

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. 115 OF 2012

BETWEEN:

**ST. VINCENT BUILDING AND LOAN ASSOCIATION
of Kingstown**

CLAIMANT

-AND-

**DOUGAN, YORK & CO.
(Acting by Carlyle Dougan) of Ribishi**

DEFENDANT

Appearances: Ms Annique Cummings, Ms Bernadine Nanton and Mr Jadric Cummings for the Claimant, Mr Stanley John Q.C. and Ms Keisal Peters for the Defendant.

2015: Jan. 13
Feb. 12

JUDGMENT

BACKGROUND

- [1] **Henry, J. (Ag.):** Dougan York & Co. (“Dougan”) is a law firm which operated from premises owned by Saint Vincent Building and Loan Association (“SVBLA”) for approximately 40 years. SVBLA sued Dougan claiming arrears of rent of \$45,394.40ⁱ and costs for the eighteen months ending on December 31, 2011. SVBLA initiated its claim by Fixed Date Claim Form on April 3, 2012. The defendant filed an Acknowledgment of Service but no Defence until January 7,

2015, almost 950 days lateⁱⁱ. The trial date was fixed for January 12, 2015ⁱⁱⁱ and the parties were ordered^{iv} to file and serve witness statements on or before November 26, 2014. Dougan did not file witness statements until January 5, 2015 - 40 days late. Seven days before the trial date, Dougan filed an application for an order that its Defence, Counterclaim and witness statement be deemed properly filed and that it be relieved from sanctions for the tardy filings.

- [2] The court considered the Application on January 13, 2015 when the matter came on for trial and refused Dougan leave to file its Defence and Counterclaim and Witness Statement after the time limited respectively by the Rules and the court's order of November 12, 2014. The Defendant's application for relief from sanctions was also denied. I provided a very brief summary of the reasons for my decision at the time. The full reasons are set out in this judgment.

ANALYSIS

Issue No. 1 - Should Dougan be granted extension of time to file its Defence and Counterclaim and witness statement?

- [3] Dougan's seeks four reliefs in his Application^v:

- (a) that (i) the witness statement and
 - (ii) the Defence and Counterclaim "filed **on January __, 2015 ... be deemed properly filed**", (bold mine);
- (b) that he be relieved from sanctions; and
- (c) there be no orders as to costs.

Framed in those terms, there is no application before the court for an extension of time to file either the defence and counterclaim or the witness statement. Not only is there no application before the court for extension of time but the prayer is missing relevant information as to the filing dates. Those details are not provided in the affidavit in support and no application was made for amendment of the application or affidavit to incorporate the missing dates. The court may not consider an application for relief from sanctions on the facts of this case in the absence of a related application for extension

of time. In all of those circumstances, the court is constrained from granting the reliefs sought.

[4] Nonetheless, if it turns out that there is a valid application for extension of time to file the defence and witness statement, I turn to consider the application on the basis of the grounds argued and the available evidence. The import of the Notice of Application as particularized in the grounds of the application and Mr Carlyle Dougan's affidavit in support is to obtain an extension of time within which to file the defence and counterclaim and the witness statement. This can be gleaned from the use of the expressions "the defendant's witness statement was not filed within the time specified in the said Order,"^{vi} and "failure to file the witness statement on time,"^{vii} and the considerations urged on the court.

[5] Mr Carlyle Dougan, on behalf of Dougan, echoed the grounds of the application and testified that the delay in filing the Defence and witness statement was not intentional or inordinate. He explained that they were filed late because Dougan anticipated that the parties would settle the matter amicably. He referenced settlement talks which took place and letters which were exchanged around November and December 2013, the last letter being sent by Dougan to SVBLA on December 13, 2013 with a counter-proposal. He also attributed the delay in filing the witness statement to his ill-health occasioned by arthritis and dental surgery in the weeks following November 12, 2014.^{viii} He claimed that the trial date could still be met.^{ix} It does not appear that the parties held discussions post-December 2013.

[6] Dougan was served with the Claim Form and Statement of Claim on April 7, 2012. He had 28 days until May 7, 2014, to file his Defence.^x It is now settled law that a defence can be filed without leave of the court after the period for filing has passed,^{xi} and a defendant may apply for extension of time to do so.^{xii} The court has wide discretion to give directions^{xiii} and to grant extension of time for complying with the CPR and orders of the court.^{xiv} A party seeking to vary a date for filing a defence or witness statement must as a general rule make an application before that date.^{xv} Dougan's

application violates this general rule, being made late on both counts. Such an application must include a prayer for relief from sanctions.^{xvi} While the Civil Procedure Rules 2000 (“CPR”) do not outline the factors which guide the court in considering an application for extension of time, the learning from decided cases^{xvii} is very instructive. The Court of Appeal in the **Carleen Pemberton** case^{xviii} articulated the principles which guide the court in exercising this discretion^{xix}. The court must take into account the (1) nature of the failure, (2) length of the delay, (3) reasons for the delay, (4) effect of the delay, (5) chances of the defence succeeding if the extension is granted; (6) degree of prejudice to the parties if the application is granted;^{xx} (7) content of the witness statement and its relevance;^{xxi} and any other relevant consideration arising from the particular facts, including any Practice Directions or Rules. As with the exercise of any other discretion, the court must give effect to the overriding objective of the CPR which is to ensure that justice is done between the parties.

