

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

COMMONWEALTH OF DOMINICA

Claim No: DOMHCV2019/0071

BETWEEN: -

[1] CARMESHA K. EDWARDS
[2] ANIKA S.W. EDWARDS
[3] KEVAUGHN K.S. EDWARDS
[4] REBECCA J EDWARDS
(Represented by their attorney Ms. Evelyn Fabien)

Claimants

And

AVAN SAMPSON

Defendant

Appearances: Kathy Buffong of Pinnacle Law Chambers for the Claimants/Respondent
Singoalla Blomqvist Williams of Blomqvist Williams Chambers for the Defendant/Applicant

2020: December 11
2021: November 29

Ruling on written submissions

[1] **STEPHENSON J.:** This is the ruling of this court on an application for relief from sanctions and for leave to file a defence out of time.

[2] The claimants claim to be the registered proprietors and are entitled to possession of property registered in Book of Titles N19 folio 54M containing 2160 square feet and that the defendant has no claim or right and/or entitlement to the said property.

[3] The Fixed Date Claim was accompanied by a statement of claim setting out the claimants' claim.

[4] A brief chronology of the salient events is relevant to the determination of this application:

- (1) The fixed date claim was filed on the 28 March 2019, the claimants initiated proceedings against the defendant by way of Fixed date claim seeking the recovery of possession of land located in Roseau Dominica. The claimants seek an order that the defendant vacates the property and deliver up possession of that property as well as an injunction preventing the defendant from trespassing and occupying the property;
- [2] An affidavit of service was sworn to on the 15th April 2019 and filed on the 23 April 2019 by the deponent Ivor Emmanuel Bailiff, where he averred that, he personally served the defendant on the 5th April 2020 with the Fixed Date Claim Form, Statement of Claim and Certificate Identifying Exhibits;
- [3] A number of notices of hearing were filed and duly signed by the registrar fixing various dates for the hearing of the matter;
- [4] To date no acknowledgment of service has been filed for or on behalf of the defendant. This failure constitutes a breach of the part 9.2.1(a) and 9.3 (1) of the CPR 2000, in that, the rules require that an acknowledgment of service must be filed by the defendant within 14 days if the defendant wishes to dispute the claim;
- [5] An affidavit of service was again sworn to on the 25th June 2020 and filed on the 3 July 2020 by Mr. Emmanuel who deposed that he served the defendant on the 16th July 2020 with a notice of hearing. It is uncertain which notice of hearing was served on the defendant as on the file there is a notice signed by the registrar and one by counsel Mrs. Buffong Royer;
- [6] The matter came up for first hearing on the **6th July 2020** and the defendant appeared unrepresented and was given the opportunity by the court to seek counsel;
- [7] On the 23rd July 2020 Counsel Mrs. Ann Riviere-Leon of the Legal Aid Clinic filed an application for relief from sanctions and for an extension of time to file the defence on behalf of the defendant with affidavit in support;
- [8] On 27th July 2020 the defendant filed an affidavit in opposition to the defendant's application. On the 5th August 2020 a defence and counterclaim was filed by the defendant by new counsel;
- [9] The matter came up for hearing on 20th November 2020 and new counsel who filed defence and counterclaim appeared on behalf of the defendant. It was noted that Counsel was not properly on record and the court ordered that counsel place themselves properly on record.
- [10] The defence and counterclaim was also struck out and the court ordered the parties to file submissions regarding the application for relief from sanctions and extension of time to file the defence.
- [11] On the 23rd November 2020, defence counsel Mrs. Blomqvist Williams placed herself on record for the defendant by filing a notice of change of solicitor.
- [12] Submissions were filed on behalf of the claimants and defendant on the 10th and 11th December 2020 respectively.

[5] The court was to rule on the application in February 2021¹ however the submissions were filed away and not brought to the attention of the court. It was when the court requested the file, that it was brought up, the submissions were observed on the file and immediately this ruling was prepared.

