

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

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2020/0004

BETWEEN:

**[1] LINDSAY F. P. GRANT
[2] JONEL F.H. POWELL**

Applicants

and

TANZANIA TOBIN TANZIL

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C. Farara

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

Appearances:

Mr. Brian Barnes together with Dr. Henry Browne, QC and Mr. Anthony Ross, QC
on behalf of the Applicants
Mrs. Angelina Gracy Sookoo-Bobb and Mr. Sylvester Anthony on behalf of the
Respondent

2020: June 10 and 29;
July 6.

Interlocutory appeal – Application for extension of time within which to seek leave to appeal – Setting aside default judgment – Rule 13.3 of the Civil Procedure Rules 2000 – Principles to be considered in exercising discretion to grant extension of time – Nature and consequential effect of applicant's failure to seek leave to appeal within prescribed time – Length of delay and whether delay excusable – Prejudice to parties as a result of failure and delay – Whether appeal has a realistic prospect of success – Computing time for filing an application for leave to appeal

REASONS FOR DECISION

- [1] **PEREIRA CJ:** On Wednesday 10th June 2020, we heard an application brought by the applicants, Messrs. Grant and Powell, who were the defendants in the court below, for an extension of time to apply for leave to appeal the interlocutory decision of Ventose J made on 28th October 2019 refusing to set aside the default judgment entered in favour of the respondent, Mr. Tanzania Tobin Tanzil, (the claimant below) on 9th October 2018 by Actie M (as she then was). We refused the application to extend time for applying for leave to appeal, which in effect rendered the rolled-up applications for leave to appeal and a stay, otiose. We also ordered that the applicants bear the costs of the respondent, which was agreed in the sum of \$2,000.00. We further promised to provide written reasons for our decision at a later time. We now do so.

The Background and Chronology

- [2] The applicants are attorneys-at-law practising in the Federation of Saint Kitts and Nevis. On 22nd December 2017, the respondent issued a claim against the applicants claiming, among others, orders to the effect that:
- (i) the applicants had breached their fiduciary duty and/or their duty of trust owed to him as his solicitors and escrow agents and/or that they acted fraudulently in receiving, using and/or failing to account for the sum of US\$460,000.00 transferred to the applicants' bank account numbered 0106966680 at First Caribbean International Bank (Barbados) Limited, Basseterre branch in Saint Kitts in or about May 2013 for a specific purpose namely, to purchase a condominium unit under the Citizenship by Investment Programme and secure title to the property;
 - (ii) the applicants have misappropriated the said funds belonging to him as their client, transferred to them initially on trust and thereafter in escrow,

for effecting the said purchase, in breach of the contract for professional services entered into between the parties;

(iii) the applicants return the said sum with interest; and

(iv) damages and costs be awarded to him.

[3] The claim form was served on the applicants on 22nd December 2017 and so acknowledged, by their acknowledgements of service - one filed on 5th January 2018 and another on 8th January 2018 by Mr. Daniel Brantley, Attorney-at-Law, stating the date of service as 22nd December 2017. In each of the acknowledgements of service the applicants stated their intention to defend the claim.

[4] Under rule 10.3 of the **Civil Procedure Rules** (CPR), the time limited for filing a defence is twenty-eight (28) days after the date of service of the claim form. The time for filing the applicants' defence would therefore have expired on 22nd January 2018. Their defences were not filed by that date, neither had they sought an extension before expiry of the time, by consent of the respondent or, by application to the court. On 23rd January 2018, the respondent applied ex-parte for default judgment to be entered against them for failure to file their defence.

[5] Curiously, on 31st January 2018 and 1st February 2018, the applicants applied to strike out the claim and to set aside the default judgment respectively, although, at that time, the court office had not acted on the request for entry of the default judgment. Much has been said by the learned trial judge as to the unusual handling of this matter. For present purposes, however, it is not necessary to delve into that aspect, save to say that it is hoped that such events and the handling of matters such as this by the court office in the manner recorded, are never repeated. The court office is integral to the promotion of the administration of justice and should be keen to ensure that this objective is always pursued.