Length of Delay and Reasons for Delay

[7] Dougan filed its defence 31½ months after it was due and its witness statement almost 1½ months after the due date. The delay in filing the defence is significant and the reasons provided for this is questionable. Dougan gives no details of any attempts it made between December 2013 and November 2014 to finalize settlement negotiations with SVBLA. In fact, the inescapable conclusion is that no such attempts were made. No reasonable explanation was given for this détente and no reasons were proffered as to why the defence was not filed between December 2013 and November 2014. Even if Dougan was expecting a response to its counter-proposal and subsequent settlement, there is no good reason why it should have waited a further 11 months in contravention of the CPR, without filing a defence. The court is satisfied that the delay in filing the defence was excessive and that Dougan had no good reasons for that delay. What of the witness statement? Mr Carlyle Dougan’s illness in the final months of 2014 provides a good reason for the Dougan’s delay in filing its witness statement. In all of the circumstances, that delay was not exorbitant.

Effect of Delay, Chance of Success and Prejudice to SVBLA

[8] If Dougan's application is successful, the belated filing of its defence and counterclaim would necessitate an adjournment of the trial to permit SVBLA to file a Defence and to allow Dougan to file a Reply. A minimum of 42 days would be required to accommodate those filings.^{xxii} Likewise, Dougan would be able to file witness statements in support of the factual assertions in its defence.^{xxiii} SVBLA conceivably would seek to file further witness statements in response to Dougan's. Consequently, the trial date would have to be vacated and re-scheduled, arguably at some inconvenience and expense to SVBLA. An entirely different trial timeframe would be created with attendant discommodities to the court and the SVBLA.

[9] Dougan's defence to the claim for arrears is that it paid rent for periods up to June 18, 2010^{xxiv}. Interestingly, at paragraph 32 of the defence,^{xxv} Dougan admits that it is indebted to SVBLA in the amount of \$45,394.40 for arrears of rent, but denies liability for rent at paragraph 35. Dougan seeks to offset its liability against special damages^{xxvi} and general damages against SVBLA for "unlawful eviction" in February 2011. It is noteworthy that Dougan alludes to two other civil claims in the High Court^{xxvii} concerning those identical matters. The court takes judicial notice that the first was a Notice of Application which was disposed of, while the latter is ongoing, in which a defence similar to the proposed one having been filed. In the circumstances, the administration of justice and particularly the overriding objective, dictates that both claims be consolidated. In that way, the defence would be fully ventilated and no prejudice occasioned to either party.

[10] Having examined the factual matrix, the legal submissions on behalf of the parties and the applicable legal principles, Dougan's application for extension of time to file its defence must fail because too much time has passed between the time limited for filing, its reasons for the delay are not substantial nor justifiable and it seems to admit liability. Further, an order extending Dougan's time to file its defence would result in substantial variation of the trial timetable and consequential prejudice and expense to SVBLA. For

these reasons, Dougan's application for extension of time to file its defence is denied. Although the delay in filing its witness statement was not excessively protracted and its reasons for the delay are justifiable, denial of extension of time to file its defence precludes Dougan from asserting any facts or factual argument in a witness statement.^{xxviii} Dougan is accordingly denied an extension of time to file its witness statement.

Issue No. 2 - Should Dougan be granted relief from sanctions for failure to file its Defence and Counterclaim and witness statement on time?

[11] Leave having been denied to Dougan to file its defence and witness statement renders consideration of this issue moot. Suffice it to say that similar considerations to those for extension of time apply when the court is exercising its discretion to grant relief from sanctions. The CPR^{xxix} establishes the regime for relief from sanctions for failure to comply with any rule, order or direction. It stipulates that an application for relief from sanctions must be "made promptly" and be "supported by evidence on affidavit." Three conditions precedent are laid down for grant of such relief.^{xxx} The court must be satisfied that the failure to comply was not intentional; there is a good explanation for the breach; and the party in default has generally complied with all other relevant rules, practice directions, orders and directions. In considering the application, the court must have regard to:^{xxxi} the effect which the granting of relief or not would have on each party; the interests of the administration of justice; whether the failure to comply has been or can be remedied within a reasonable time; whether the failure to comply was due to the party or the party's legal practitioner; and whether the trial date or any likely trial date can still be met if relief is granted. All of these criteria must be satisfied.^{xxxii} Most of those matters have been considered earlier and on balance the interests of justice require that there be no relief from sanctions. No order is made for relief from sanctions.

[12] No order was made as to costs on the hearing date of this application. The general rule is that the unsuccessful party pays costs of the successful party.^{xxxiii} Dougan is therefore ordered to pay costs to SVBLA of \$750.00.

