

**THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2017/0002

BETWEEN:

PINNEYS HOTEL DEVELOPMENT LIMITED

Claimant/Applicant

and

ST. KITTS NEVIS AND ANGUILLA NATIONAL BANK LIMITED

Defendant/Respondent

Appearances:

Mrs. Emily Prentice-Blackett of Counsel for the Claimant/Applicant

Mr. Garth Wilkin with Mr. Danni Maynard holding papers for Damian Kelsick for the
Defendant/Respondent

The Applicant's representative being absent

Mrs. Ermelin Sebastian-Duggins, the Defendant's representative being present

2018: November 15th;
2020: June 18th

JUDGMENT

***Civil Procedure – CPR 26.4 - Application for Unless Order – Non-Compliance
with Strikeout Order – Amendment to Defence – Whether leave required***

- [1] **DYER, M (AG.):** This is an application brought by the Claimant pursuant to CPR 26.4 to seek full compliance with the Order on Judgment herein of Master Actie (as she then was) dated 26th June 2018 ("Master Actie's Order"). The Claimant

prays for an order directing that unless the Defendant has complied with the said order by deleting paragraphs 3 (a) (vi) to (x) of its amended defence filed on 3rd July 2018 within 7 days, its statement of case herein is to be struck out.

Procedural History

- [2] The substantive claim in this matter was filed on the 6th January 2017 and concerns the alleged repudiatory breach by the Defendant of a loan contract dated 16th July 2014. On 14th February 2017 the Defendant applied to Strike Out the Claim. The Defendant's Strike Out Application was fixed for hearing on the 9th May 2017. The Claimant however sought to stave off this attack by amending its claim on 5th May 2017. As can be gleaned from the Order of Master Fidela Corbin Lincoln dated 18th July 2017, the hearing on 9th May 2017 was adjourned to the 18th July 2017 seemingly for the Hearing of an Application which the Defendant had proposed to file¹. This Order which was adduced by the Claimant is somewhat at odds with the evidence of Mrs. Ermelin Sebastian-Duggins at paragraph 9 of her Corrected Affidavit in that it makes no reference to the Strike Out Application which Mrs. Sebastian-Duggins essentially says was adjourned to the 18th July 2017 for consideration. In fact, Mr. Cozier's evidence at paragraph 37 of his Affidavit in Response states that the Master was of the view that the Strike Out Application had been overtaken by the Claimant's amendments to its Claim appears to be more plausible. I however make no finding in this regard since the evidence has not been tested and nothing in my view turns on it.
- [3] As it turns out, the Defendant, rather than filing the Second Application to Strike Out, filed a Defence to the Amended Claim on 6th June 2017. On 11th October 2017 the Claimant applied to Strike Out certain parts of the Defence on the grounds that they were an abuse of process, prolix and failed to disclose any reasonable grounds for defending the Claim. This Strike Out Application was granted in part by Master Actie (as she then was) on 26th June 2018 who ordered

¹ The Order dated 9th May 2017 was not adduced by either party.

and directed that paragraphs 3 (a) (iv) to (xxiv) be struck out as being prolix and required the Defendant to file and serve an Amended Defence which reflected this ruling. Master Actie also directed that the matter should thereafter be listed for Case Management Conference.

- [4] On 3rd July 2018 the Defendant filed an Amended Defence which the Claimant says not only deleted the paragraphs that had been Struck Out by Master Actie but also added further paragraphs. On 18th July 2018 the Claimant applied to Strike Out the new paragraphs which according to it *“summarizes the content which the Master had struck out”* on the basis that the Defendant required leave of the Court to make such amendments to its Defence. When the Application for an Unless Order came on for hearing by this Court, Leave was Granted to the Parties to file Submissions, if necessary, on the issue of whether leave was required to make the amendments which the Claimant now challenges. The Claimant filed Submissions on the issue, the Defendant opted not to.

The Issue

- [5] The sole issue which arises for determination on the Application at Bar is thus whether the Defendant required Leave to Amend its Defence. The Claimant relies on CPR 20.1(1) which provides that *“[a] statement of case may be amended once, without the court’s permission, at any time prior to the date fixed by the court for the first case management conference. This issue therefore hinges on whether the first case management conference has taken place”*.