[6] The defendant's application for relief from sanctions and to file a defence out of time was made some 14 months after the defence was due.

[7] The application is being resisted by the claimant on the grounds that the defendant was personally served with the statements of case in the matter on 5th April 2019. That the due date for filing is May 2019.

[8] The claimants in opposition to the application submits that:

(1) **There is an inordinate delay.**

Counsel for the claimants cited and relied on the Court of Appeal judgment in **J R Oneal & G A Cobham –v Cliff Williams**² and in the judgment of Barrow JA said, *“whether the application was made promptly is a question that needs to be examined in light of all the circumstances and not only by reference to the length of time.”* Counsel Buffong Royer submitted that the defendant at all material times knew that a defence had to be filed, this is based on the admission of the defendant that he was aware that a defence had to be filed and that he contacted various counsel and that he was unable to retain the services of one due to his impecuniosity.

Counsel also submitted that the defendant at all material times knew that he had to file a defence as the notes to the Defendant on Form 1 clearly specifies the need to file a defence and the relevant time for filing.

That it was after the first hearing that he sought the assistance of the Legal Aid Clinic and thereafter applied for a relief from sanctions.

Counsel further cited and relied on the local case of **Joseph Leblanc –v- The Attorney General of Dominica et anor**³ where it was said, *“That it can hardly be said that the*

¹ Information gleaned from the court's minute noted on the file

² (BVI Civil Appeal 10 of 2006)

³ DOMHCV2009/0254

defendant's application in this case was made promptly coming as it did 38 days after the period for filing of the defence had expired.⁴ ”

(2) That the defendant's failure to comply was intentional

It was submitted on behalf of the respondent that the defendant knew that the defence had to be filed and within what time. That even though the defendant claims that he did not know how to file the defence at all material times he was aware that it had to be filed. That the defendant knew of the consequence of not filing and disregarded that consequence. Counsel urged the court to consider that the defendant's actions were deliberate.

(3) That the defendant has no good reason for failing to file the defence within the time prescribed by CPR 2000 and he has failed to provide the court with any evidence of his alleged impecuniosity.

Counsel Buffong Royer made reference to Part 26.8(2) (b) which she submitted mandates that there must be a good explanation for the failure to comply with the rules. Counsel also cited and relied on the Court of Appeal Decision in **Harold Simon –v- Carol Henry and Tracy Joseph (Civil Appeal 1 of 1995)**. In that case Satrohan Singh JA stated that the question of impecuniosity was a conclusion to be arrived at by the court upon consideration of the evidence placed before it. In that case the applicant's affidavit was held to disclose no more than a bare assertion of impecuniosity and this was held to be insufficient to establish an acceptable reason for the delay.

Counsel Buffong Royer also cited and referred to the decision of Master Actie in **Clement Johnson –v- Peter Celaire and others⁵**. Counsel submitted that in that case the defendant advanced two reasons for failing to file his defence on time namely impecuniosity and difficulty contacting the beneficiaries of the estate to obtain documents and information needed for the preparation of the defence. Counsel submitted that the master held at paragraph 14 of the judgment “*that the defendant had not provided any satisfactory evidence to prove their impecuniosity and the nature of the information that was required to file the defence*”.

[9] A defendant who wishes to defend a case commenced by fixed date claim is required to file his defence within 28 days⁶. In the case at bar the defendant has failed to do so. He is therefore in

⁴ Ibid paragraph 10

⁵ DOMHCV2014/0130

⁶ CPR Part 10.3(1)

breach of the CPR 2000. Where a matter is commenced by fixed date claim it is well established law and practice that there is no default judgment. In matters proceeding as a fixed date claim these proceedings are placed before the judge upon the issuing of the fixed date claim for first hearing.

