

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2010/0394

BETWEEN:

VERONICA JOSEPH

Claimant

and

ALAN MARK JULIEN/PHILLIP

Defendant

Appearances:

Ms. Shireeen Wilkinson for the Claimant
Mr. Alban John for the Defendant

2012: April 19;
2013: January 30.

JUDGMENT

- [1] ELLIS, J.: The Claimant's fixed date claim form and statement of claim together with the customary documents were personally served on the Defendant on 23rd September 2010. No defence has been entered in respect of this claim.
- [2] By notice of application filed on 1st March 2012, the Defendant herein applied for an extension of time to file and serve his defence herein.
- [3] The grounds of the application are:
1. That the Defendant lives with his girlfriend, the mother of the Defendant's three young children. The mother of the said children is unemployed and the Defendant is the sole bread winner of the family earning \$574.00 per fortnight as maintenance man at Maurice Bishop International Airport. The

Defendant was therefore not able to retain counsel and was attempting to handle the matter himself.

2. Mr Alban John, of counsel, was asked by the court to assist the Defendant on 7th July 2011 but the Defendant then had an accident on the job causing serious injury to his hand resulting in hospitalisation for 8 days.
3. The Defendant then fixed an appointment on 9th December 2011 but became disillusioned and disheartened because he was unable to raise the monies to approach counsel for assistance as he was of the view that he had to be able to financially retain counsel to handle the matter.

- [4] The application is opposed by the Claimant. On the last occasion that this matter came up for hearing the court asked the parties to provide submissions in writing. The parties agreed to have this matter decided on the papers.

Chronology

- [5] The factual background and chronology are critical to the decision in this case and is set out in brief.
1. 8th September 2010 – Claimant files fixed date claim form and statement of claim seeking inter alia an order for recovery of possession of land owned by the Claimant and occupied by the Defendant.
 2. 23rd September 2010 – the Defendant is served.
 3. 4th November 2010 – first hearing of fixed date claim. Defendant appears and advises that his name is incorrectly stated on the claim form.
 4. 12th April 2011 - application to amend the Claim granted.
 5. 28th February 2011 – the Claimant files an application for judgment pursuant to CPR 20.2 (3) on the basis that the Defendant has failed to file a defence within the time prescribed by the CPR 10.3 and the Defendant has not filed an application to extend the time for filing a defence.
 6. 12th October 2011 – Defendant sustains an on-the-job injury which requires hospitalisation for 8 days.

7. 1st December 2011 – at the hearing of the Claimant's application the court invites Alban John to act for the Defendant.
8. 8th December 2011 – counsel for the Defendant files notice of his appointment as counsel.
9. 27th February 2012 – Court grants leave until 2nd March 2012 to make an application for leave to file a defence failing which the Defendant will not be allowed to file a defence in the action and the Claimant can proceed to apply for judgement.
10. 1st March 2012 – Defendant files application to extend the time for filing his defence.

Analysis

- [6] CPR 10.3 (1) mandates that the time for filing a defence is 28 days after service of the claim form. No distinction is drawn between the fixed date claim form and the ordinary claim form. The distinction arises under CPR 12. In the case of the ordinary claim form where a Defendant fails to file a defence within the prescribed period, judgment may be entered for failure. However under CPR 12.2 (b) default judgment is not available for a fixed date claim.
- [7] The Defendant concedes that his defence was filed outside the period stipulated by the CPR, and in the premises he asks that the court exercise its discretion to extend the time for the filing of his defence.
- [8] CPR 26.1 (2) (k) provides that except where the rules provide otherwise, the court may 'extend or shorten the time for compliance with a rule, practice, direction, order or direction of the court if the application for an extension is made after the time for compliance has passed.'
- [9] What then are the factors to be taken into account in the exercise of the court's discretion?

