mr. Ruggles Ferguson KC, with him Ms. Mckaeda Augustine for the Respondent

2025: February 28;
May 06.

Application for an extension of time to file an application for leave to appeal – Application for leave to appeal – Ancillary claims – Rule 18.2(4) of the Civil Procedure Rules, 2000 - Time for service of an ancillary claim form – Rule 18.5 of the Civil Procedure Rules, 2000 – Extension of time for service of an ancillary claim form – Exercise of case management powers

Before the Court were two applications filed by the applicants on 14th June 2023. In the first application, the applicants sought an extension of time to file an application for leave to appeal the decision of the learned master dated 27th April 2023 and in the second application, the applicants sought leave to appeal the decision of the learned master dated 27th April 2023.

The applications arise out of a claim filed by the respondent in the court below on 11th August 2021, in which it claimed against the defendant for, among other things, an injunction restraining the defendant or his agents from trespassing on property belonging to the respondent (the “Property”) and damages for trespass. On 20th August 2021, the defendant filed a defence and counterclaim in which he alleged that it was the respondent who was encroaching on land belonging to the defendant (the “Encroached Property”) and counterclaimed, among other things, for a declaration that the Encroached Property was the property of the defendant and damages for trespass. The respondent on 22nd July 2022 filed an ancillary claim form against the applicants as ancillary defendants seeking indemnity for any damages, costs and expenses that may arise from the defendant’s counterclaim. The respondent sought to rely on a Deed of Indemnity dated 13th July 2018 signed between the respondent and the applicants as it relates to any losses, costs, charges and expenses that relate to the non-production of a deed earlier than a Deed of Assent dated 25th March 1974. The respondent then filed an application on 10th October 2022 seeking permission to make an ancillary claim.

The application came on for hearing before the learned master on 31st October 2022 and he granted the application by the respondent to make an ancillary claim against the applicants by deeming the ancillary claim form filed by the respondent on 22nd July 2022 to be properly filed. The learned master ordered the ancillary claim form and all other forms, statements of case filed in the proceedings to be served on the applicants on or before 15th November 2022. On 6th April 2023, the applicants filed an acknowledgement of service of the ancillary claim form in which it was stated that they were served with the ancillary claim form on 22nd March 2023. On 25th April 2023, the respondent and the applicants (the ancillary defendants in the court below) filed a notice of consent to the late filing of the ancillary defence, noting that they had agreed to extend the time by which the ancillary defendants must file and serve a defence to the ancillary claim to 16th June 2023. The notice was signed by the legal practitioners for the parties.

The matter came on for case management before the learned master on 27th April 2023. After hearing from counsel for the parties, he made his order. In that order, the learned master ordered the applicants to file their defence to the ancillary claim on or before 16th June 2023 as agreed (the “Consent Extension Order”). On 14th June 2023, the applicants filed the two aforementioned applications for an extension of time to file an application for leave to appeal the decision of the master dated 27th April 2023 and an application for leave

to appeal. The applicants filed a defence to the ancillary claim on 19th June 2023 as amended on 11th July 2023, on the basis that the ancillary claim had expired by the effluxion of time and there was no order for an extension of time granted by the court.

The applicants contend that the acknowledgement of service entered on behalf of the second applicant was erroneous and failed to reflect that the second applicant was never served with the ancillary claim and that same was filed as a result of the misunderstanding and error by the then legal practitioners of the applicants. The applicants further submit that the learned master had no jurisdiction to make the Consent Extension Order because the time for serving the ancillary claim had expired and the acknowledgment of service was filed when the period for serving the ancillary claim had also expired.

Held: dismissing the application for an extension of time to file an application for leave to appeal, the application for leave thereby falling away, and ordering that the applicants pay costs to the respondent to be assessed if not agreed within 21 days of today's date, that:

1. Granting an extension of time is a discretionary power of the Court, which will be exercised in favour of the applicant for good and substantial reasons. The factors which the Court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the respondent if the application is granted. These factors mirror those that must be considered in determining whether to dismiss an appeal.

John Cecil Rose v Anne Marie Uralis Rose SLUHCVP2003/0019 (delivered 22nd September 2003, unreported) followed; **Carleen Pemberton v Mark Brantley** SKBHCVP2011/0009 (delivered 14th October 2011, unreported) mentioned.

