

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2016/0167

BETWEEN:

[1] ANTIGUA AND BARBUDA FISHERMAN CO-OPERATIVE SOCIETY

Claimant

AND

[1] THE FINANCIAL SERVICES REGULATORY COMMISSION

**[2] THE CHIEF REGULATORY OFFICER OF THE FINANCIAL
SERVICES REGULATORY COMMISSION
THE SUPERVISOR OF CO-OPERATIVES**

Defendants

Appearances:

Sir Gerald Watt Q.C. and Dr. David Dorsett for the Applicant
Mr. Anthony Astaphan SC and Ms Leslie Ann Brissett for the Respondents

.....
2018: January 4
.....

DECISION

[1] HENRY, J.: The claimant was, by order of the court, granted leave to file a claim for Judicial Review. The order provided that the claim be filed within 14 days of the order. The Fixed Date Claim was not filed within the 14 days. The defendants apply to the court for the following orders:

- (a) A declaration that the High Court has no jurisdiction to hear or determine the Fixed Date Claim Form filed, and
- (b) The Fixed Date Claim filed by the claimant be struck out and dismissed with costs

Thereafter by Notice of Application the claimants sought an order for the following relief:

- (1) The Fixed Date Claim Form and affidavits filed and served on behalf of the claimant be deemed properly filed and served;
- (2) No order as to costs

The Application to Strike out the Fixed Date Claim

- [2] The grounds advanced by the defendants are that the claimant is in breach of the Court's order and Rule 56.4 (11) of the Civil Procedure Rules 2000 (CPR) and therefore the claim ought to be struck out pursuant to Part 26.3(1) of the Civil Procedure Rules 2000. Further, Part 56.4 (11) provides that leave is conditional on filing the claim within 14 days of receipt of the order granting leave. In the circumstances, the court has no jurisdiction to hear or determine this matter and the claim should be struck out in accordance with Rule 9.7(6)(c) and Rule 26.3 (1) and/or pursuant to the court's inherent jurisdiction.
- [3] The claimant admits that it was unable to comply with CPR 56.4 (11) on account of the fact that lead Counsel in the matter, left the jurisdiction on the 22nd day of July to attend the 41st Conference of the Commonwealth Parliamentary Association in his capacity as Speaker of the House of Representatives and returned on Saturday the 30th July. Counsel's return to the State coincided with public holidays on Monday and Tuesday, the 1st and 2nd of August and consequently only returned to office on Wednesday 3rd August, by which time the court was on long vacation. The claim was subsequently filed on 17th August, some ten working day after Counsel's return to office. The claimant relies on Rules 26.4 (2) (w), 26.9 (3) of the CPR together with Rule 1.1 (12)m 1.1 (2) (b) (c) (i) (iv) and 1.2 (a) and (b) the overriding objective which jointly and specifically authorises the court inter alia, to issue such directions and orders, so that the actions and steps taken in the proceedings to date by the claimant be deem to be properly done. Further, the defendants have failed to show that they suffered any prejudice on account of the belated filing of the claim.
- [4] The defendants submit that the claimant is not entitled to rely on those provisions of the CPR as the claim filed after the expiration of the 14 days is null and void, the conditional leave having by then expired.
- [5] Part 56 of the CPR deals with applications for an administrative order, including the remedies included in judicial review. Rules 56.3 (1) and 56.4 (11) states:

"A person wishing to apply for judicial review must first obtain leave.

"Leave must be conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."
- [6] The question is does the court have the authority to vary the condition by extending the time?

- [7] The Defendant has referred the court to several cases from Jamaica where the issue has been addressed. The leading case of **Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller**¹ stated:

"There can be no doubt that the grant of leave to proceed to judicial review under rule 56.4 (12) is provisional. It is not absolute. It imposes a condition on an applicant to present his or her claim within 14 days of the grant of the leave. To satisfy this condition a Fixed Date Claim Form with an affidavit in support thereof must be filed, in obedience to rule 56.9 (1)(a)

- [8] The claimant has argued that the wording of the Jamaican provision is different from our CPR and therefore the court cannot rely on those cases.

- [9] Having review the submissions and authorities of both counsel, the court is of the view that there is no authority under the provisions of the CPR relied upon by the claimant to extend the time limit set out in Part 56.4 (11). In the court's view the provisions in Part 26 referred to by the claimant are general provisions which are inapplicable to the provision for leave and specifically to extension of the time fixed in 56.4 (11). Once the claim is filed, Rule 56.11 indicates that the provisions of Parts 25 to 27 apply to directions to be given by the Judge at the first hearing. Without a similar express provision, the general provisions for extension of time cannot be applied to Rule 56.4 (11). Further, the fact that the court's order does not contain the word condition cannot change the fact that leave under the Rule 56.4 (11) is conditional on the claim being filed within 14 days.

- [10] Lastly, the claimant has submitted that section 15 (8) of the Constitution of Antigua and Barbuda provides for the right of access to the court. That section provides:

(8) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any persons before such a court or other authority, the case shall be given a fair hearing within a reasonable time.

- [11] Counsel submits that all legal persons have a right of access to the court and this right is so much the more important in judicial review cases. He cites **Lord Neuberger in R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills**² where he stated:

"The courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law."