ORDER

[13] For the reasons given, it is ordered:

1. Dougan York and Company's application for extension of time to file its Defence and Counterclaim and witness statement is refused.
2. Dougan York and Company's application for relief from sanctions for failure to file its Defence and Counterclaim and witness statement respectively within the time limited by the CPR Part 10.3 and Order dated November 12, 2014 is denied.
3. Dougan York and Company shall pay to Saint Vincent Building and Loan Association costs of \$750.00.
4. The instant Claim and Claim No. 287 of 2011 are consolidated in accordance with CPR Part 26.1 (2) (b) and shall proceed as Claim No. 115 of 2012.

[14] The court is grateful to all counsel for their submissions.

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Esco L. Henry
HIGH COURT JUDGE (Ag.)

ⁱ At a monthly rent of \$2,184.00. The invoices reflect a 15% VAT charge.

ⁱⁱ Civil Procedure Rules 2000, Part 10.3 establishes as a general rule that the period for filing a defence is 28 days after the service of the claim form. In the instant case the defence should have been filed on or before May 7, 2012 to comply with this timeline.

ⁱⁱⁱ It was subsequently moved to January 13, 2015.

^{iv} By Order dated November 12, 2014.

^v Paragraphs 1 – 4.

^{vi} See ground 1 and paragraph 4 of the affidavit in support.

^{vii} See ground 4 and paragraph 6 of the affidavit in support.

^{viii} See paragraph 11 of Affidavit in support filed on January 5, 2015.

^{ix} See paragraph 14 of the Affidavit.

^x See CPR Part 10.3(1) which provides:

“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.”

^{xi} **Attorney General v. Keron Matthew [2011] UKPC 38.**

^{xii} CPR Part 10.3(9) states: “A defendant may apply for an order extending the time for filing a defence.”

^{xiii} CPR Part 26.1 (2) (w) reads: “(2) Except where these rules provide otherwise, the court may- ...
(w) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.”

^{xiv} Part 26.1(2)(k) of the CPR provides: “(2) Except where these rules provide otherwise, the court may - ...

(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.”

^{xv} CPR Part 27.8 (1), (3) states:

“27.8 (1) A party must apply to the court if that party wishes to vary a date which the court has fixed for-

- (a) a case management conference;
- (b) a party to do something where the order specifies the consequences of failure to comply;
- (c) a pre-trial review;
- (d) the return of a listing questionnaire; or

(e) the trial date or trial period.

(3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date.”

^{xvi} CPR Part 27.8 (4); see also **Prudence Robinson v Sagicor General Insurance Inc SLUHCVP2013/0009**. CPR 27.8 (4) provides:

“(4) A party who applies after that date must apply for –
(a) An extension of time; and
(b) relief from any sanction to which the party has become subject under these Rules or any court order. “

^{xvii} **Carleen Pemberton v. Mark Brantley SKBHCVP 2011/009; John Cecil Rose v. Anne Marie Uralis Rose SLUHCVP2003/019; C. O. Williams Construction (Saint Lucia) Co. Ltd. V. Inter Islands Dredging Co. Ltd. SLUHCVP2011/017; Cuthbert James v. Vida James SLUHCVP2014/0012 and Prudence Robinson v Sagicor General Insurance Inc. SLUHCVP2013/0009.**

^{xviii} Supra. At para. [13]

^{xix} Supra. See para. 52.

^{xx} See also **Cuthbert James v. Vida James SLUHCVP 2014/0012**

^{xxi} Supra.

^{xxii} See CPR Parts 10.3 (1), 10.9 (1) (a) and 18.2 (1). Rules 10.9 (1) and 18.2 (1) provide:

“10.9 (1) A claimant may file and serve a reply to a defence –
(a) 14 days after the date of service of the defence; or
(b) At any time with the permission of the court.”

18.2 (1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as provided by this rule.”

^{xxiii} See also CPR Part 10.7 states: “The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree.”

^{xxiv} Paragraphs 1 – 20.

^{xxv} Paragraph 32 states “Paragraph 11 of the Statement of Claim is admitted.” See Paragraphs 10 and 11 of the Statement of Claim which state: “10. As at the 31st December 2011 the Defendant owed the Claimant \$45,394.40 in outstanding rent demanded. 11. The Defendant failed and refused to pay the outstanding rent as demanded.”

^{xxvi} \$15,328.00 for loss of earnings for 6 days (at \$2,500.00 per day) and partial rental for unspecified days in February, 2011.

^{xxvii} Claim No. 41 of 2011 and Claim No. 287 of 2011.

^{xxviii} Supra.

^{xxix} Part 26.8.

^{xxx} CPR Part 26.8 (2) provides: “The court may grant relief only if it is satisfied that-

- (a) The failure to comply as 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.”

^{xxxi} CPR Part 26.8 (3) provides: “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 of the party’s legal practitioner; and
- (e) whether the trial date or any likely trial date can still be met if relief is granted.

^{xxxii} **Roderick Frederick v. Owen Joseph et al DOMHCVAP2005/032.**

^{xxxiii} CPR Part 64.6 (1) provides in part “ Where the court ... decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.”