2. The ancillary claim did not lose its validity due to the period of 6 months having elapsed prior to service. CPR 18.2(4) disapplies CPR 8.12 and CPR 8.13 to ancillary claims. By disapplying CPR 8.12, CPR 18.2(4) makes clear that the 6-month period within which an ordinary claim must be served does not apply to ancillary claims. Additionally, by disapplying CPR 8.13, CPR 18.2(4) makes clear that the limitations on the extension of time stated therein do not apply such that there is nothing in CPR 18.2(4) precluding the court from extending any time for service of the ancillary claim. CPR 18.5 (service of the ancillary claim form) is subject to the court's general case management powers in Part 26 of the Civil Procedure Rules, 2000, in particular, CPR 26.1(2)(k) which states that 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 for an extension is made after the time for compliance has passed.

Rule 18.2(4) of the **Civil Procedure Rules, 2000** applied.

3. A case management decision such as the court extending the time for compliance with any rule, practice direction, order or direction is a decision

entrusted to the first instance judge. The appellate court could only interfere with the discretion of the first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors, or has come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree. The master was clearly exercising his case management powers in making the Consent Extension Order. Before him was a filed consent order from the parties seeking an extension of time for filing the ancillary defence. The applicants have not shown that the learned trial judge misdirected himself in law or had failed to take relevant factors into account, had considered irrelevant factors, or had come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree. While the applicants had good reasons for the delay in seeking leave to appeal and the delay, in the circumstances, could not be said to be inordinate, the applicants have little or no chances of success of the appeal succeeding if the extension of time is granted to file the application for leave to appeal from the Consent Extension Order. Accordingly, the application for an extension of time must be dismissed.

Emmerson International Corporation v Renova Holding Limited
BVIHCMAP2019/0001 (delivered 7th February 2023, unreported) considered.

JUDGMENT

- [1] **VENTOSE JA:** The applicants filed two applications on 14th June 2023. In the first application, the applicants, the ancillary defendants in the court below, sought an extension of time to file an application for leave to appeal the decision of the learned master dated 27th April 2023 and in the second application, the applicants sought leave to appeal the decision of the learned master dated 27th April 2023.
- [2] This matter has a storied history. On 11th August 2021, the respondent filed a claim against the defendant for, among other things, an injunction restraining the defendant or his agents from trespassing on property belonging to the respondent (the “Property”) and damages for trespass. On 20th August 2021, the defendant filed a defence and counterclaim in which he alleged that it was the respondent who was encroaching on land belonging to the defendant (the “Encroached Property”) and counterclaimed, among other things, for a declaration that the Encroached Property was the property of the defendant and damages for trespass.

- [3] The respondent on 22nd July 2022 filed an ancillary claim form against the applicants as ancillary defendants seeking an indemnity for any damages, costs and expenses that may arise from the defendant's counterclaim. The respondent had purchased the Property from the applicants on 13th July 2018. The respondent sought to rely on a Deed of Indemnity dated 13th July 2018 signed between the respondent and the applicants as it relates to any losses, costs, charges and expenses that relate to the non-production of a deed earlier than a Deed of Assent dated 25th March 1974. The respondent then filed an application on 10th October 2022 seeking permission to make an ancillary claim.
- [4] The application came on for hearing before the learned master on 31st October 2022 and he granted the application by the respondent (the claimant and the ancillary claimant in the court below), to make an ancillary claim against the applicants by deeming the ancillary claim form filed by the respondent on 22nd July 2022 to be properly filed. The learned master ordered the ancillary claim form and all other forms, statements of case filed in the proceedings to be served on the applicants on or before 15th November 2022.
- [5] On 30th March 2023, the respondent filed an application seeking the following orders: (1) an order deeming the service of the ancillary claim form and all previously filed pleadings on Ramesh Amarnani on 22nd March 2023 as proper; and (2) an order permitting the respondent to serve Mohan Amarnani with the ancillary claim form and all previously filed pleadings through his attorney-in-fact Mahesh Amarnani. On 6th April 2023, the applicants filed an acknowledgement of service of the ancillary claim form in which it was stated that they were served with the ancillary claim form on 22nd March 2023. On 25th April 2023, the respondent and the ancillary defendants (the applicants herein) filed a notice of consent to the late filing of the ancillary defence, noting that they have agreed to extend the time by which the ancillary defendants must file and serve a defence to the ancillary claim to 16th June 2023. The notice was signed by the legal practitioners for the parties.