[10] The Court is empowered, upon the first hearing of a fixed date claim to treat the same as the trial of the claim and dispose of the claim, if it is not defended.⁷

[11] In making his submissions the defendant contended that he was served with the claim and that he sought the services of some attorneys but that he was not working and therefore impecunious. He said he made up his mind to defend himself and to that end he intended to write his defence on a piece of paper. In his application and affidavit, the defendant avers that he has a real prospect of success and to allow him to file his defence would give him a fair opportunity to put his case before the court.

[12] The defendant further contends that the claimants would not be prejudiced but on the other hand he would be severely prejudiced.

[13] The defendant contended that the court has the jurisdiction to grant the order sought pursuant to part 26.1(2) (k) of the CPR 2000.

[14] In the submissions filed on behalf of the defendant it was submitted that pursuant to part 10.3(9)⁸ of CPR 2000, the court has the jurisdiction to extend the time to file the defence.

[15] It was further submitted that part 26.1.2(k) of CPR 2000 gives the court jurisdiction to extend the time to file a defence. This section reads

“26.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule, practice directions or any enactment.

...

⁷Re: Part 27.2(3) of CPR 2000

⁸ The period for filing defence 10.3 (1) The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form. ... (9) A defendant may apply for an order extending the time for filing a defence.

(k) 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;"

[16] Counsel Blomqvist Williams referred the court to **JR O'Neal & G A Cobham Ltd –v- Cliff**

Williams⁹ in support of her submission that when a party applies for an extension of time within which to do something which he has failed to do, that party is in effect applying for a relief from sanctions and thus part 26.8 of CPR applies.

[17] Counsel further submitted that part 26.8 directs what must be done in order to seek relief from sanctions and sets out the mandatory conditions' precedent to the grant of relief. Counsel submitted that the court is expressly precluded from granting relief if certain conditions are not satisfied.¹⁰ Counsel quoted Part 26.8 in its entirety as follows:

"Relief from sanctions

26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be – (a) made promptly; and (b) supported by evidence on affidavit. (2) The court may grant relief only if it is satisfied that – (a) the failure to comply was not intentional; (b) there is a good explanation for the failure; and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. (3) In considering whether to grant relief, the court must have regard to – (a) the effect which the granting of relief or not would have on each party; (b) the interests of the administration of justice; (c) whether the failure to comply has been or can be remedied within a reasonable time; (d) whether the failure to comply was due to the party or the party's legal practitioner; and (e) whether the trial date or any likely trial date can still be met if relief is granted...."

[18] Counsel Blomqvist Williams on behalf of the defendant/applicant further relied on the Trinidad and Tobago Court of Appeal decision in **Trincan Oil Limited and Ord –v- Chris Martin** ¹¹ where that court considered Part 26.7 of the TTCPR and said,

"The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard to in considering whether to exercise the

⁹ Civil Appeal 10 of 2007 Territory of the Virgin Island

¹⁰ See paragraph 6 of Defendant submissions filed on the 11th December 2020

¹¹ Civil Appeal no 65 of 2009

discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre- conditions at 26.7 (3) are not satisfied.”

[19] Counsel submitted that the first consideration in the application at bar is promptitude. Counsel submitted that the defendant’s application for extension of time in this matter was made some 90 days after his defence should have been filed and that length was not inordinate especially when one considers the reason presented by the defendant.

[20] Counsel cited and relied on the statement of Mr. Justice David Batts in the Jamaican case of **Blake, Sherine –v- Ldosta Loans and Financial Management and Brown, Lincoln**¹² when he said

“... whether or not each of these mandatory prerequisites are satisfied can only be assessed with reference to the context and facts before the tribunal considering the application for relief. “Promptness” for example is a function of the nature of the duty imposed, that or any other pertinent time periods for example the trial date and how far away it is, and the reason for the failure to comply. This must be so for otherwise the drafter of the rules would have stipulated a fixed time period within which the application is to be made. There is very good reason why that was not done. This is because in the fog of litigation, there may be a great many and unpredictable circumstances and situations that may occur. A just cause ought not to be defeated by mere technicalities. Litigation is not, as a great judge once said a game of “snap” in which a party wins because the other has “tripped” over the rule.”

