

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2020/0004

BETWEEN:

**[1] ROVIKA INC
[2] MANISH VALECHHA
[3] DENNISON DALEY**

Appellants

and

**[1] THE ATTORNEY GENERAL
[2] THE OFFICE OF THE PREMIER**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Dexter Theodore

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Farid Scoon for the Appellants
Ms. Renée A.R.D. Morgan for the Respondents

2021: January 27.

Interlocutory appeal – Appeal from refusal of application for extension of time to file defence – Appeal from entry of judgment in default of defence – Failure to file defence within the prescribed period – Whether learned master considered relevant factors in exercising her discretion – Rule 26.1(2)(k) of Civil Procedure Rules 2000 - Whether learned master erred in law in granting default judgment – Rules 12.5 and 12.10(4) of the Civil Procedure Rules 2000

On 27th July 2018, the first respondent filed a without notice application against the first appellant intitled MNIHCV2018/0032, seeking an interim injunction and certain other reliefs. The application was granted on 3rd August 2018 and the matter was adjourned to 13th

September 2018 for further consideration. On 12th September 2018, the first respondent filed a claim alleging breach of copyright against the appellants intituled MNIHCV2018/0037, which was served on the appellants on 17th September 2018. On the same day the appellants filed an acknowledgement of service, but failed to file a defence within the prescribed period.

The respondents made a request for judgment on 22nd October 2018, followed two days later by a notice of application for judgment to be entered against the appellants on terms to be determined by the court. On 5th November 2018, the appellants filed an application for an extension of time to file their defence, which was granted. A defence was filed on 9th November 2018. The respondents applied for leave to appeal against the order granting the extension of time, which was refused by the learned judge.

On 3rd June 2019, a single judge of this Court overturned the decision of the learned judge and ordered that both the application for the extension of and the application for default judgment were to be remitted to the learned master for determination, after determining the order in which the applications were to be heard. The learned master heard the application for the extension of time first, which she refused, holding, among other things, that the application was not made promptly and that the difficulty in obtaining counsel was not a good reason for the delay and that the respondents would suffer prejudice if the extension were granted. The learned master proceeded to grant the application for default judgment against the appellants.

The appellants appealed.

Held: dismissing the appeal; confirming the order of the learned master dated 3rd February 2020; and ordering the appellants to pay the respondents' costs of the application in the sum of \$1,500.00, that:

1. The learned master did not err in the exercise of her discretion whether or not to extend time and correctly considered, and weighed, the relevant factors including: (i) the length of the delay; (ii) the reasons for the delay; (iii) the prospects of success of the case; and (iv) degree of prejudice if the application is granted while having proper regard to the overriding objective.

Carleen Pemberton v Mark Brantley [2011] ECSCJ No. 229 applied.

2. The learned master was entitled to determine, on the evidence before her, what weight she placed on the various factors that she considered.
3. The appellants had not persuaded the court that the learned master, in exercising her discretion, had exceeded the "generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

Michel Dufour et al v Helenair Corporation Ltd et al (1996) 52 WIR 188 applied.

ORAL JUDGMENT

- [1] **THEODORE JA [AG.]:** In this interlocutory appeal the appellants, Rovika Inc., Manish Valechha and Dennison Daley, appeal against the refusal of the learned master to grant their application for an extension of time to file a defence and against the entry of default judgment against them. The application for an extension of time was made on 5th November 2018, approximately 12 days after the respondents had filed an application for default judgment on 24th October 2018. The appellants contend that no, or no sufficient regard was paid to the to the overriding objective and the fact, they contend, that they had a good defence.