- [6] The request for default judgment laid dormant at the court office for several months and it was not until 9th October 2018 that the request made by way of application for default judgment, and the applications to strike and to set aside the default judgment came up for consideration before the learned master. The learned master took the view that applications should be addressed based on the first in time principle. She accordingly entered default judgment in favour of the respondent with the terms thereof to be determined by the court. The learned master also dismissed the application to strike out the claim and the application to set aside default judgment as, in her view, that application had been made prematurely, the terms of the default judgment not yet having been determined.
- [7] On 16th October 2018, the applicants applied to set aside the default judgment pursuant to CPR 13.3(1), or alternately through the ‘exceptional circumstances’ gateway provided by CPR 13.3(2). No challenge was raised in that application as to the irregularity of the default judgment under CPR 13. 2. We will return to this point later in our reasons.
- [8] On 11th February 2019, the court determined the terms of the default judgment and ordered the applicants to pay to the respondent damages to be assessed. The hearing of the application to set aside the default judgment entered on 9th October 2018 was eventually heard on 26th September 2019.
- [9] By his judgment, rendered on 28th October 2019, the learned judge exercised his discretion under CPR 13.3(1) and 13.3(2) to refuse the application. As to CPR 13.3(1) he found, after referring to a number of authorities,¹ that the applicants had failed to satisfy two of the three conjunctive limbs of CPR 13.3 (1), namely:

¹ Public Works Corporation v Nelson DOMHCVAP2016/0007 (delivered 29th May 2017, unreported); Attorney General v Universal Projects Limited [2011] UKPC 37; Sylmord Trade Inc v Inteco Beteiligungs AG BVIHCVAP2013/0003 (delivered 24th March 2014, unreported); Laudat et al v Ambo DOMHCVAP2010/0016 (delivered 15th December 2010, unreported); Marina Village Limited v St. Kitts Urban Development Corporation Limited SKBHCVAP2015/0012 (delivered 19th May 2016, unreported); Pendragon International Limited et al v Bacardi International Limited ANUHCVP2007/0003 (delivered 23rd November 2007, unreported); Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste SLUHCVP2009/0008

- (i) furnishing a good explanation for the failure to timely file a defence (CPR 13.3(1)(b)), based, as it was, essentially on a misapprehension of the law relating to time of service of the defence; and
- (ii) demonstrating in their draft defence that they had a real prospect of successfully defending the claim.

It is well established, as to be considered trite, that the provisions of CPR 13.3(1) are unyielding. A failure to satisfy any one of the three conditions is fatal to the application.²

[10] As to CPR 13.3(2), the learned judge then went on to consider whether the applicants could bring themselves within the 'exceptional circumstances' gateway for setting aside the default judgment, having failed under CPR 13.3(1). He found that the matters prayed in aid by them to do so "merely repeat arguments that [he] ha[d] already rejected as a good explanation and 'real prospect of successfully defending the claim' under CPR 13.3(1)". Accordingly, he concluded that they had failed to bring themselves within the ambit of 13.3(2).

[11] Despite being present (by counsel) when the learned judge delivered his ruling on 28th October 2019, the applicants applied only on 21st November, 2019 for leave to appeal. Being an appeal from a decision which was interlocutory in nature, such an application was required to be made within fourteen (14) days of the 28th October 2019 order. The time for doing so would have expired on 12th November 2019. The application for leave to appeal was therefore out of time.

[12] The respondent, by notice of opposition filed on the said 21st November 2019, put the applicants on notice that their application for leave to appeal was out of time.

(delivered 11th January 2010, unreported); Wyre (Personal Legal Representative of the Estate of Arnold Wyre, Deceased) et al v Edwards et al ANUHCVP2014/0008 (delivered 3rd September 2014, unreported).

² Public Works Corporation v Nelson DOMHCVAP2016/0007 (delivered 29th May 2017, unreported) at para. 13.

The applicants' response was to counter his notice of opposition on 22nd November 2019, by submitting and relying on the authority of **Charles De Barbier et al v Roland Leduc**,³ a 2008 decision of this Court and one prior to the 2011 amendments of the CPR, as their rationale for counting time as from the date they were said to be served with the written judgment or order, which they asserted was on or about 8th November 2019.

- [13] This prompted the respondent to file and serve on the applicants a further notice of opposition pointing out the wording of CPR 62.2(1) (which in any event had not been amended by the 2011 CPR amendments) and the distinguishing features of the **Barbier** decision being: (1) a pre-2011 CPR amendment decision, and (2) importantly, a decision which dealt with a notice of appeal (CPR 62.5) as distinct from an application for leave to appeal (CPR 62.2 (1)).
- [14] The applicants, seemingly unperturbed by the respondent's position as set out in his notices of opposition, or, perhaps convinced of the rightness of their reliance on **Barbier**, whichever it may have been, took no further steps such as the issuance of a protective application for an extension of time in the event they were found to be wrong.
- [15] Sometime prior to February 2020, the application for leave came on for hearing before a single judge of the court who indicated, in the order referring the application to the Full Court pursuant to CPR 62.2(5), that the court was minded to refuse leave. This indication still did not stir the applicants into issuing an extension application at that time.
- [16] On 12th February 2020, the Full Court dismissed the application for leave as being out of time. It is only following the Full Court's pronouncement, and another 13 days thereafter, that the applicants issued this application for extension of time to

³ Saint Christopher and Nevis High Court Civil Appeal No. 10 of 2008 (delivered 8th December 2008, unreported).

seek leave to appeal. This brings us to the application for extension.