[21] It was submitted by Counsel Blomqvist Williams that the defendant’s delay was not intentional, and he had a good explanation as stated in his affidavit in support. Counsel submitted that when one considers this, the application at bar satisfies the test for promptitude.

[22] Counsel referred the court to the Trinidad Case of **Trincan Oil Limited –v- Keith Schnake**¹³ where it was said that *“intentionality for the purpose of Part 26.7(3) of CPR, requires that there be “... a deliberate positive intention not to comply with a rule. This intention can be inferred from the circumstances surrounding the noncompliance”.*

Consideration

¹² 2014 JMSC Civ 14 (Jamaica) at paragraph 9

¹³ Civil Appeal No. 91 of 2009 (Trinidad & Tobago)

[23] This is an area of law that is well settled in our jurisdiction. Granting an extension of time is a discretionary power of the court. A court ought not to exercise its discretion in a vacuum, it is important that both sides of the case are carefully considered so as to ensure that whether or not an extension of time is granted, the objective of justice is achieved.

[24] The onus is on the applicant to show by convincing cause with particularized evidence on the civil standard of proof that is on the balance of probability that he has met the threshold warranting consideration for the grant of relief.

[25] It is necessary that Mr. Sampson, the applicant who seeks to invoke this Court's discretion places before the court acceptable evidence which provides the basis on which the court will exercise its discretion. In **Adam Bilzerian v Gerald Weiner and another**¹⁴, it was said that the onus is on the applicant to show by credible and particularized evidence that he has met the threshold that would cause the court to grant the relief sought and that in essence that he had taken all reasonable steps to meet the timeline. It is thus incumbent for the applicant to show why, notwithstanding taking such reasonable steps, that he was unable to meet that deadline.

[26] The power to extend time and relief from sanctions for filing one's statement of case is given to the court by Part 26.8 of the CPR 2000. Part 26.8 provides

1. "An application for relief from any sanction imposed **for a failure to comply** with any rule, order or direction must be –
 - a. made promptly; and
 - b. supported by evidence on affidavit.
2. The court may grant relief only if it is satisfied that –
 - a. the failure to comply **was** not intentional;
 - b. there is a good explanation for **the failure**; and
 - c. the **party in default** has generally complied with all other relevant rules, practice directions, orders and directions.
3. In considering whether to grant relief, the court must have regard to –
 - a. the effect which the granting of relief or not would have on each party;
 - b. the interests of the administration of justice;
 - c. whether **the failure to comply** has been or can be remedied within a reasonable time;

¹⁴SKBHC VAP2015/0015

- d. whether **the failure to comply was due** to the party or the party's legal practitioner; and
 - e. whether the trial date or any likely trial date can still be met if relief is granted.
4. The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[27] This court will firstly ask the question, has the applicant made his application promptly and then, has he given a good reason for his failure to file an acknowledgement and a defence in this case.

[28] The defendant was served personally with the proceedings in this case on the 5th April 2019 and his application for an extension of time within which to file his defence and for relief from sanctions was filed after the first hearing of the matter on the 23 July 2020.

[29] This court notes the finding of the court of appeal in **Irma Paulette Robert –v- Cyrus Faulkner and others**¹⁵ where Justice of Appeal Ola Mae Edwards said,

"[34] It is important to note that CPR 26.8(1) (b) establishes no criteria for granting an application for relief from sanctions...CPR 26.8(1) does not create a sanction for failing to make an application for relief from sanction promptly. Any such sanction would have to be created by a court order or other rule. CPR 26.8(1) does not preclude the court from hearing an application for relief from sanction that has not been made promptly...

[36] In the absence of any order invalidating an application for relief from sanction that has not been made promptly, the court may proceed to determine the application on its merit in my view, based only on the mandatory criteria established by CPR 26.8(2) and having regard to the factors prescribed in CPR 26.8(3), while seeking to give effect to the overriding objective."