Background

- [2] I propose to state the relevant background in order to provide the relevant context of the appeal.
- [3] On 27th July 2018, the first respondent filed a without notice application against the first appellant, intituled MNIHCV2018/0032, seeking various reliefs.
- [4] On 3rd August 2018, the court granted the relief sought, including an interim injunction, and adjourned the matter to 13th September 2018 for further consideration.
- [5] On 30th August 2018, the court office issued a notice for the hearing of MNIHCV2018/0032 on 13th September 2018.
- [6] On 12th September 2018, the first respondent filed a claim against the appellants intituled MNIHCV2018/0037, alleging breach of copyright, to which the appellants filed, in person, an acknowledgement of service on 17th September 2018.
- [7] The appellants were represented by local counsel on 17th September 2018 when the court heard, and refused, an application to discharge the injunction. On that day, the

appellants were served with the claim form and accompanying documents which had been filed in MNIHCV2018/0037.

- [8] The appellants failed to file a defence within the prescribed period and the respondents made a request for judgment on 22nd October 2018, followed two days later by a notice of application for judgment to be entered against the appellants, on terms to be determined by the court.
- [9] On 5th November 2018, the appellants filed an application for an extension of time to file their defence, which was granted. A defence was filed on 9th November 2018.
- [10] The respondents applied for leave to appeal against the order granting leave, which was refused by the learned judge, whose decision was overturned on appeal. On 3rd June 2019, this Court ruled that the application for the extension of time for the present appellants to file their defence and the application for default judgment, be remitted to the learned master for determination, who was also to determine the order in which the applications were to be heard.
- [11] In due course, the learned master decided to hear the application for extension of time first to be followed by the application for default judgment.
- [12] On 3rd February 2020, the learned master ruled that the application for extension of time having been made some 19 days after the time for filing a defence had expired and 13 days after new counsel had been officially retained in the matter and without any satisfactory explanation for the delay had not been made promptly.
- [13] The learned master considered that the difficulty in obtaining appropriate counsel was not a good explanation for the delay because: (i) the appellants had confirmed that they did in fact have legal (albeit junior) counsel from Trinidad and Tobago visiting Montserrat as early as 5th October 2018, which was 11 or so days before the deadline for filing their defence; (ii) the perceived complexity of the claim and the need for

experienced counsel should have triggered an early request to extend the timelines for a defence or, a formal application for same; and (ii) the principles attendant upon an application for an extension of time are not complex or novel (and presumably here the learned master was reasoning that such an application could have been handled by junior counsel while the search continued for appropriate senior counsel).

[14] The learned master rejected the submission that the respondents would suffer no prejudice if the extension were granted, ruling that “the prejudice is innate in that the application is an attempt to retard the due consideration and possible granting of judgment in favour of the Claimants.”

[15] The learned master considered that the appellants could not treat the rules “scantily and expect favourable consideration of the Court’s discretion”.

[16] The learned master concluded her consideration of the application for extension of time by indicating that she had also considered the other applicable principles including whether the appellants had complied with other rules and directions and whether the failure was intentional but considered the factors of length of delay, reason for delay and degree of prejudice to carry more weight. The learned master finally indicated that it was not enough for the appellants to submit that they may have a good defence.

[17] On the application for default judgment, the learned master ruled that in accordance with rule 12.10(4) of the **Civil Procedure Rules, 2000** (“CPR”), when a request for default judgment had been made and the claim is for a remedy other than for money or goods the court had no discretion but to enter a default judgment when no defence had been served at the time of the making of the request for judgment.

Issues for Consideration

[18] Mr. Farid Scoon, learned counsel for the appellants identified the following issues:

- (1) What is the threshold to be crossed to set aside the ruling of the learned master;
- (2) What criteria must be satisfied on an application for an extension of time when no sanction has been imposed by the rules, order or direction of the court for non-compliance;
- (3) Was the learned master plainly wrong to refuse the appellants' application for an extension of time to file a defence; and
- (4) Did the learned master err in granting the respondents' request for default judgment.

[19] This Court accepts that these are the issues to be addressed but considers that they may be all crystallised into one overarching issue which is, whether the learned master erred in the exercise of her discretion.