Extension of Time – The Principles

- [17] The granting of an extension of time is discretionary. The principles governing the exercise of the discretion to extend time are also trite, having been stated and restated in several decisions of the Court dating back from the early days of the introduction of the CPR in **Rose v Rose**⁴ in 2003. Those principles were restated by me in **Carleen Pemberton v Mark Brantley**⁵ and endorsed in the later decision of the Court in **C.O. Williams Construction (Saint Lucia) Limited v Inter-Island Dredging Co. Ltd.**⁶ The court, in exercising its discretion, in giving effect to the overriding objective of ensuring that justice is done between the parties, undertakes an evaluation exercise by weighing all the relevant factors in the scale. These factors would normally include: (i) the nature of the failure and the consequential effect; (ii) the length of the delay and whether any good explanation has been put forward for excusing it; (iii) weighing the prejudice to the parties in the context of the failure and the delay; and (iv) importantly in this case, where an extension is sought to seek leave to appeal, whether the appeal has a realistic prospect of success. Our analysis of these factors is set out below.

The Nature and Consequential Effect of the Failure

- [18] The applicants have failed to make a timely application for leave to appeal. A number of decisions of this Court treat an application for leave to appeal which is filed out of time as a nullity, with the result that the judgment below remains in full force and effect. The requirement for leave in the first place serves as a filter for weeding out unmeritorious appeals. There is no unqualified right of appeal from an interlocutory decision where, as here, the court has refused to grant an indulgence of setting aside a judgment entered as a result of the applicants' default. Their failure to timely apply for leave is yet a further default for which, in this instant

⁴ Saint Lucia High Court Civil Appeal No. 19 of 2003 (delivered 22nd September 2003, unreported).

⁵ SKBHCVAP2011/009 (delivered 14th October 2011, unreported).

⁶ SLUHCVAP2011/017 (delivered 19th March 2012, unreported).

application, they sought a further indulgence. Unless granted, there can be no appeal and the judgment of the court below in favour of the respondent remains in full force and effect with him being entitled to reap the fruits of his judgment.

The Length of the Delay and Whether Excusable

- [19] From all that has been said above, on any view, the length of delay was inordinate - in essence, almost four months after the decision was made. What is even more remarkable is that the applicants, in the face of the respondent's strident notices of objection, from as early as 21st November 2019, and further after the single judge's indication, took no protective steps or indeed any steps at all which could be viewed as redemptive. They have failed to put forward any reasons which may be taken as a good explanation. This is even more so when it is considered that the applicants are well-seasoned attorneys-at-law. Why it took a further 13 days after the dismissal of the application by the Full Court to raise an application to extend time has been left wholly unexplained.

The Prejudice

- [20] The applicants sought to suggest that they are facing the greater prejudice having regard to the nature of the judgment against them and their standing as politicians and members of Government. This is an irrelevant consideration in assessing prejudice in the context of this case. Before the court, all parties are equal and entitled to equal protection before the law. One class of persons is not afforded some greater privilege and merits more consideration than another by virtue of political or ministerial portfolio. For the court to take such an approach would be an affront to the constitutional principles and the rule of law by which the Federation of Saint Christopher and Nevis is governed. This is a case in which the applicants, time and again, have abysmally flouted the rules of court or chose to adopt a lax approach in respect of the serious claims made against them. It would be reasonable to expect that the applicants, given the gravity of the averments made in the claim as early as 22nd December 2017, would have been punctilious in their defences of it. The respondent is clearly prejudiced, as he has to date not yet

reaped the fruits of his judgment while having to counter the applicants' belated efforts to seek the court's indulgence to possibly deprive him of them.