- [6] The matter came on for hearing at a case management conference before the learned master on 27th April 2023, in which the learned master noted: (1) the acknowledgment of service filed by the applicants on 6th April 2023; and (2) the notice of consent to the late filing of the defence filed by the respondent on 25th April 2023 and signed by counsel for the parties, and after hearing from counsel for the parties he made his order. In that order, the learned master ordered the applicants to file their defence to the ancillary claim on or before 16th June 2023 as agreed (the “Consent Extension Order”).
- [7] The applicants filed a defence to the ancillary claim on 19th June 2023 as amended on 11th July 2023, on the basis that the ancillary claim had expired by the effluxion of time and there was no order for an extension of time granted by the court. The applicants also counterclaimed against Renwick and Payne, a law firm, for an indemnity for any damages, costs and expenses that may arise from the defendant’s counterclaim. The defendants to the applicants’ counterclaim in the ancillary claim filed a defence on 11th June 2024.
- [8] On 13th May 2024, two applications came on for hearing before the learned trial judge: (1) an application for an order that the validity of the applicants’ (ancillary) claim be extended; and (2) an application for the second applicant, Mohan Amarnani to be substituted by Mahesh Amarnani. The learned trial judge noted that there was no objection to the grant of the substitution application. In respect of the extension application, the following was stated by the learned judge in the preamble to the order:
- “With respect to the extension application, after discussions with counsel, it does appear that the claim was served on the law firm which acknowledges receipt of the paper copy. There was, however, noncompliance with the rules on service on (sic) the electronic portal code. The court could have utilized CPR 26.9 to address the procedural oversight. However, by the time that this application was brought, the time for service of the claim had expired. Counsel for the law firm nonetheless is prepared to accept that the law firm was eventually served with the code. So as at today’s date, the law firm has both the code and the claim. The law firm also does not strenuously

object to the court putting matters right and allowing the claim to proceed. In view of the posture taken by the parties and in light of the court's case management powers to set procedural missteps aright and to further the overall objective to manage the case to achieve a just outcome, the court will extend the time for the claim to proceed. There seems to be no case management utility in discussing the claim. The ancillary claimant will in all likelihood file the same claim again. This in my view be a patent waste of the court's time and resources."¹

- [9] It is apparent that this order relates to service in respect of the ancillary claim made by the applicants on the law firm of Renwick and Payne, and not service of the ancillary claim made by the respondent against the applicants. Consequently, this order has no bearing on the issues relating to the application for an extension of time to which I now turn.

The application for an extension of time

- [10] As noted earlier, the applicants filed an application on 14th June 2023 for an extension of time to file an application for leave to appeal the decision of the learned master dated 27th April 2023. This application was supported by an affidavit of Ariela Medford filed on 15th June 2023.
- [11] This Court in **John Cecil Rose v Anne Marie Uralis Rose**² stated at paragraph [2] that granting the extension of time is a discretionary power of the Court, which will be exercised in favour of the applicant for good and substantial reasons. It continued that the matters which the Court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the respondent if the application is granted. These principles have been applied several times by this Court in the context of an application for an extension of time for filing a notice of appeal, including in **Carleen Pemberton v Mark Brantley**.³

¹ Trial Bundle pages 352 – 353.

² SLUHC VAP2003/0019 (delivered 22nd September 2003, unreported).

³ SKBHC VAP2011/0009 (delivered 14th October 2011, unreported).

- [12] The Consent Extension Order of the master was made on 27th April 2023. Pursuant to rule 62.2(1) of the **Civil Procedure Rules 2000** (the “CPR”) the applicants had 14 days within which to file the application for leave to appeal. The application should have been filed on or before 12th May 2023. The application for leave to appeal was filed on 14th June 2023, 33 days late. In the affidavit in support of the application, it was stated that the application was filed late because Mohan Amarnani was gravely ill and died on 7th June 2023 and that Mr. Ramesh Amarnani was also gravely ill. It was stated that the applicants are brothers originally from India and that at the time of the order made on 27th April 2023 both were in poor health, in need of family assistance for their care and facing serious medical illness. I can readily accept that these reasons are good reasons for the delay in filing the application for leave to appeal the Consent Extension Order. In such circumstances, it cannot be said that the delay was inordinate.
- [13] In considering the merits of the appeal or rather the chances of the appeal succeeding if the extension of time is granted, I note that the decision that the applicants seek to appeal is a case management decision of the learned master as contained in the Consent Extension Order. The applicants state that the acknowledgement of service entered on behalf of the second applicant was erroneous and failed to reflect that the second applicant was never served with the ancillary claim and that same was filed as a result of the misunderstanding and error by the then legal practitioners of the applicants.
- [14] The applicants further submit that the learned master had no jurisdiction to make the Consent Extension Order because the time for serving the ancillary claim had expired and the acknowledgment of service was filed when the period for serving the ancillary claim had also expired.
- [15] CPR 18.4(1) states that a defendant may make an ancillary claim (other than a claim falling within rule 18.3) without the court’s permission if in – (a) the case of a counterclaim – it is filed with the defence; or (b) any other case – the ancillary claim

form is filed before the case management conference. CPR 18.4(2) states that where paragraph (1) does not apply an ancillary claim may be made only if the court gives permission. CPR 18.4(3) states that an application for permission under paragraph (2) may be made without notice unless the court directs otherwise. The respondent filed its defence on 15th October 2021 but did not also file an ancillary claim with the defence so the respondent could not thereafter file the ancillary claim without the court's permission pursuant to CPR 18.4(1)(a). The ancillary claim was not filed before the case management conference so the respondent could also not file the ancillary claim without the court's permission pursuant to CPR 18.4(1)(b). They could only find refuge in CPR 18.4(2).

