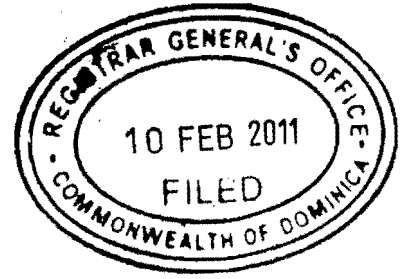


COMMONWEALTH OF DOMINICA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO DOMHCV2009/0254

BETWEEN:

JOSEPH LEBLANC

Claimant

AND

THE ATTORNEY GENERAL OF DOMINICA
MINISTER OF PUBLIC WORKS & INFRASTRUCTURAL DEVELOPMENT

Defendants

Appearances

Mr Steven Isidore holding for Mr Glenworth Ducreay for the Claimant
Ms Tameka Hyacinth holding for Ms Sherma Blaize for the Defendants

.....
2009: November 24
2010: June 28;
2011: February 10
.....

Ruling

- [1] **LANNS, MASTER:** On 14th July 2009, the Claimant commenced proceedings against the Defendants alleging trespass and damage to his property registered in Register Book T11 Folio 96 of the Register of Titles for the Commonwealth of Dominica. The Claimant alleges that in or about 1993 the 2nd Defendant dumped or caused to be dumped rubbish on land then owned by his late father, Leo Leblanc. He avers that his father departed this life in 1993 and devised the subject property to him. In 1996, the property was transferred to the Claimant, **and the trespass and dumping of debris continued unabated up to 2006.** The Claimant avers that **the effects of** the dumping caused damage to agricultural crops and rendered the land non-productive, uneconomic and virtually useless for the purposes of its retention for the purposes of production of agricultural commodities.

- [2] On 24th July 2009, the Defendants filed a joint Acknowledgement of Service indicating an intention to defend. To date, they have not filed any Defence. The period for filing a Defence expired on 13th August 2009.
- [3] In the application now before the court, the Defendants seek an order striking out the Claimant's Statement of Claim on the grounds that
- (a) The Claim is statute barred under the Public Authorities Protection Act;
 - (b) The Claimant's Statement of Claim is an abuse of the court's process under the Civil Procedure Rule 26.3 (1)(c) as the claim has been issued after the expiry of the relevant limitation period.
 - (c) The Defendants can successfully defend the Claim;
 - (d) The Claimant will not be prejudiced by the Defendants' failure to file their defences within time nor will it affect the trial date since no date has yet been set.
 - (e) It is in the interest of justice that the relief sought be granted.
- [4] In the alternative, the Defendants seek an order extending the time within which to file their Defence.
- [5] The Application was filed on 23rd September 2009, and is supported by Affidavit affirmed by Pricilla Paquette, State Attorney, and filed on the same date as the application.
- [6] The Claimant responded to the Claimant's application with an affidavit in reply. Both parties filed brief submissions and authorities in compliance with an order of the court.

- [6] I think it would be a prudent approach to deal first with the application for extension of time within which to file a Defence, since if the application is decided in favour of the Defendants, then they may be in a position to plead the Statute of Limitation and thus set the stage or the platform for their assertion that the Claimant's claim is statute barred. I do not think it is appropriate to consider an application to strike out a Claim on the ground that it is statute barred in circumstances where the application is made outside the period for filing a Defence and where there is no Defence containing such averment. If the application is decided against the Defendants, then there would be no Defence and thus, the Claimant would be entitled to either default or summary judgment which would effectively end the matter and would save time and costs. I now consider the application for extension of time.

Application for extension of time within which to file a Defence

- [7] The application for an extension of time within which to file a Defence falls under CPR 10.3 (9) which provides that "a defendant may apply for an order extending the time for filing a defence".

- [8] The jurisdiction of the court to extend time for filing a defence falls under CPR 26.2 (k) which reads:

"26.2 Except where these rules provides otherwise, the court may ---
(a to j) ...

(k) extend 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.