¹ Jamaica, SCCA No. 3 of 2008

² [2015] UKSC 6, at [61]

[12] He further submits that the need for a party not to be lightly denied access to the court, even where a statute suggest that the party may have lost that right on account of having missed a statutory time period was highlighted in the case of **Cannonier v Director of Public Prosecutions**³. There the Court of Appeal considered the matter of statutory restrictions on the right of appeal. The Court of Appeal stated:

“There must be shown to be a sufficiently important objective for the restriction, a rational connection with the objective, the use of the least drastic means, and no disproportionately severe effect on those to whom the restriction applies. The provision under challenge must be shown not to be arbitrarily or excessively invasive of the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of individuals.”

[13] He submits that an interpretation of CPR 56.4 (11) which conclusively and absolutely prohibits the advancement of a judicial review proceeding if there is a breach of the 14-day filing requirement is an interpretation and application of the rules of court which is not reasonably justifiable in a democratic society. It is arbitrary and “excessively invasive of the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights of individuals.

[14] Counsel makes particular mention of the case of **Deane v Allamby [2016] CCJ 21**. There the issue was whether the Court of Appeal was empowered to extend the statutory time to appeal. The court confirmed that there was no statutory power to extend the 7-day time limit prescribed by the section of the Act under challenge. The court then noted:

“However, we caution that this does not necessarily translate into an absence of jurisdiction of the court to extend time. The court must preserve jurisdiction to give effect to section 18 (1) of the Barbados Constitution which affords citizens the right to a fair trial within a reasonable time. An example, which may seem obvious, could arise if there was a national disaster, such as a hurricane, which shut down the country and the court making it impossible to comply with the statutory time limits. In a circumstance such as that, the court would have jurisdiction to make orders to give effect to the constitutional right to a fair trial and facilitate access to justice for citizens at the broader level.”

[15] Counsel concludes that what has occurred in the instant case is a mild breach of a time limitation imposed by a rule of procedure, not a breach of a time limitation imposed by a statute. Even when there is a breach of a time limitation imposed by statute the court still retains a jurisdiction to extend time to give effect to a party’s constitutional right of access to the court and the seat of justice.

[16] The court accepts that this court must preserve jurisdiction to give effect to the constitutional right to a fair trial and to facilitate access to justice for citizens. However, the court in **Deane** confirmed that it is well established that in approaching the question whether to grant an extension of time the

³ (2012) 80 WIR 260

court must examine and evaluate whether there were good grounds for the delay. After looking at the circumstances of that case, the court found that there was no good reason for the delay to file the notice of appeal within the 7-day time limit. Therefore even if there was the power to make such an order no justifiable reason had been offered to support the exercise of discretion in favour of the appellant.

- [17] There are a plethora of cases by the Eastern Caribbean Supreme court where the court has considered what constitutes a good reason to grant an extension of time. Even in pre-CPR 2000 cases, the court expressed its position in regard to time fixtures. In **Casmir Shillingford v Pinand**⁴ the court held that pressure of work was not a good and substantial reason to grant an application to extend time within which to appeal. In May 2017 in the case of **Public Works Corporation v Matthew Nelson**⁵, Chief Justice Pereira addressed the issue again. The case involved the failure of a defendant to timely file its defence. The Master had refused to set aside the default judgment and the defendant appealed. The court considered whether the explanations advanced by the appellant amounted to a good one. The court stated:

"I am satisfied having regard to the pleaded claims of the respondent and the evidence put forward by PWC in seeking to explain its failure to timely file its defence, that its administrative difficulties or deficiencies, though they may be a common occurrence do not amount to a good explanation. As this court reminded in **Michael Laudat et al v Danny Ambo**:

'Counsel do not have a good explanation which will excuse non-compliance with a rule or order or practice direction where the explanation given for the delay is misapprehension of the law, mistake of law . . . lack of diligence, volume of work, difficulty in communication with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.'

In short the giving of a full and detailed explanation does not thereby make the explanation one that is good or put differently, excusable."

- [18] In the Public Works Corporation case the appellant had also advanced the loss of an opportunity to be heard if the default judgment was allowed to stand. In response the Chief Justice stated:

'It is of the very essence of a default judgment that the defaulting party has lost the opportunity to attack the merits of a claim as it relates to liability. There is nothing unusual or disproportionate about that. It cannot be said that PWC has been deprived of an opportunity to be heard. Rather, it is the case that PWC has simply failed to make use of its opportunity to be heard. . . The fact that PWC has lost its opportunity due to its own default does not give rise to an exceptional circumstance.'

⁴ (1967) 10 WIR 269

⁵⁵ DOMHCVAP/0007 (delivered 29th May 2017)

[19] The claimant's application to deem the Fixed Date Claim properly filed amounts to a request to extend the 14 day time limit for filing. The reasons advanced by counsel for his failure to timely file fall within the categories of volume of work and pressure of work on Counsel. So that even though the court does retain jurisdiction to give effect to a constitutional right, in the circumstances of this case no good reason has been shown for the claimant's failure to timely file its Fixed Date Claim. Further, it cannot be said that if the claimant is not allowed to advance its claim it will be deprived of its right to access to the court. The claimant has simply failed to take advantage of the access provided within a timely manner.

[20] Accordingly, the application by the claimant for an order that the Fixed Date Claim and affidavits filed on behalf of the claimant be deemed properly filed is denied. The application by the defendants for an order that the said Fixed Date Claim be struck out is granted with costs to be assessed if not agreed.

Clare Henry
High Court Judge

By the Court

Registrar