

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CLAIM NO. MNIHCV2023/0021

BETWEEN:

[1] PROVIDENCE ESTATE LIMITED

Claimant/Respondent

and

[1] REGISTRAR OF COMPANIES

Defendant/Applicant

Appearances:

Mr. Khamaal Collymore for the Claimant/Respondent

Ms. Renee Morgan for the Defendant/Applicant

2024: MARCH 26

2024: APRIL 30

RULING

FITZPATRICK [AG.]:

THE COURT CONSIDERED THE FOLLOWING.

[1] The Claimant/Respondent is a company incorporated in Montserrat that has many extant proceedings in this Court arising from real property transactions where the fundamental allegations are fraud based. To say that the combined litigation is complicated is to offer nothing more than a penetrating view into the obvious. My predecessor, Mr. Justice Morley, described these proceedings as being a “Gordian Knot” threatening to choke the ability of the Montserrat High Court to function with any degree of efficiency. That said, these files must be managed and progressed.

[2] The Defendant/Applicant is the Registrar of Companies for Montserrat.

- [3] The Claimant brought an application without notice seeking leave for judicial review of the decision of the Registrar of Companies to refuse to file amended, historic annual returns and Notice of Change of Directors for the corporation. Obtaining leave to seek judicial review was mandated in June, 2023 by the then operative Rule 56.3(1) of the Civil Procedure Rules 2000 (“CPR 2000”).
- [4] The Claimant’s application was heard before Mr. Justice Morley on June 30, 2023. Justice Morley’s Order granting leave was made *ex parte* pursuant to Rule 56.3(2) CPR 2000.
- [5] The Defendant became aware of Justice Morley’s Order on June 30, 2023 when it was served on its counsel. The application before this Court is brought by the Defendant seeking to set aside the Order of Justice Morley granting leave for judicial review (the “Defendant’s Application”). The Defendant’s Application was filed November 23, 2023.

Analysis

- [6] The first issue to address is to determine the Civil Procedure Rule(s) applicable to this Application.
- [7] As noted, the Claimant’s leave application was heard on June 30, 2023 when CPR 2000 were in force.
- [8] The Civil Procedure Rules (Revised Edition) 2023 (“CPR 2023”) came into effect on July 31, 2023, being 31 days following Justice Morley’s Order. CPR 2023 removed the requirement that leave be obtained by a party seeking judicial review.
- [9] The Defendant’s Application was commenced after CPR 2023 came into effect. Although the current Rules apply to the Defendant’s Application pursuant to CPR 2023 Rule 75.3(3), both CPR 2000 and CPR 2023 will be referenced for completeness given this matter straddles both.
- [10] The following are the CPR 2000 and equivalent CPR 2023 Rules engaged by this narrative:

Applications which may be dealt with without hearing

CPR 2000

Rule: 11.14

1. The court may deal with an application without a hearing if –
 - a. no notice of the application is required;

Service of application where order made on application made without notice

Rule: 11.15

1. After the court has disposed of an application made without notice, the applicant must serve a copy of the application and any evidence in support on all other parties.

Applications to set aside or vary order made on application made without notice

Rule: 11.16

1. A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.
2. A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.
3. An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.

Power of the court to proceed in absence of party

Rule: 11.17

1. If the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the court may proceed in the absence of that party.

Application to set aside order made in absence of party

Rule: 11.18

1. A party who was not present when an order was made may apply to set aside or vary the order.
2. The application must be made not more than 14 days after the date on which the order was served on the applicant.

3. The application to set aside the order must be supported by evidence on affidavit showing –
 - a. a good reason for failing to attend the hearing; and
 - b. that it is likely that had the applicant attended some other order might have been made.

CPR 2023

Applications which may be dealt with without hearing

Rule: 11.17

The court may deal with an application without a hearing if –

- (a) no notice of the application is required;

Service of application where order made on application made without notice

Rule: 11.18

After the court has disposed of an application made without notice, the applicant must serve a copy of –

- (a) the application;
- (b) any evidence in support of the application; and
- (c) the order made by the court,
on all other parties.

Applications to set aside or vary order made on application made without notice

Rule: 11.19

- (1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.
- (2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.
- (3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.

Power of the court to proceed in absence of party

Rule: 11.20

If the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the court may proceed in the absence of that party.