Realistic Prospects of Success on Appeal

[21] As the Court observed in its decision in **Joseph Hyacinth v Allan Joseph**,⁷ in weighing up the relevant factors, the prospects of a successful appeal may in some cases be a weighty factor, which in the circumstances of a particular case may be accorded more weight than other factors which may not weigh favorably in respect of an applicant. Hence the use of the term 'good prospects of success' in **Hyacinth** as opposed to showing merely a 'realistic prospect of success'. A good prospect connotes at least a realistic prospect on the higher end of the measuring stick. As set out above, the nature of the applicants' failure, and the delay without any good explanation for it, all weigh in the scale against the grant of relief to the applicants. They would accordingly have to demonstrate that their appeal is one with good prospects of success to tilt the scale in their favour. In the context of this case, they were required to show good prospects of overturning the exercise of the trial judge's discretion by demonstrating that, in the exercise of his discretion, he "erred in principle, either by failing to take into account or giving too little or too much weight to relevant factors and considerations... and that as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong".⁸ Further, it is not open to this Court to substitute its own exercise of discretion for that of the trial judge.

[22] Unfortunately, it is in dealing with this factor that the arguments took an unprecedented turn. Counsel for the applicants, without warning or notice of any kind and upon a wholly new basis which was never placed before the trial judge or indeed foreshadowed in the grounds seeking leave to appeal, sought to launch a full-scale collateral attack on the default judgment entered on 9th October 2018.

⁷ GDAHCVAP2015/0025 (delivered 20th June 2016, unreported).

⁸ See *Dufour and others v Helenair Corporation Ltd and others* (1996) 52 WIR 188.

This attack ranged from challenging the admissibility of the affidavit in support of the ex-parte application for entry of default judgment to complaining of a lack of an opportunity to be heard on the further affidavit as ordered by the learned master for the purpose of determining the terms of the default judgment as contemplated under CPR 12.4 and 12.5. If ever there was an ambush this was surely one and ought not to be countenanced by this Court. As the Privy Council observed in **Bergan v Evans (St Christopher and Nevis)**,⁹ such practice is “far removed from the defendant’s duty, as a party to civil proceedings, to help the court to further the overriding objective”. In **Townsend and another v Persistence Holdings Ltd.**,¹⁰ the Privy Council observed, “[i]t is simply a denial of justice to dismiss an appeal on the basis of a point which has not been argued or put to counsel for the [a]ppellant, so that he can deal with it before it is decided”. So too, it is wholly unfair to put forward a whole new basis for an appeal and one wholly different to the case put forward before the trial judge on the set aside application. This is impermissible and cannot be entertained. That said, given the importance placed on the arguments by learned Queen’s Counsel on behalf of the applicants, they are addressed by way of the following observations for the purpose of explaining why they are wholly unmeritorious:

- (i) A claimant may request the entry of a default judgment (if permitted)¹¹ where a defendant duly served with the claim fails to file a defence in the time limited by proving service of the claim and statement of claim or by an acknowledgement of service of the claim by the defendant, the period for filing the defence has expired and that the defendant has not filed a defence to the claim - (CPR 12.5(a), (b) and (c)(i)). The claimant (respondent here) elected to make his request for entry of default judgment in the form of an application supported by an affidavit stating fulfillment of the conditions required under CPR 12.5 (a) to (c)(i). Although the Rules specify a form for making the request (Form 7), a deviation

⁹ [2019] UKPC 33 at para. 46.

¹⁰ [2008] UKPC 15 at para. 23.

¹¹ See CPR 12.3 which deals with cases where permission is required to enter a default judgment.

from the form would not render the request invalid. Form 7 itself affords various options depending on the nature of the default judgment sought.¹² Fulfillment of those conditions entitled the claimant to entry of a default judgment based on the defendants' (applicants') failure to defend.

- (ii) The next stage, having regard to the causes of action pleaded and the nature of the relief claimed which encapsulates some other remedy to those specified in CPR 12.10(1)(a) to (c), requires an application which may be made without notice and supported by evidence on affidavit to enable the court to determine the form of the judgment as the court considers the claimant to be entitled on the statement of claim. As urged by counsel for the respondent, there is no qualitative difference between an application for entry of a default judgment (normally termed an interim judgment) for damages to be assessed (which assessment then proceeds by way of engaging a further procedure under CPR 16.2), and an application for entry of a default judgment (an interim judgment) the terms or form of which are to be determined by the court supported by evidence on affidavit. It matters not that the terms or form of the judgment is determined at a later date. What matters is the fact that a claimant has taken the step, as he/she is entitled to do, to obtain judgment in default and in so doing foreclosing a defaulting defendant from putting in a late defence to the claim.
- (iii) A defendant cannot be heard to complain of not having an opportunity to respond to the evidence provided in determining the terms or form of the default judgment as CPR 12.10(5) permits it. The application need not be on notice. Further CPR 12.10(5) expressly disapplies CPR 11.15 which provides for service of the evidence of a party in respect of a without notice application heard by the court.

¹² See CPR Form 7.