The Arguments

- [6] The Application at Bar is opposed by the Defendant who avers that no leave was required since no notice has been issued by the Court Office pursuant to **CPR 27.3(1)** and **27.3(6)** fixing the date, time and place of the Case Management Conference herein. Mrs. Sebastian-Duggins who gave evidence on behalf of the

Defendant essentially avers that whilst the matter has come up before the Court on several occasions, the hearings were in relation to certain Applications and were not Case Management Conferences. It is the Defendant's position that the matter is yet to come on for Case Management and therefore no Leave of the Court was required. The Defendant relies in this regard on Master Actie's Order wherein she (in addition to Striking Out certain paragraphs of the Defence) also directed that the matter be thereafter listed for Case Management Conference. This is disputed by the Claimant who contends that:- (i) on the 18th July 2017 Master Corbin Lincoln fixed the matter for Case Management Conference; and (ii) on that date the matter was adjourned to 17th October 2017 for further Case Management Conference. The Claimant also relies on the Court's list for 17th October, 2017, 18th July, 2017, 12th December 2017 and 13th November 2018 as proof that the parties have been given notice of the Case Management Conference. The Claimant relies on **Adelaide Jackson v. Elvis Alfred**² and maintains that the Defendant had notice via the said Court's list of the date, time and place of the Case management Conference inasmuch as the form of notice to be given under **CPR 27.3(6)** is not prescribed.

Discussion

- [7] This Court has the power under **CPR 26.4(1)** to make an Unless Order on Application where a party has failed to Comply with any Order of the court in respect of which no sanction for non-compliance has been imposed. A review of Master Actie's Order would reveal that no sanctions were imposed therein and as such it was open to the Claimant being faced with the Defendant's alleged non-compliance to apply for an Unless Order under CPR 26.4(1). This raises the question whether the Defendant was in fact in breach of Master Actie's Order.
- [8] Having reviewed the Amended Defence against the backdrop of Master Actie's Order, I find that the Defendant has not fully complied with same inasmuch as it

² Suit No. 292 of 1992

still includes the following allegations that Master Actie had directed be Struck Out:-

- (i) NCCL was Struck Off the register in December 2000; and
- (ii) by Fixed Date Claim filed on December 15, 2000, Spencer Howell purported to bring a Claim entitled Nevis Club Company Limited and Spencer Howell v. Attorney General and Registrar of Companies Claim No. SKBHCV2010/0348, in which it was sought to obtain an Order permitting NCCL to re-register under the Companies Act out of time.

[9] These paragraphs were formerly paragraphs 3 (a) (vii) and (viii) of the Defence which Master Actie had clearly struck out. Furthermore, the Defendant has also added certain new paragraphs which according to the Claimant summarizes the content which Master Actie had Struck Out. The Defendant says no leave was required to make such amendments because the Court Office has not yet issued a Notice under **CPR 27.3(1)** and **27.3(6)** fixing the date, time and place of the Case Management Conference in this matter. This raises the question whether the Defendant was entitled to Amend its Defence without permission as it contends. To the extent that **CPR 20.1** enables a party at any time prior to the first Case Management Conference to change its statement of case, this issue turns on whether or not the matter had been listed for the first Case Management as the Claimant maintains.

[10] It cannot in my view be said that this Claim has not yet reached the stage of Case Management. **CPR 27.3 (3)** states, as a general rule, the Case Management Conference must take place not less than four (4) weeks nor more than eight (8) weeks after the Defence is filed. The pleadings had closed when the Claimant applied to Strike Out certain paragraphs contained in the Defence. The matter however fell off track as a result of that application which was determined on the 26th June 2018. Whilst the Order dated 18th July 2017 indicates on its face that the matter came on for "further case management" on that date, I cannot accept on the evidence before the Court that the Defendant had the required notice. First,

the Order which was made on the 9th May 2017 is not before me on this application. As such, whilst I accept that the form of notice is not prescribed as the Claimant contends, I am therefore unable to find that on 9th May 2017 Master Corbin Lincoln also adjourned the matter to 18th July 2017 for Case Management. Second, a review of the list for the 18th July 2017 which is exhibited as “DC1” would reveal that the matter was therein listed for “*Hearing of Application*”. The matter was not listed thereon for Case Management Conference. Third, I note that the list for 18th July 2017 was requested on 12th July 2017 and was presumably circulated sometime thereafter. **CPR 27.3(6)** mandates that the parties must be given not less than 14 days’ notice of the date, time and place of the Case Management Conference. The list for the 18th July 2017 does not satisfy this requirement.