Application to set aside order made in absence of party

Rule: 11.21

- (1) A party who was not present when an order was made may apply to set aside or vary the order.
- (2) The application must be made not more than 14 days after the date on which the order was served on the applicant.
- (3) The application to set aside the order must be supported by evidence on affidavit showing –
 - (a) a good reason for failing to attend the hearing; and
 - (b) that it is likely that had the applicant attended some other order might have been made.
- (4) In any event, the court may set aside an order made in the absence of a party if the applicant satisfies the court that there are exceptional circumstances.

[11] As can be seen, the CPR 2000 and CPR 2023 Rules are similar, particularly where both provide a 14 day deadline following service of the order for a responding party to file to set aside.

[12] The Defendant's Application was argued with reference to the provisions of CPR 2023.

[13] The material difference between the CPR 2023 Rules for this Application is the deadline for filing to set aside an order where the other party was not a participant in the hearing.

[14] Rule 11.19(2) has a firm deadline of 14 days following service of the subject order. Rule 11.21(2) also has a deadline of 14 days following service of the subject order. However, Rule 11.21(4) further provides that the court can entertain an application to set aside filed at any point by an absent party where exceptional circumstances are established. In other words, there is no filing deadline of any kind in exceptional circumstances.

[15] The Claimant argues that CPR 2023 11.19(2) dealing specifically with the setting aside of orders obtained *ex parte* (without notice) is the Rule applicable to the Defendant's Application.

[16] Counsel for the Defendant argues that the broader provisions of Rule 11.21(4) are also available. In other words, counsel for the Defendant argues that both CPR 2023 11.19(2) and Rule 11.21(4) can apply and that she is at liberty to rely on either.

- [17] There is no doubt in the mind of this Court that Rule 11.19(2) dealing specifically with orders obtained *ex parte* (without notice) is the applicable Rule on this Application.
- [18] The Claimant appeared before Justice Morley on a **without notice** application as permitted by the then operative CPR 2000.
- [19] CPR 2000 11.16(2) and its current equivalent CPR 2023 Rule 11.19 (2) provide a 14 day deadline following service for a non-participant party to file an application to set aside an order obtained **without notice**. There is no doubt that the Defendant missed that 14 day deadline. As such, the Defendant submits there are here exceptional circumstances that permit this Court to allow the late filing for the Defendant's Application.
- [20] The difficulty for the Defendant is that CPR 2023 Rule 11.19 does not provide for exceptions to the deadline in exceptional or any other circumstances. If the drafters of CPR 2023 had intended an open ended deadline in exceptional circumstances to file an application to set aside an order obtained without notice then that would have been stipulated within Rule 11.19.
- [21] Related to the above, it is clear and unambiguous that CPR 2023 Rule 11.21 that does allow the Court to permit filing beyond the 14 day deadline addresses applications to set aside an order by a party who was **given notice** of the subject hearing but did not attend. That is not the case here. The Defendant was not given notice of the hearing before Justice Morley and cannot, therefore, seek to rely on the open ended opportunity for challenge presented by Rule 11.21(4).
- [22] Rule 11.19(2) set a firm deadline of 14 days for the Defendant to file his Application to set aside following service of Justice Morley's Order. The Defendant's Application was filed 132 days after that deadline. There is no provision within Rule 11.19 for the Court to permit filing beyond that 14 day deadline. On that basis, the Defendant's Application should be dismissed.
- [23] Even if there was some general authority for this Court to extend the filing deadline, the Defendant has failed to provide any meaningful justification for the exercise of such discretion.

- [24] The Defendant offers three explanations for the delayed filing, namely the busy schedule of the Registrar of Companies, the busy schedule of his counsel and the failure of the Order, as drafted by Claimant's counsel, to specifically state that the Defendant had the option to bring process before the Court to ask that the *ex parte* Order be set aside. I reject all of these.
- [25] The Registrar of Companies specifically swore that he prioritized his work to this Application. He also referenced work related travel amounting to 8 days as explanation for the delay. The Registrar's evidence also suggested that his counsel was, generally, busy, including one week where she was acting in the capacity of Attorney General.
- [26] Not prioritizing a response to the *ex parte* Order lays at the feet of the Registrar. It offers absolutely no reason why this Court would extend a filing deadline. His travel of 8 days also offers only the slightest response to a delay of 132 days.
- [27] Similarly, referencing counsel's duties for one week as acting Attorney General is a muted justification. Saying lawyers are generally busy is banal and unresponsive.
- [28] The final argument advanced to explain the long delay in the Application filing is the failure of the Order form, as drafted by Claimant's counsel, to specifically state that the Defendant had the option to bring process before this Court to set aside.
- [29] There is no doubt that the Claimant was required by CPR 2023 Rule 11.19(3) to include a statement in the drafting of Justice Morley's Order advising the Defendant that it had the "right to make an application under this rule", namely Rule 11.19, to set aside the *ex parte* Order.
- [30] As an aside, the irony of the Defendant's complaint about this missing language is not lost on me. The obligation to include the wording noted in Rule 11.19(3) identifying the right of a party who is served with an order obtained **without notice** "to make an application [to set aside] under this rule" seems to run contrary to the Defendant's argument above that its Application engages the provisions Rule 11.21(4).