Appellant's Submissions

[20] The appellants relied on the decision of the Court of Appeal in Trinidad and Tobago in **Dr. Keith Rowley v Anand Ramlogan**¹ where it is stated that the factors stated, in that country's equivalent of our CPR 26.8, the overriding objective and the question of prejudice should be taken into account when determining whether to extend time. The court there ruled that it was for the court to attach such weight to each factor, having regard to the circumstances of the case bearing in mind that not all the factors will be relevant to every case and the list of factors is not exhaustive.

[21] Learned counsel for the appellants, relied on **BBL Limited et al v Canouan Resorts Development Limited et al**² in his oral arguments to the court and stressed that **BBL Limited** was authority for the submission that the court has a

¹ Civ. App. No. P215 of 2014.

² ECSCJ No. 431.

wide discretion even after time has expired with a view to giving effect to the overriding objective.

[22] In **BBL Limited** this Court held, at paragraph 57 of the judgment:

“ Under CPR 26.1(2)(k) the court has a wide discretion to extend the time to comply with any order, rule or practice direction, and to do so even where the application to extend time was made after the time for compliance has expired. As Pereira JA (as she then was) very helpfully stated at paragraph 12 of the judgment in *Carleen Pemberton v Mark Brantley*,²⁰ [2011] ECSCJ No. 229] this discretion is not to be exercised in a vacuum, but in accordance with well-established principles, and with a view to giving effect to the overriding objective. It is trite that in determining an application to extend time or to vary the time imposed in an order of the court for compliance, the court must consider (i) the length of the delay, (ii) the reasons for the delay, (iii) any prejudice to the respondent; and (iv) whether the applicant’s pleaded case is, in any event, a hopeless one - the chances of success.²¹ However, these four considerations or factors, which to some extent are reflected at CPR 26.8(2), are not exhaustive of the matters to be taken into account by the court in determining an application to extend or to vary time for compliance.”

[23] Learned counsel for the appellants considered that the case provided a gloss on the **Carleen Pemberton**³ case, in the sense that, according to learned counsel, **BBL Limited** went further than **Carleen Pemberton** by declaring that the court was to seek to give effect to the overriding objective, while considering the criteria established by **John Cecil Rose v Anne Marie Uralis Rose**.⁴ Learned counsel submitted that while in **Carleen Pemberton** Pereira JA (as she then was) stated that the factors enumerated in **Rose v Rose** were not exhaustive, the learned Justice of Appeal did not link the factors outlined in **Rose v Rose** with the overriding objective, as learned counsel submitted, had been done in **BBL Limited**.

[24] Learned counsel for the appellants submitted that in situations where no sanction applied, or if one applied it had not yet bitten, the court ought to be less stringent in its deliberations especially where it was dealing with a situation where the parties

³ [2011] ECSCJ No. 229.

⁴ SLHCVAP2003/0019 (delivered 22nd September 2003, unreported).

have not yet had their day in court unlike the situation where, as in **Rose v Rose** and **Carleen Pemberton** the court was considering an application for an extension of time to file a notice of appeal.

[25] Mr. Scoon urged that a delay of 20 days was not inordinate and placed much emphasis on the fact that the proceedings were in what he called a state of confusion which, learned counsel argued, the learned master did not adequately consider.

[26] Learned counsel for the appellants further submitted that the learned master did not consider the injunction which had been granted in the claim intituled MNIHCV2018/0032. Mr. Scoon submitted that the respondents' rights were protected by the injunction and this ought to have been considered by the learned master. However, he was unable to provide the Court with any authority on that submission.

[27] Learned counsel submitted that the learned master had acknowledged that the appellants might have had a good defence, but he took issue with her ruling that this did not override the fact that the reasons for the delay were unsatisfactory.

[28] Learned counsel posited that the learned master ought to have balanced the reason for the delay with the other factors such as the strength of the defence before exercising her discretion whether or not to grant the extension.

[29] Learned counsel relied on the case of **Nelson Springs Homeowners Association v Deon Daniel et al**,⁵ where the learned master granted an extension of time although there had been an earlier application for default judgment.