[30] It is well established law in our courts that the lack of promptitude in making an application to be relieved from sanction is not an immediate bar unless there is a sanction attached. The important factors to be considered are rules 26.8(2) and 26.8(3) of the CPR 2000, the latter rule only to be considered if rule 26.8(2) is satisfied.

¹⁵ ANUHCVP2012/002

[31] According to the CPR 2000, the defendant had 28 days from the service of the claim on him to file his defence. This was explained to him very clearly in the notes for defendant served on him. The period for filing a defence in the case at bar expired some 14 months before the date for the filing his application.

[32] There can be no doubt that the application was not made promptly. Counsel on behalf of the claimant submitted that this delay is inordinate and this court agrees with her in that regard unless there is an acceptable reason for it.

[33] The court must also consider whether or not the applicant in the case at bar provided a good explanation for the delay which is a factor to be taken into account to allow or refuse the application at bar. The defendant's affidavit provides the evidence in support of his application. The applicant contends that he was not working, impecunious and could not afford to retain the services of a lawyer in spite of his attempting to do so.

[34] Counsel for the claimants contended that stating that he is impecunious without more is not an acceptable excuse and counsel has relied on the statement of the Court of Appeal in **Harold Simon –v- Carol Henry and Tracey Joseph**¹⁶ and the dicta of **Satrohan Singh JA** when he said
“In my view, this assertion of the applicant without more is insufficient to establish an acceptable reason for the delay. This assertion is really the conclusion that this Court should be asked to reach based on evidence or sufficient material in the applicant's affidavit as to his financial circumstances. The applicant's affidavit disclosed no more than this bare assertion.”

[35] It has been a long-held view in our courts which predates CPR 2000 that bold assertions of impecuniosity and financial embarrassment are not acceptable as reasons or excuses for failure to file a defence. Re: **Evelyn-v- Williams**¹⁷.

[36] In the **Evelyn Williams Case**¹⁸ it was held that the affidavit did not contain sufficient material to satisfy the court of the applicant's financial circumstances and that they were such as to

¹⁶ Civil Appeal no 1 of 1995 (SVG)

¹⁷(1962) 4 WIR 265

¹⁸(1962) 4 WIR 265

constitute such an exceptional circumstance as would warrant an extension of time for appealing. The learned Justice of appeal had this to say that

“... It is not sufficient for an applicant to make a bare statement that he was financially embarrassed, as has done in this case. He must set out in his affidavit sufficient material to satisfy the court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitles him to ask the indulgence of the court and that he may be relieved of the legal bar which arises under the rules by lapse of time. It was suggested by counsel for the applicant that the statement that he was financially embarrassed put upon the respondent the onus of showing that that was not so, and that that fact not having been denied, the court should take it as proof that there was this alleged financial embarrassment. The answer to that, in my view, is two-fold. First of all, circumstances which create financial embarrassment are in the personal knowledge of the applicant and it must, therefore, be for him to allege and prove them; secondly, it is the duty of the applicant to satisfy the court that his allegation is correct and for that reason, as I have said before, it is necessary for him to set out a sufficiency of material. ... ”

[37] In **Aggraram Maharaj vDhanraj .agrooAnd Another**¹⁹ Bernard J.A., in the Court of Appeal of Trinidad and Tobago, in similar circumstances said that it was trite law that it was not sufficient merely to assert that one is financially embarrassed in order to obtain the Court's indulgence. Even though these cases predate CPR 2000 ,the principles as enunciated in these courts have been considered to be still applicable post CPR 2000. **Re: Armand Nano –v The Attorney General of St Vincent**,²⁰**John Cecil Rose –v- Anne Marie Uralis Rose**²¹. In **Paget Lake –v- Liat(1974) Limited**²²Justice of Appeal Rawlings in considering the legal principles and whether or not to grant an extension of time for leave to appeal said the “*criteria that were stated in these cases are referable to extension of time generally*”. This court can do no better but to adopt the enunciation of the learned Justice of Appeal.