- [11] The Order dated 18th July 2017 reveals that when the matter came up before Master Corbin Lincoln on that date, it was “... *adjourned to 17th October 2017 for further case management*”. The Order dated 18th July 2017 indicates that Counsel Mr. Damian Kelsick and Mrs. Ermelin Sebastian-Duggins were present at that hearing on behalf of the Defendant. Mrs. Ermelin Sebastian-Duggins has sworn a corrected Affidavit in Opposition to this Application wherein she states that she is the Defendant’s Chief Legal Officer. I accordingly accept the Claimant’s contention that the Defendant who was represented at the hearing on the 18th July 2017 had the requisite notice that the matter would come on for Case Management on 17th October 2017³. The Defendant cannot be heard to say in light of the decision of our Court of Appeal in **Comodo Holdings Limited v. Renaissance Ventures Limited et al**⁴, which is relied on by the Claimant, that only the Court Office can give notice of the Case Management Conference. In any case, no authority was provided for such proposition.

³ Adelaide Jackson v. Elvis Alfred.

⁴ BVIHCMAP2014/0032.

[12] The Court's List for the 17th October 2017 indicates that the matter came on Further Case Management on said date. I am unable to accept Mrs. Sebastian-Huggins' evidence that the hearing on 17th October 2017 was not a Case Management Conference and did not purport to be one. As aforementioned, the Order dated 18th July 2017 indicates on its face that the matter was adjourned on that date to 17th October 2017 for Further Case Management. This appears to have been seemingly overlooked by the Defendant who was represented at the said hearing. Moreover, the Court's List for the 17th October 2017 also indicates on its face that the matter came up for Further Case Management on said date. As it turns out, no directions were given on 17th October 2017 because Counsel for the Claimant informed Master Actie that an Application to Strike Out had been filed on the same date. It is of no moment that no Case Management Directions were given on 17th October 2017. Our Court of Appeal has held that "*what triggers the need of otherwise to obtain the permission of the court is the arrival of the date of the first case management conference*"⁵ which I find on the evidence before me had occurred when the Defendant amended its pleadings. It follows that it was necessary for the Defendant to **first** obtain leave of the Court to do so. I accordingly accept the Claimant's contention that paragraphs 3(a) (vi) to (x) of the Amended Defence ought therefore to be Struck Out.

[13] An Unless Order is draconian in its effect because it is a form of sudden-death. It goes directly to a litigant's right of access to a Court. It is not and should not be commonplace. The Defendant being faced with the Application at Bar did not take any protective steps such as applying to the Court under **CPR 26.9** to rectify the foregoing procedural error since Master Actie's Order did not specify the consequences of its failure to comply. The Court in all the circumstances of this case is nonetheless constrained to, as a matter of discretion, grant the Unless Order sought by the Claimant to require full compliance with Master Actie's Order and **CPR 20.1**. The general rule is that the Respondent to an Application for an Unless Order should be ordered to pay the assessed costs of such application.

⁵ See Comodo Holdings Limited v. Renaissance Ventures Limited et al at paragraph 72.

Conclusion

[14] In summary and for the reasons given above, it is ordered and directed that:-

1. The Defendant is to file a Re-Amended Defence within 7 days of this Order to reflect the Court's ruling that it required permission to Amend its Defence by adding paragraphs 3 (a) (vi) to (x) and as such the paragraphs are to be Struck from its Amended Defence; and
2. Unless and until the Defendant files a Re-Amended Defence which reflects the Court's ruling at paragraph 1 above within 7 days of today's date, its Statement of Case shall be Struck Out pursuant to CPR 26.4(7).
3. Costs on the Application are awarded to the Claimant which are to be assessed if not agreed within 21 days.
4. If the Defendant complies with paragraph 1 above within the time limited therein, the matter is to be fixed by the Court Office for Further Case Management Order.

**Jean Dyer
Master (Ag.)**

By the Court

 Lake
Registrar