- [10] There is no express or implied sanction for the failure to comply with the CPR 10.3 (1). The court notes the dicta of Lord Dyson in *Attorney General v Keron Matthews* [2011] UKPC 38 where at paragraph 16 of the judgment he stated:

“There is no rule which states that, if the Defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the Defendant fails to file a defence with the prescribed period: rule 10.3(5) provides that the Defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the Claimant. It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the Defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the Claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.”

- [11] It follows therefore that the Defendant is not required to seek relief from sanctions and that the court is not obliged to consider the factors set out in Part 26.8 of the CPR.

- [12] In circumstances where there is no sanction, the rules do not expressly prescribe the factors which the court must take into account in exercising its discretion to extend time. Thankfully, however, the Court of Appeal has provided clear guidance on this.

- [13] In *C.O. Williams Construction Co. Ltd. v Inter Islands Dredging Co. Ltd*, the Eastern Caribbean Court of Appeal held that:

“On an application for extension of time generally, where no sanction specified for failure to comply with a rule which prescribes the time limit, the court in the exercise of its discretion will consider (1) the length of the

delay (2) the reasons for the delay (3) the chances of success if the extension is granted; and (4) the degree of prejudice if the application is granted.”

- [14] The Court accepts that applying these factors to this case that these are relevant factors to be considered in the exercise of its discretion. In exercising its discretion the Court must ultimately seek to give effect to the overriding objective.

Length of Delay

- [15] It is not disputed that the Defendant was served with the claim form on 23rd September 2010. It follows that this application to extend time (filed on 1st March 2012) was filed some 17 months after his defence became due. Given the prescription in CPR 10.3(1), there is no question that the delay is inordinate.

Reasons for the Delay

- [16] The affidavit of Veronica Plenty, filed in support of this application indicates that following receipt of the fixed date claim the Defendant was not able to retain counsel and was attempting to handle the matter himself. Ms Plenty averred that the Defendant is the sole bread winner of the family, earning \$574.00 per fortnight as maintenance man at Maurice Bishop International Airport.
- [17] Although counsel had been asked by the Court to assist the Defendant on 7th July 2011, it appears that he suffered an accident on the job which caused serious injury to his hand resulting in hospitalisation for 8 days. The medical certificate exhibited indicates that he was in fact admitted and treated at the MSW ward of the General Hospital between the 14th October 2011 and 21st October 2011.
- [18] The evidence discloses that Defendant then fixed an appointment with Counsel on 9th December 2011 but then became disillusioned and disheartened because he

felt unable to approach counsel for assistance as he was of the view that he had to be able to financially retain counsel to handle the matter.

- [19] The court accepts that the illness or physical incapacity of an applicant would be a justifiable and plausible excuse for delay. However in the Claimant's case, the illness or incapacity covers a period of no more than 10- 15 days. There are several significant gaps in the chronology which have not been addressed in the Defendant's application.
- [20] The evidence which the Defendant has offered in support of his application provides no reasonable explanation for the delay between 21st October 2010 and the 7th July 2011. Having elected to go it alone without the benefit legal counsel, the Defendant does not explain why he failed to personally take any steps in the matter.
- [21] Further, there is no explanation for the failure to take any step in the proceedings between 7th July 2011 (when the assistance of counsel was solicited) and 21st October 2011 (when the Defendant sustained his injury). There is also no plausible or reasonable explanation to explain the further period of delay between 21st October 2011 and 9th December 2011 or between 9th December 2011 and the eventual filing of this application.
- [22] In order to determine whether there is a good explanation for the failure to file a defence within time, there must be proper evidence before the court to justify the entire period of delay. The Court is not satisfied that the Defendant's alleged impecuniosity could justify failing to take any action to defend this claim. He may well have felt unable to retain counsel in the matter but that does not excuse his inertia. As with any other litigant in Grenada, the Defendant has the legal right to approach the court without the benefit of counsel. He chose not to do so and, save for the period of his hospital stay, his serial inaction suggests to the court that

he was content to allow this matter to progress without any serious attempt to defend his position.