- [9] In **JR O'Neal and G.A. Cobham Ltd v Cliff Williams** BVI Civil Appeal No. 10 of 2006, Barrow J.A. stated that when a party applies for an extension of time within which to do something which he failed to do, that party is in effect applying for relief from sanctions and thus rule 26.8 applies. CPR 26.8, directs what the Defendant must do in order to seek

relief from sanctions and it sets out mandatory conditions precedent to the grant of relief. The court is expressly precluded from granting relief if certain of the conditions are not satisfied. Rule 26.8 is in the following terms:

"(1) An application for relief from any sanction imposed for failure to comply with any rule, order or direction must be –

- (a) made promptly; and
- (b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that-

- (a) the failure to comply was 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.

(3) 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 or the party's legal practitioner; and
- (e) whether the trial date or any likely trial date can still be met if relief is granted.

(4) "

Was the application made promptly?

[10] It can hardly be said that the Defendant's application in this case was made promptly coming as it did 38 days after the period for filing of the Defence had expired. I am not satisfied.

Whether the failure to comply was intentional

- [11] In this case, the affidavit supporting the application, to which Ms Paquette deposed, comprises nine paragraphs, five of which deal specifically with the reasons why the claim should be struck out under the Limitation Act. In paragraph 1, Ms Paquette speaks to her identity and her authority to make the affidavit. In paragraph 2 Ms Paquette states:

"2. I make this Affidavit in support of the application to strike out the Statement of Claim made on the 14th day of July, 2009 by Joseph Leblanc."

- [12] Paragraphs 3, 4, 5, 6 and 7 were devoted to the grounds put forward for the striking out application.

- [13] Paragraph 8 is the only paragraph which addresses any of the three conditions that must be satisfied under 26.8. In that paragraph Ms Paquette states:

"8 ... [T]he Claimant will not suffer any prejudice by the granting of an Order giving the Defendants time within which to file their Defence in the event that this application is not granted, nor will it affect the trial since none has been set."

- [14] Paragraph 9 urges the court to grant relief because it is in the interest of justice to do so.

- [15] It is clear from the contents of the Affidavit, that there is no or no sufficient evidence upon which the court can make a finding as to whether or not the failure to comply was intentional.

Whether there is a good explanation for the failure.

- [16] I come to the same conclusion that there is no or no sufficient evidence upon which the court can make a finding as to whether or not there is a good explanation for the failure.

- [17] The court is therefore left to "figure out" or guess the reasons for the failure to file a Defense, and whether or not the failure was intentional.
- [18] As His Lordship Barrow J.A. noted in **Frampton v Pinard et al Newton** Dominica Civil Appeal No 15 of 2005 at paragraph 19, the court is not permitted to guess and supply the omission in the application. It is not permissible for the applicant to violate clear rules and escape sanctions by leaving it to the court to find a way out for the applicant.
- [19] The admonition given to us by Justice of Appeal Saunders, in **Avril Francis v St Kitts-Nevis Finance Company Limited**, St Christopher and Nevis Civil Appeal No. 21 of 2003, is also apt.
- [20] In refusing an application for leave to extend time for the filing and service of a Notice of Appeal, His Lordship stated at paragraph 7.

"The court has to be careful not to set precedents which may have the effect of allowing these rules to be interpreted in a manner that carries us back to the lax ways that built up under the old rules. Under these new rules the Court places a premium on timeliness, on professionalism, on efficiency, on cogent reasons being advanced for failure to adhere to time standards. This is apparent from Part 26.8 which explicitly refers to promptness, to unintentional failure to comply and to good explanation when one seeks relief from sanctions...."

Conclusion

- [21] The rules provide a procedure and criteria for avoiding the consequences of failure to comply. The Defendants have not satisfied the criteria for obtaining relief from sanctions. They have not applied with promptitude for the extension of time. They have failed to satisfy the conditions set forth in rule 26.8 (2) to enable me to exercise my discretion. In particular, they have failed to explain their failure to file a defence. There is no material or evidentiary basis on which the court could be asked to exercise the

discretion to allow an extension of time or relief from sanctions.

- [22] The evidence before the court leads me to conclude that there is no merit in the application. Therefore, I dismiss the application by the Defendants for an order extending time within which to file a Defence, and enter judgment for the Claimant.

The Order

- [23] IT IS HEREBY ORDERED that

- [1] The Application by the Defendants for an extension of time within which to file a Defence is denied.
- [2] Judgment is hereby entered for the Claimant for damages to be assessed upon application.
- [3] The Defendants must pay the Claimant costs of this application in the sum of \$500.00.


Pearlitta E. Lanns
Master