[38] I find the reason provided by the defendant unconvincing. I also agree with counsel for the claimant that there is simply no evidence of the applicant's means before the court other than the statement that he is unemployed. There is nothing in the affidavit to provide proof of this, \ his expenses and how he meets those expenses. The affidavit is bare of any sufficient evidence to provide any proof. Even if the statement in the affidavit were to be accepted without more by this court, the evidence as adduced clearly does not support the plea of impecuniosity.

¹⁹(1985) 37 WIR 398

²⁰ Civil Appeals numbers 15 ad 16 of 2002 (St Vincent & The Grenadines)

²¹ Civil Appeal number 19 of 2003 (St Lucia)

²² Civil Appeal number 3 of 2003 (Antigua & Barbuda)

[39] This court also cannot help but note that having obtained direction from the court to seek advice from Legal Aid which presumably offers free legal advice or legal advice at a reduced rate, the defendant's alleged impecuniosity did not prevent the defendant from retaining the services of one of the more senior legal counsel to pursue his matter. Inability to access legal advice and process as stated was not demonstrated.

[40] This court finds as has been established by the authorities quoted, that the plea of impecuniosity has not been substantiated in any manner and as such, it cannot be accepted as the reason for the failure.

[41] Legal proceedings are a serious thing, when the fixed date claim form was served on a defendant it clearly told him what to do and specified the consequences of not complying. The notes for the defendant are very prominent on the fixed claim form. By his own words the defendant understood the seriousness of the case. I agree with Counsel for the claimant that, the decision to not file a defence by the defendant was a conscious decision on his part as having written his defence on a piece of paper he could have taken it to the registry to ask a question he may have gotten guidance. The registry has had to in the past and continues to be of assistance to unrepresented litigants.

[42] In my judgment, therefore, there was no acceptable reason presented to this court excusing what is an inordinate delay. For these reasons as stated above I would hold that the Applicant has not proved to this Court that he has a substantial reason or for that matter an acceptable reason for the eight weeks delay in the matter and his failure to file the defence.

[43] This application will be dismissed because the defendant was in breach of the requirement to file a defence within 28 days. His delay of more than three months after the time limited for filing was inordinate. The reason he advanced for the delay was not acceptable.

[44] The defendant has not placed a draft defence for the court to consider in his application. To authorize further delaying the resolution of this dispute would amount to a denial of justice to the claimants.

[45] I find therefore that there is no good explanation by the defendant for the failure to respond to the claim, the applicant has also failed to satisfy this court that his failure was not intentional. This court would therefore dismiss this application. This matter is therefore adjourned to a date to be fixed for the summary trial of the matter.

[46] Costs of this application will be determined after trial.

M E Birnie Stephenson
High Court Judge

By The Court

Registrar

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
(CIVIL) -

DOMHCV2019/0071

BETWEEN: -

**CARMESHA K. EDWARDS
ANIKA S.W. EDWARDS
KEVAUGHN K.S. EDWARDS
REBECCA J EDWARD
(Represented by their attorney Ms. Evelyn Fabien)**

Claimants

And

AVAN SAMPSON

Defendant

Before: Honourable Madam Justice M E Birnie Stephenson

Dated the 29th day of November 2021

Entered the day of 2021

UPON the matter coming up on an application to extend time and for relief from sanctions filed on behalf of the defendant

AND UPON the claimant opposing the application for extension of time

AND UPON the court reviewing the submissions filed on behalf of both parties herein

IT IS HEREBY ORDERED THAT:

1. The application for relief from sanctions and extension of time to file the defence herein is not granted and is hereby dismissed;

2. The matter is fixed for hearing on the **8th March 2021**;
3. Costs are awarded to the claimants which shall be determined after the trial herein.
4. The claimant has conduct of this order.

BY THE COURT

REGISTRAR