- [23] Given this, the Court is of the view that the Defendant has not sufficiently discharge his burden to demonstrate that there is a good reason for the delay.

Arguable Defence/Chance of Success

- [24] In her statement of claim, the Claimant claims that she is the freehold owner entitled to possession of a portion of land in Woodlands, Grenada. She claims that this property was conveyed to her by her father on 15th August 2008 in a registered Deed of Indenture.
- [25] She noted that prior to this conveyance the Defendant trespassed on the property and constructed a chattel house thereon without the permission of her father, the then legal owner. The Claimant states that her father made numerous requests to the Defendant to vacate the premises and that he refused to do so. She claims possession of the property and damages for the wrongful occupation.
- [26] The Defendant states that he has a good defence to the claim which was exhibited to his application. The basis of the Defendant's defence varies throughout the document.
- [27] First, he alleges that he went into occupation of the property at the invitation of his grandfather, (the Claimant's father) in or around 1997. On its own, this would clearly not be a sufficient basis to resist the Claimant's claim for possession. The defence does not disclose that the Defendant has any basis to proffer a claim for adverse possession or prescription, and given his admission that he took up occupation as an apparent gratuitous licensee, it is doubtful that a case for prescription could in any event be made out.

- [28] The Defendant also alleges that his grandfather (during his lifetime) promised to give him the property because he had nothing. He does not advance that the property was transferred to him prior to his grandfather's death neither does he provide any sustainable legal basis upon which such a promise (if proved) could be enforced.
- [29] The Defendant then purports to directly challenge the Claimant's legal title to the property. He challenges the validity of the signature (which he alleges is a forged or pretend signature) appended to the Deed of Indenture on the basis that his grandfather was illiterate. In that regard he states that he intends to rely on the National ID card issued to his grandfather in 2008 for its full effect.
- [30] In the alternative, the Defendant alleges that the deed of indenture was obtained by fraud or undue influence on the basis that the grandfather was illiterate and had no attorney upon whom he could rely or trust to conduct any legal business. He alleges that the indenture would have been procured when his grandfather was illiterate or mentally incapable of understanding the nature and effect of the execution of the Indenture and without the benefit of independent legal advice. He contends that the conveyance was therefore not effective to convey title and asks that the court declare it void.
- [31] Counsel for the Claimant submits that the defence does not disclose a defence which is sustainable in fact or in law. She submits that the defence contains hearsay and scandalous allegations which are a malicious attack on the character of the Claimant.
- [32] While the defence expressly alleges dishonest and fraudulent conduct on the part of Claimant this does not without more render the defence unsustainable. It is clear that if such allegations are relevant to the issue in dispute and material to the relief prayed (as they clearly would be in this case), they would not be deemed scandalous. *Millington v Loring* (1881) 6 QBD, 190 at 196.

- [33] Counsel for the Claimant also contends that the defence does not disclose a defence which is sustainable in either fact or law as it does nothing to place him in a position to deny that the Claimant is the owner of the premises.
- [34] What is clear is that none of the defences advanced by the Defendant demonstrate that he has title in the property or that that he has a legal right to remain in occupation. Even assuming that the deed were to be declared void, this would not *without more* give the Defendant a legal or equitable right to remain on the property and the draft defence posits no such claim.
- [35] The only import of a successful challenge to the validity of the deed would be to vitiate the Claimant's legal entitlement to demand possession of the property. In other words, while the Defendant does not claim title or ownership to the property, the Claimant (who the Defendant claims is not in possession of the property) would otherwise have no prior or superior right to seek or obtain his removal.
- [36] It is clear that in an action for recovery of possession in land, the Claimant's right to recovery will depend upon the strength of his own title and not the weakness of the Defendant. The Defendant need only prove that he is in possession. The Claimant must, if he or she can do so positively, prove that his or her title is better. *Dunford v Mc Anulty* [1883] 8 App. Cas. 456 at 460; *Emmerson v Maddison* [1906] AC 569 at 575; *Ezekiel v Fraser* [2002] EWHC 2066 (Ch.)
- [37] The title relied on by the Claimant is the *inter vivos* gift made to her by her now deceased father (the Defendant's grandfather), the authenticity and validity of which is now disputed by the Defendant. While there is no doubt that any litigant would find it difficult to advance a challenge to an *inter vivos* transfer on the basis of fraud or undue influence, and it is clear that that Defendant would have a high evidential threshold, the court cannot in the circumstances conclude that this