[30] Learned counsel further submitted that the fact that he was only called to the local bar on the day of the hearing of the case was not given sufficient weight. Mr. Scoon

⁵ NEVHCV2012/0016 (delivered 14th March 2013, unreported).

criticised the learned master's finding that junior counsel had been on the record for some time before, and at the time when, the deadline for filing the defence expired and the finding that Mr. Scoon had been retained on 23rd October 2018.

[31] Learned counsel for the appellants also submitted that the learned master misapplied the law when she ruled in effect that there was no option but to enter default judgment.

[32] Mr. Scoon submitted that the learned master should have considered whether the request for judgment satisfied CPR 12.10(4) and 12.10(5) having regard to the nature of the claim. Learned counsel relied on the case of **Minvielle & Chastenet Insurance Brokers Ltd v Risk Consultants and Insurance Brokers Ltd et al**⁶ where the learned master refused to grant default judgment in a claim which sought various reliefs, including a declaration of right.

[33] Senior Crown Counsel for the respondents, Ms. Renee Morgan, submitted that the learned master did not err in the exercise of her discretion and considered all relevant matters in this case, and properly applied the **Carleen Pemberton** decision and **Rose v Rose**, in coming to the conclusion that the appellants had not satisfied the threshold in order to persuade the master to exercise her discretion in their favour.

[34] She further submitted that the appellants failed to advance any argument to the learned master, as to the strength of their defence and therefore the learned master could not properly be faulted for the observations that were made.

⁶ SLUHCv2014/0655 (delivered 3rd May 2016, unreported).

Discussion

[35] **Michel Dufour et al v Helenair Corporation et al**⁷ elucidated the circumstances in which an appellate court will interfere with the discretion exercised by a court at first instance as follows:

“An appeal against the exercise of judicial discretion will not be allowed unless the appellate court is satisfied (1) that in the exercise of the discretion the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of error, in principle the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly or blatantly wrong.”⁸

[36] The factors to be taken into account when considering applications for an extension of time to perform an action when no sanction has been specified, or if one has been specified, it has not yet bitten, have been elucidated by this Court in the case of **Carleen Pemberton**. That oft-cited case concerned an application for an extension of time to file a notice of appeal, but Pereira JA (as she then was) explained that the same principles applied when considering applications for extensions of time generally, so long as there was no sanction specified for failure to comply. In such cases the court must exercise its discretionary power judicially, seeking at all times to give effect to the overriding objective,⁹ while acting in accordance with the principles established by a long line of cases, particularly the case of **Rose v Rose** where Byron CJ (as he then was) stated:

“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. The matters which the court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice if the Application is granted.”¹⁰

[37] Pereira JA explained further in **Carleen Pemberton** that:

⁷ (1996) 52 WIR 188.

⁸ Ibid at p. 1.

⁹ *Carleen Pemberton v Mark Brantley* [2011] ECSCJ No. 229, at para. 12.

¹⁰ SLHCVAP2003/0019 (delivered 22nd September 2003, unreported) at para. 2.

“Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise.”¹¹

[38] I now turn to the CPR , where rule 12.5 provides as follows:

“The court office at the request of the claimant must enter judgment for failure to defend if –

(a) (i) the claimant proves service of the claim form and statement of claim; or

(ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(c) the defendant has not –

(i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or

(ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) satisfied the claim on which the claimant seeks judgment; and

(c) (if necessary) the claimant has the permission of the court to enter judgment.”

[39] CPR 12.10(4) provides as follows:

“Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.”

¹¹ [2011] ECSCJ No. 229, at para 13.