- [31] The Claimant failed to include the language required by Rule 11.19(3) suggesting this was an oversight in drafting. To be clear, this was an error made by the Claimant's counsel and one I am critical of. However, on this Application the question is whether some or all of the 132 day filing delay can be blamed on this error. I can assign no such blame.
- [32] The submission on behalf of the Defendant is, of course, that the very experienced Attorney General's Principal Counsel and sometimes acting Attorney General representing the Defendant had no idea that the *ex parte* Order herein could be challenged because the Order failed to say so. This argument is hollow. I have no doubt that any lawyer as experienced as the Defendant's counsel would know that an *ex parte* order may be set aside upon notice of same.
- [33] Ignoring the experience of counsel herein, a first year lawyer once served would, if otherwise ignorant, simply look at CPR 11.19 to investigate the process surrounding *ex parte* orders thereby quickly learning the receiving side has 14 days to move to set aside.
- [34] I absolutely reject the argument that any part of the 132 day delay in filing this Application arose from the failure of the *ex parte* Order to state on its face that the Defendant had the option to bring process before the Court to set it aside.
- [35] In assessing whether to grant any available extension of time for filing, this Court may also consider the prospect of success for the Defendant's Application. Here, this also directs the Court to deny any extension.
- [36] The fundamental argument enshrined in the Defendant's Application is that Claimant's counsel misrepresented the evidence to Justice Morley resulting in a flawed decision by this Court. The only misrepresentation relied on by the Defendant was that counsel incorrectly suggested to Justice Morley that the letter from their office dated June 19, 2023 to the Registrar asked why the company's returns had been filed and then unfiled. The subject letter did not put that specific allegation to the Registrar although it did address the larger issue of the Registrar's decision not to file the returns.

- [37] The simple fact is that this misrepresentation did not impact Justice Morley's decision. In other words, the decision would have been the same even if the correct submission was made.
- [38] The first thing to note is that there is no requirement that a letter be sent in advance of litigation. It may be the practice but it is not a mandatory precondition to obtaining an *ex parte* order or one on notice with both sides participating. More importantly, the admitted misrepresentation did not materially mislead the Court.
- [39] The Claimant's counsel did make an error in submitting that their letter to the Registrar sent prior to the attendance before Justice Morley asked why the returns had been filed and then unfiled. Clearly and admittedly, the Court had an incorrect submission before it. The letter from Claimant's counsel did not put that specific allegation to the Registrar. However, Justice Morley's decision was not premised on the contents of the letter or any inference flowing from it.
- [40] Justice Morley was completely alert to the fact that there were, at least, two, competing narratives engaged by the whole of the evidence before him, namely one where the returns were filed and then somehow unfiled versus the other where the returns were received but never filed. He was not labouring under any material misunderstanding from the mistaken submission of counsel about the contents of the June 19, 2023 letter.
- [41] Justice Morley, in the context of his appreciation of the competing narratives, correctly identified the focussed issue for judicial review, namely whether the Registrar appropriately exercised his discretion to not have the returns and Notice of Change of Directors filed.
- [42] The request for a filing extension also engages the Rule 1 directive that this Court manage cases justly, including efficiently. Even if the Defendant's Application was otherwise allowed to proceed it represents an exercise of no practical merit. The reason for this is that CPR 2023 that came into force on July 31, 2023 (31 days after Justice Morley's Order) eliminated the need for leave of the Court to commence an application for judicial review with related transitional directions.