aspect of the defence is not sustainable or hopeless. The court is satisfied that prima facie there appears to be an arguable defence to this claim.

Prejudice

[38] If the second Defendant's application is denied, he runs the risk of having judgment entered against him on a summary application by the Claimant. There will obviously be significant prejudice to his case.

[39] What of the Claimant? The Claimant has not obtained judgement in this case. However, by notice of application filed on 28th February 2011, the Claimant has applied for a summary judgment in this action on the basis that the Defendant has failed to file a defence within the time prescribed by CPR 10.3 and there has been no application by him to extend time for filing his defence. This application was originally set down on 5th May 2011, has been repeatedly adjourned and remains pending.

[40] It is clear that at the time of filing this application, the claim was unchallenged and the Defendant would likely be entitled to the relief sought. Some 17 months have now lapsed since the claim form was served on the Defendant. There have been numerous court appearances since then and yet the Defendant has failed to act promptly.

[41] The court finds that granting the Defendant's application would render moot the Claimant's application for judgment which application pre-dated the Defendant's application by at least 1 year.

Conclusion

[42] Ultimately the court has a broad and unfettered discretionary power to extend time under CPR 26.9. This discretion must however be exercised judicially and must

give effect to the overriding objective which is to ensure that justice is done as between the parties. “Dealing with cases justly” means that courts as far as possible ought to decide cases on their merits.

- [43] In regards to applications to extend time where there is no sanction, the overriding objective has led the courts to consider whether the Defendant has a properly arguable defence however tardy may be his application for further time. In that regard the court notes the judgments in *Parker S. Quillen and Joan F. Quillen et al v Harney Westwood and Reigels* [1999] ECLR. 23 and *Ellis v Compass* (2005) Supreme Court of Jamaica No. E201 of 1999 unreported.
- [44] In the *Quillen Case* (which was handed down pre CPR 2000), although not convinced on the other applicable factors, the Court of Appeal extended the time for filing the notice of appeal on the basis that the appellants disclosed an arguable ground of appeal.
- [45] This case was considered by the Court of Appeal in *C.O. Williams Construction Co. Ltd. v Inter Islands Dredging Co. Ltd.* Given the judgment of the Court of Appeal in that case which followed the judgment in *Carleen Pemberton v Mark Brantley* HCVAP 2011/0009 delivered 14th October 2011 and that of the Privy Council in *Attorney General v Keron Matthews*, the court finds in exercising its discretion that the Defendant should be granted an extension of time to file his defence.
- [46] The court recognises however that the Defendant’s dilatory conduct has caused prejudice to the Claimant who has incurred legal costs as a result of this application. Given the Defendant’s conduct thus far, it is also clear that this litigation must proceed at a more acceptable pace than previously obtained. The Defendant must therefore promptly comply with all directions and orders of this court.

[47] The court's order is therefore as follows:

1. The Defendant is granted an extension of time to file his defence to this action.
2. The defence is to be filed and served on the Claimant within 7 days of the date of this judgment.
3. The Defendant will pay the Claimant's costs of in the amount of \$1500.00 on or before the 30th November 2012.
4. The Defendant will also pay the costs of \$500.00 ordered on 27th February 2012 on or before 30th November 2012.

VICKI ANN ELLIS
High Court Judge