- [40] I am of the view that there are nuances between the Civil Procedure Rules in the various Caribbean jurisdictions and this Court would do well to follow the principles enunciated by this Court in a long line of authorities on our **Civil Procedure Rules, 2000**, including **Rose v Rose, Carleen Pemberton** and more recently, **BBL Limited**.
- [41] I do accept Mr. Scoon's proposition that the court has a wide discretion even after time has expired, with a view to giving effect to the overriding objective.
- [42] However, I do not consider that **BBL Limited** provided a gloss on **Carleen Pemberton's** case, in the sense advanced by learned counsel for the appellants. It is clear from paragraph 36 above that in **Carleen Pemberton**, this Court did specify that a court, in the exercise of its discretion, must have regard to the overriding objective. **BBL Limited** is entirely consistent with **Carleen Pemberton** and indeed expressly applied that case.
- [43] Although the learned master did not specifically cite the case of **Carleen Pemberton** it was obvious that she was being guided by the principles enunciated in that case when she was hearing the applications before her.
- [44] During the hearing the learned master invited learned counsel for the appellants to address her on whether the length of, and reasons for, the delay were weighty factors for consideration when the court was exercising its discretion whether or not to extend time. The notes of evidence reveal that in his response learned counsel for the appellants pointed to what he considered to be various procedural missteps by the respondents. It does not appear that learned counsel for the appellants ever sought in his address to the learned master to highlight the features of the defence which he thought gave the appellants a real prospect of success, or which otherwise merited heavy weighting in the exercise of the court's discretion.

- [45] That notwithstanding, the learned master did give consideration to the appellants' prospects of success but concluded that the factors of the length of delay and the reasons for the delay carried more weight in her eyes. The weight that a court attaches to a particular factor is a matter for the court in any given case. An appellate judge will not substitute his own discretion for that of the court at first instance merely because he would have exercised that discretion differently. To do so, he must be satisfied that the decision of the court below was clearly wrong.
- [46] The learned master did, incorrectly, refer to Mr. Criston Williams from Trinidad and Tobago as being junior counsel on the record and to Mr. Scoon as having been retained on 23rd October 2018. The evidence, however, suggests that although Mr. Williams visited Montserrat on 5th October 2018, he did not enter the record and more experienced counsel was sought by the appellants, resulting in the retention of Mr. Farid Scoon on 22nd October 2018.
- [47] The application for extension of time to file the defence was filed on 5th November 2018, 13 days after Mr. Scoon had been retained, a period for which no sufficient explanation was given. The errors made by the learned master of considering Mr. Williams to have been on record for the appellants and finding that Mr. Scoon was retained on the 23rd October 2018 when he was in fact retained a day earlier, were not, in my view, errors that resulted in the learned master reaching a wrong decision regarding the refusal to grant an extension and the decision to grant default judgment.
- [48] After refusing the application for extension of time the learned master proceeded to deal with the application for default judgment.
- [49] In my view, learned counsel for the appellant's reliance on **Minvielle & Chastenet Insurance Brokers Ltd** is misplaced. In the first place, that case is distinguishable because, unlike the one at bar, it was a case where the defence had been filed before the request for judgment was made. Secondly, in **Minvielle & Chastenet**

Insurance Brokers Ltd the learned master acknowledged that CPR 12.5 provided that the court office must enter judgment if the defendant fails to enter an appearance where the time for doing so has expired and the defendant fails to file a defence where the time for doing so has expired and there is a request for judgment. Thirdly, the discretion afforded by CPR 12.10(4) is only as to the form of the judgment, not to the claimant's entitlement to it, once all the criteria set out in CPR 12.5 are met.

[50] The learned master in the case at bar had stated:

“... careful examination of CPR 12.10(4) leads to the inescapable conclusion that where a request for default judgment has been made and that the claim is for a remedy other than for money or goods the Court does not have any discretion in deciding whether to enter judgment in default.”

[51] In my view, the appellants' application for an extension having been refused, the learned master was correct, in the circumstances, to grant the application for default judgment.

[52] Having considered the submissions, both oral and in writing by both counsel, I have not been persuaded by the appellants that the learned master committed any of the errors complained of or that her decision was not within the ambit of generous disagreement, or was plainly wrong.

[53] I am of the view that the learned master exercised her discretion properly in refusing to grant the extension and in granting the application for default judgment.

Conclusion

[54] For all of the above reasons, this appeal is dismissed with costs, to the respondents in the sum of \$1,500.00.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Margaret Price-Findlay
Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]