- [43] The practical outcome of a successful application by the Defendant to set aside the leave granted by Justice Morley would be the Claimant simply filing a new application for judicial review that would proceed on the merits given leave is now not required. In other words, the parties would be in exactly the same position as they are now where the judicial review application is to proceed on the merits. There is nothing to be gained in terms of advancing this litigation by allowing the Defendant's Application to proceed.
- [44] The prejudice to the Claimant in granting the Defendant's Application is obvious, namely lost resources invested in obtaining Justice Morley's Order and the investment of further resources to file a new application seeking the same judicial review.
- [45] Lastly, counsel for the Defendant takes a very strong position concerning the conduct of Claimant's counsel in this matter. She says that counsel for the Claimant was deliberate and orchestrated in efforts to mislead her towards some litigation advantage. Counsel submits that this Court must recognize this campaign of misconduct and censure the Claimant for the failings of counsel.
- [46] The elements of unethical and misleading actions alleged are three.
- [47] One, that the Claimant's counsel misrepresented the contents of counsel's letter to the Registrar dated June 19, 2023 in submissions before Justice Morley.
- [48] Second, that there were material differences between the hearing notes made by Claimant's counsel of the submissions before Justice Morley and the audio recording of those submissions. The only difference identified was that counsel's hearing notes excised all references in submissions that opposing counsel had the right to move to set aside any *ex parte* order if granted by the Court.
- [49] Third and seemingly related to the notes omissions, that Justice Morley's Order drafted by counsel for the Claimant failed to include a statement that identified the Defendant's right to bring process before the Court to set aside the *ex parte* Order.
- [50] This Court is unable and unwilling to adopt the argument that Claimant's counsel was engaged in a purposeful, unethical campaign to mislead opposing counsel or this Court.

- [51] I have above addressed and rejected the challenge raised by Defendant's counsel that this Court was misled by the misstatement of Claimant's counsel concerning the contents of their June 19, 2023 letter.
- [52] I have also above addressed and rejected the challenge raised by Defendant's counsel that she was misled by the failure of Claimant's counsel to include a statement in their draft of Justice Morley's Order specifically identifying that the Defendant could bring an application to set aside. My comments in that regard have equal application to any related omissions in the hearing notes by Claimant's counsel.
- [53] I do not accept that counsel was misled for the reasons given. There is nothing further that this Court need say or do in that regard. Counsel for the Defendant is, of course, at liberty to pursue this issue through whatever disciplinary or other body she deems fit as it pertains to misconduct directed towards her.
- [54] Saying the above should not be interpreted as some exoneration of Claimant's counsel. I do note that senior counsel appeared on behalf of the Claimant before Justice Morley on June 30th. Counsel must be very careful to make accurate submissions before the Court, especially when appearing on an *ex parte* basis. Related to this, counsel should take every effort to accurately and comprehensively represent the *ex parte* proceeding in notes intended to be provided to opposing counsel and not expect to automatically be able to rely on some accuracy disclaimer at the top of said notes as was argued before me. Finally, counsel needs to ensure that their orders follow the required templates and include all terms.
- [55] While I was not here prepared to make a finding of purposeful misconduct, any future, similar errors made by Claimant's counsel may not be viewed in the same benign light with counsel now having the benefit of this warning.
- [56] In conclusion, this Court is not persuaded that the Defendant should be granted an extension to file his Application to set aside the *ex parte* Order of Justice Morley made June 30, 2023. The Order of Justice Morley dated June 30, 2023 granting leave for judicial review remains in full force and the Claimant's judicial review application shall move forward to be determined on the merits.

IT IS HEREBY ORDERED THAT:

1. The Defendant's request for an extension of time to file his Application to set aside the *ex parte* Order of Justice Morley made June 30, 2023, granting leave to the Claimant for judicial review of the decision of the Registrar of Companies to refuse to file amended, historic returns and a Notice of Change of Directors for the corporation, is dismissed.
2. The Order of Justice Morley, dated June 30, 2023 granting leave for judicial review remains in full force and the Claimant's judicial review application shall move forward to be determined on the merits.
3. The parties should attempt to resolve the issue of costs between them. If they are unable to then this matter shall return before me on a date to be scheduled to speak to costs of this Application.
4. The parties should attempt to resolve the issue of costs between them. If they are unable to then this matter shall return before me on a date to be scheduled to speak to the matter of costs of this Application.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

Registrar