- [16] The respondent belatedly appreciated that it could not have filed the ancillary claim, which it filed on 22nd July 2022, without permission of the court under CPR 18.4(3). It was therefore not surprising that the respondent sought permission of the court on 10th October 2022 to file the ancillary claim and to deem the ancillary claim filed on 22nd July 2022 to be properly filed. As noted above, the learned master granted that order on 31st October 2022 and ordered the respondent to serve the ancillary claim on the applicants on or before 15th November 2022. The starting point for service of the ancillary claim is therefore CPR 18.5 which provides as follows:

"Service of ancillary claim form

18.5 (1) An ancillary claim which may be made without the court's permission must be served on the person against whom it is made within 14 days after the date the defendant files a defence.

(2) If the court gives permission to make an ancillary claim it must at the same time give directions as to the service of the ancillary claim form.

(3) A copy of the ancillary claim form and ancillary statement of claim (if any) must be served on all other parties."

- [17] When the learned master made the Consent Extension Order he complied with CPR 18.5(2), as he was required to do. He gave a direction to the respondent to serve the ancillary claim on the applicants on or before 15th November 2022. It must be noted that the Consent Extension Order did not go on to provide that if the respondent failed to comply with the time for service, the ancillary claim would be struck out.

- [18] The applicants contended that the ancillary claim had lost its validity because the period of 6 months for service of the ancillary claim had lapsed. In my judgment, the applicants' contention is wholly misconceived.
- [19] CPR 18.2(4) disapplies CPR 8.12 (time within which a claim form may be served) and CPR 8.13 (extension of time for serving a claim form) to ancillary claims. The applicants misunderstand the impact of CPR 18.2(4). It does two things. First, by disapplying CPR 8.12 it makes clear that the 6-month period within which an ordinary claim must be served pursuant to CPR 8.12(1) does not apply. Second, by disapplying CPR 8.13 it makes clear that the limitations on the extension of time stated therein do not apply. There is nothing in CPR 18.2(4) that can be read as precluding the court from extending any time for service of the ancillary claim in CPR 18.5. The applicants correctly accept that CPR 18.5 is subject to the court's general case management powers in Part 26, in particular, CPR 26.1(2)(k) which states that 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 for an extension is made after the time for compliance has passed.
- [20] The applicants incorrectly read CPR 18.5 as a limitation on the court's general powers in CPR 26.1(2)(k). As just mentioned, nothing in CPR 18.4 or CPR 18.5, precludes the application of any of the court's case management powers being deployed in respect of an ancillary claim. This Court has repeated on many occasions, such as in **Emmerson International Corporation v Renova Holding Limited**⁴ that case management decisions are discretionary decisions in which the discretion is entrusted to the first instance judge. This Court makes clear that an appellate court can interfere with the discretion of the first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors, or has come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree.

⁴ BVIHCMAP2019/0001 (delivered 7th February 2023, unreported).

[21] In my view, the learned master, while not expressly referring to CPR 26.1(2)(k), was clearly exercising his case management powers in making the Consent Extension Order. Before him was a filed consent order from the parties seeking an extension of time for filing the ancillary defence. The applicants have not shown that the learned trial judge misdirected himself in law or has failed to take relevant factors into account, has considered irrelevant factors, or has come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree. In my view, the applicants have little or no chances of success of the appeal succeeding if the extension of time is granted to file the application for leave to appeal from the Consent Extension Order.

[22] It goes without saying that if chances on appeal are hopeless then, *a fortiori*, permitting such an appeal to go forward must be to the certain prejudice of the respondent who would wish to have its ancillary claim against the applicants determined at trial.

Disposition

[23] Based on the foregoing, the applicants have failed to satisfy this Court that in all the circumstances the factors weighed in their favour in enabling the exercise of the discretion to grant the extension of time sought. Accordingly, I would dismiss the application for an extension of time. It follows therefore that the application for leave to appeal falls away. The applicants shall pay costs to the respondent to be assessed if not agreed within 21 days of today's date.

[24] I am grateful for the assistance provided by learned counsel.

I concur.

Margaret Price Findlay
Justice of Appeal

I concur.

Vicki Ann Ellis
Justice of Appeal

By the Court

Chief Registrar