- (iv) The entry of a default judgment does not leave a defendant without a remedy. A defendant may apply to set aside the default judgment either under CPR 13.2 where it is asserted that the judgment is irregular, in which case the court must (not may) set it aside, or under CPR 13.3 which is premised on the basis that the default judgment was regularly entered and pursuant to which the court may set the default judgment aside in the exercise of its discretion where an applicant satisfies the cumulative conditions of CPR 13.3(1)(a) to (c), or, under CPR 13.3(2) by demonstrating exceptional circumstances.
- (v) The applicants' application to set aside the default judgment was made pursuant to CPR 13.3, which assumes an acceptance that the default judgment was regularly entered. There was no challenge to the default judgment under CPR 13.2 and the learned judge quite rightly did not address his mind to this provision.
- (vi) As to the applicants' complaint of a failure of natural justice, this was simply not made out. They applied, as was their entitlement to do, to set aside the default judgment. They chose to do so on the basis of CPR 13.3 only. It was clearly open to the applicants, on their application, to set aside to challenge on all bases, in the alternative, as they so wished, and put forward a case challenging the regularity based on the provenance or propriety of the affidavits supporting the default judgment. They did not do so. An opportunity was accordingly afforded to deploy their full case. A complaint of a lack of an opportunity to be heard is not availing where a party had the opportunity but failed to make good use of it. It is not open to the applicants in seeking to appeal to put forward a whole new basis of challenge, which was never put forward in the application or canvassed at the hearing below.
- (vii) In any event, it has not been shown that the default judgment as entered was in any way irregular.

[23] The only other basis put forward by the applicants to demonstrate good prospects of success was the manner in which the learned judge treated with the draft defence submitted by them. They pointed to the fact that the learned judge directed that no order was being made for return of the funds, which had ultimately been paid out by the applicants either at the time of the issuance of the claim or at some point shortly thereafter. The thrust of the applicants' argument, if I understand it correctly, is that the ultimate payment out of the funds, albeit at a later time than agreed, ought to have been found by the learned judge to be a complete answer to the claim and ought to have, in effect, rendered the claim not viable. This does not amount to a sound legal argument, as the trial judge rightly found in paragraph 26 of his judgment, where he summed up the essence of their defence and concluded: "Based on the defence, while the Defendants have shown that the Claimant is not entitled to the order requiring the return to him of the sum of US\$460,000.00, they have not shown that they have a real prospect of successfully defending the other aspects of the claim". At paragraph 27, he went on further to conclude in these terms:

"It was clear that the court was satisfied that the Claimant was not entitled to the order requiring the return to him of the sum... The Defendants have in fact shown no prospect at all since they have not fully answered the specific claims of the Claimant in respect of breach of trust, breach of fiduciary duty, failing to account or misappropriation of monies belonging to the Claimant."

[24] Counsel for the applicants say that the learned judge was required to go further and explain why it was that the monies having been paid out eventually did not in essence bring an end to the claim since, as he puts it, the central subject matter of the claim had now been fulfilled. With the utmost respect to learned counsel, this argument completely misses the point in respect of what the learned judge was saying. It does not follow that an eventual payment out of monies, held by a trustee or fiduciary, cures the breach of trust or breach of fiduciary duty, or that the monies may not have been misappropriated, or that

accounting need not be given by the custodian of the funds in respect of the period the funds were so held. In short, the learned judge was merely succinct in saying that these other causes of action had not been addressed by the defendant. Further, when the draft defence which was before the learned judge was examined, the defendants' defence amounted to a bare denial. This runs afoul of CPR 10.5(4) and does not avail the applicants. It has not been shown that the learned judge erred in his approach in his assessment of the draft defence.

- [25] Based on the foregoing, the applicants have simply not demonstrated good prospects of upsetting the discretion exercised by the learned judge.

Conclusion

- [26] All factors, when weighed by the court in exercising its discretion to grant an extension, militated against the applicants. Their delay in making the application was inordinate; no good explanation for the delay was proffered; any prejudice they suffered was of their own making in their lax approach to obeying timelines or seemingly being uninterested in taking corrective measures even when given notice of them. Furthermore, the applicants have failed to demonstrate a realistic prospect of success on appeal, let alone a good prospect of upsetting the discretion exercised by the learned judge, or, in any event, of overcoming the conjunctive requirements required by CPR 13.3 which would result in a setting aside of the default judgment. An appeal on the grounds put forward would be hopeless. The application to extend time was accordingly refused with costs to the respondent, which was agreed in the sum of \$2,000.00.

[27] We are grateful to counsel on both sides for their written and oral arguments.

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar