

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

(CIVIL)

ST. LUCIA

Claim No. SLUHCV2008/0158

BETWEEN:

BARON GABRIEL DER ELST

Claimant

And

**(1) LPA INTERNATIONAL INC
(2) LANE PETTIGREW ASSOCIATES (ST. LUCIA) LTD
(3) JON LANE PETTIGREW**

Defendants

Appearances:

Miss L. Verneuil for the Claimant
Mr. D. Theodore for the Defendant

2010 July 21 August 30

JUDGMENT

- [1] **REDHEAD J (AG):** On 15th February 2008 the Claimant filed a claim form with a statement of claim on Defendants claiming damages against them as a result of deceit and for fraudulent misrepresentation during the period of design and construction of the Claimant's house at Beau Estate together with interest and costs.

- [2] On 4th August, 2008 an amended statement of claim was filed by the Claimant. An Affidavit of Service was filed by Graham Elliot who swore that on 29th March 2008 at 6:10am at Jalousie Estate, he served Ms Jean John claim forms. In an amended Affidavit of Service Graham Elliot deposed that on **29th March 2008** at 6:10am at Beau Estate, the house of Lane Pettigrew, he served Ms Jane John, worker of Lane Pettigrew, with Claim Form, Statement of Claim and other documents filed in the High Court of Justice on 15th day of February 2008. Graham Elliot also swore ***“Ms Jean John the house keeper of Mr. Lane Pettigrew informed me that Mr. Pettigrew was at home and insisted that I give her the documents for him because he would not come out to me. I handed her the documents, waited and she returned confirmed that she handed him the documents.”***
- [3] On 24th April 2008 there was filed in the High Court Office an Acknowledgement of Service on 23rd April on behalf of the third named Defendant by his then Counsel Mr. Mark Maragh.
- [4] On 15th May 2008 at the High Court Office was filed an Affidavit of Service by Graham Elliot. He deposed that on 13th May 2008 at Massade, Rambally Building, Gros Islet at 11:00 am, he served Angela Gustave, Secretary to Jon Lane Pettigrew with Claim Form, Statement of Claim and other documents filed in the High Court on 15th February 2008.
- [5] On 4th August 2008, the Claimant filed an amended Statement of Claim. On 13th August 2008 an Affidavit of Service was filed in relation to Amended Statement of Claim. Bryan Jean deposed that on 5th August 2008, at 9:40am at Micoud Street, Castries, he served Sally Ann Alfred employee of McNamara with the amended Statement of Claim filed at the High Court of Justice dated 4th August 2008.
- [6] On 3rd December 2008 Counsel on behalf of the Claimant filed in the High Court Office a request for judgment in default of defence. On 30th December 2008 an

Amended Affidavit of Service was filed. Bryan Jean swore that on 5th August, 2008 at Micoud Street, Castries, he served Sally Ann Alfred, employee of Mc Namara with an Amended Statement of Claim filed at the High Court of Justice dated 4th August.

[7] Bryan Jean swore that Mc Namara and Company is the legal practitioner for Mr. Lane Pettigrew. ***“I was instructed by Ms Verneil that Mr. Maragh Counsel for Pettigrew would accept service of the Amended Statement of Claim.”*** Bryan Jean also swore “ I served Ms Sally Ann Alfred with the documents for Mr. Pettigrew in his personal capacity and in his capacity as director and officer of LPA International Inc and Lane Pettigrew and Associates (St. Lucia) Ltd.”

[8] Mr. Theodore in his submissions says the service of the documents is not personal service on Mr. Pettigrew. As Sally Ann Alfred is not an officer of either the first or second Defendants. One has to take a common sense approach to the rules, in serving the documents on Sally Ann Alfred who was/is a Secretary/Clerk at Mc Namara & Co; the process server was not serving Sally Ann Alfred as officer of either the first or second Defendants but rather service on Mc Namara & Co. who was authorized to accept service on behalf of third Defendant.

[9] On 22nd April 2010 a notice of Application by the third named Defendant was filed for an order of the Court to extend time to serve a defence filed on 26th September 2008 and for relief from Sanctions. This application came up for hearing before me on 21st July 2010.

[10] Mr. Theodore in his skeleton arguments filed on the same date identified the relevant issues to be determined as:

- 1.1. Whether claim form was properly served.
- 1.2. Whether the amended claim form was properly served.
- 1.3. Whether the claim has expired in relation to the first and second Defendants.

- 1.4. Whether the 3rd Defendant is entitled to an extension of time to serve his defence.
- 1.5. Whether the Claimant is entitled to default judgment against the Defendants.

[11] I deal first of all with the statement of claim filed on 15th February 2008 and service thereof. Mr. Graham Elliot swore that on 29th March that he served the statement of claim, claim form on Ms Jean John at the home of the third Defendant.

[12] I need not trouble myself with an analysis of whether the third Defendant was properly served or not. As learned counsel for the third Defendant has accepted that he was properly served, as he had no choice having regard to what is before me. However, what is very interesting, in my view, is that the lawyer who was then acting on behalf of the third Defendant, on 23rd April 2008 wrote Claimant's lawyer a letter in the following terms, inter alia;

“the Claim Form and Statement of Claim ... was apparently deposited on his door step and he found it on 29th March, 2008.”

[13] Jon Lane Pettigrew in his application for an extension of time filed on 22nd February 2010, the same Jon Lane Pettigrew in his Affidavit in support swore:

“3 I have never been served with this Claim Form or the Statement of Claim in this matter...”

4 Although I have seen Affidavit of Service in which a Mr. Graham Elliot claims to have served documents on a worker of mine whom he referred to as Jane John on one affidavit, and in another affidavit as Jean John. I do not now employ, nor have I ever employed such a person.

However I eventually got to learn about this claim and instructed the firm of Mc Namara & Co. to act for me in the claim.”

- [14] In addition and more telling, in my view, Mr. Mark Maragh, Jon Lane Pettigrew’s lawyer, in an affidavit filed on May 27th, 2010, at paragraph 2 swore:

“In about the month of April 2008, the third Defendant Jon Lane Pettigrew, attended our offices, with the Claim Form, Statement of Claim and other documents attached thereto in the captioned matter.”

- [15] I shall later return to this issue in my judgment. Mr. Theodore argues that service of claim upon Jean John was not proper service upon any of the Defendants. I disagree.

- [16] In my judgment there was proper service of the third named Defendant when the claim form and statement of claim were served on Jean John in the manner as sworn to by Graham Elliot in his affidavit. There was proof of this service¹.

- [17] In addition there was an acknowledgment of service by Mc Namara & Co. on behalf of the third Defendant filed on April 24th, 2008. In that regard the claim is deemed to have been served on 3rd Defendant on 24th April 2008 and the Claimant is entitled treat that date as acknowledgment of service.²

- [18] Mr. Theodore argues that at all material times the registered office of the second Defendant was at the corner of Mongiraud and Brazil Streets, therefore service at Massade was not service at the registered office of the second Defendant.

- [19] In his submission Mr. Theodore further contends that since it appears from Exhibit BA 4 that Angela M Gustave has been the Secretary of the second Defendant since 28th November 2000, personal service upon her was proper service on the second Defendant provided that it can be proved that the claim form, statement of claim, defence form, a form of acknowledgment of service and

¹Part 5.5 CPR 2000

²Part 5.19(2) and (3)

a form of prescribed notes for Defendants³ where also served on the Defendants. Learned Counsel argues that there is no evidence of this. This evidence is not contained in the affidavit of service by Graham Elliot. According to Learned Counsel, all he attests to having served are the Claim Form, Statement of Claim and other documents file at the High Court on 15th day of February 2008.

- [20] I make the observation that in an affidavit sworn by Barbara Andrew, Clerk in the Chambers of Jennifer Remy and Associates at paragraph 6 she swore:

“Following the letter from Mr. Mc Namara & Co. dated April 23rd, 2008, I am informed and verily believe that Miss Verneuil caused to be served the Claim Form and other documents on Angela Gustave on Lane Pettigrew and Associates (St. Lucia) Ltd at Massade Buildings, Massade, Gros Islet where the 1st and 2nd Defendants have a place of business, on behalf of Defendants nos. 1 and 2.”(see Affidavit of Service by Graham Elliott May 15th 2008.)

I have seen no affidavit evidence to counter this.

- [21] The letter from Mc Namara & Co was to the effect that they were not authorized to accept service on behalf of nos. 1 and 2 Defendants.
- [22] Mr. Theodore submits that when this amended Statement of Claim was filed, the Claimant was under an obligation to serve it on all the Defendants⁴. I agree.
- [23] Mr. Theodore concedes that it is not in dispute that the Amended Statement of Claim was served on the third Defendant. The third Defendant in his acknowledgment of service gave his address for service as C/o Mc Namara and Co. # 20 Micoud Street, Castries. Having regard to the Amended Affidavit of Service sworn by Bryan Jean filed on 30th December 2009 (referred to above) I have no doubt that the third named Defendant was properly served with the Amended Statement of Claim.

³ Part 8.14(1) CPR 2000

⁴ Part 20.4(1) CPR

- [24] Miss Verneuil in her Skeleton Arguments submits at paragraph 6 that three copies of the Claim Form had been served on Jon Pettigrew the Defendant no. 3 on 29th March 2008. Three copies were served because according to the records of the Registry of Companies and Intellectual Property, Lane Pettigrew (the same person as Jon Lane Pettigrew) was the sole shareholder and the sole director of Defendant no. 2. In so far as Defendant no. 1 is concerned, as pleaded in paragraph 2 of the Amended statement of claim, the Defendant is incorporated in the United States of America. Notwithstanding that no. 1 does business in St. Lucia. It is not registered as an External Company pursuant to Section 338 of the Companies Act. As pleaded the Defendant entered into a contract through the agency of the Defendant no. 3 with the Claimant.
- [25] Learned Counsel Miss Vernueil in her Skeleton Argument submits that when Mr. Mc Namara by letter of 23rd April 2008 said that he had no authority or ability to accept service on behalf of the 1st and 2nd Defendants, the third Defendant must have neglected to inform him that according to the Annual Returns of the 2nd Defendant, the 3rd Defendant is the only shareholder and the sole director and that he held himself as the sole director of Defendant no. 1.
- [26] On 4th August 2008 the Claimant filed an Amended Statement of Claim. It was served on Mc Namara & Co. In my judgment and I hold that when the statement of claim was served on the third named Defendant, that this document was duly served on the third named Defendant and was service also on 1st and 2nd named Defendants. In addition to the affidavit evidence of Barbara Andrew (referred to above) when she said that the claim forms and other documents were served on Angela Gustave at Massade Buildings Gros Islet, where Defendants 1st and 2nd have a place of business that was proper service on 1st and 2nd Defendants. The claim was first issued on 15th February, 2008 service was effected on all the Defendants on 29th March 2008. It goes without stating that the claim is valid against all three Defendants.

- [27] I now turn to consider the question of whether the 3rd Defendant is entitled to an extension of time in which to serve his defence.
- [28] Mr. Theodore Learned Counsel for the third named Defendant, in his skeleton arguments submits that no part of Rule 10 requires service of a defence and part 10.3 speaks only of the general rule is that the period for filing a defence is 28 days after the service of a claim⁵.
- [29] Learned Counsel, Mr. Theodore refers to Part 10.2(1)⁶ and 10.2(5)⁷ and points out that nowhere in these provisions is reference made of service of a defence. He refers to Part 10.2(4)⁸ and contends that the only time services is mentioned in the particular case is where a Defendant admits liability and wishes to be heard on the issue of quantum. In such a case he must file and serve defence dealing with that issue.
- [30] Mr. Theodore submits that the service of the defence is only required because of Part 6.1(3)⁹. This rule appears under the caption **Who is to serve documents other than Claim Form.**

6.3 Any other document must be served by a party unless-

- (a) rule otherwise provides

Counsel goes on to argue that rule stipulates no time for the filing of a defence only requires that a defence must be filed. Continuing his argument Learned Counsel contends that on a literal interpretation of Rule 26.9 it would seem that it applies whenever there has been a failure to comply with a rule or order and the failure to comply with a rule or order and the consequence of failure to comply has not been specified.

⁵ *Part 10.3 of the CPR 2000*

⁶ *Part 10.2(1) of the CPR*

⁷ *Part 10.2(5) of the CPR*

⁸ *Part 10.2(3) of the CPR*

⁹ *Part 6.13 of the CPR*

- [31] Mr. Theodore, however, says the court of Appeal has whittled down the applicability of Rule 26.9 in the **Mavis William** case by ruling that it is Rule 26.8¹¹ that applies when there has been a failure to comply with a rule or order **that stipulates a time for** doing something without imposing a sanction.
- [32] Learned Counsel concludes by submitting that in follows inexorably this rule 26.9¹² is left to handle only case where an order or rule stipulates that **something must be done without stipulating a time** for doing it.
- [33] Taking Mr. Theodore's argument to its logical conclusion that Rule 26.8 is applicable when there has been a failure to comply with a rule or order that stipulates a time for doing something. According to him, service of a defence is not mentioned in any of the rules so in my opinion there cannot be a failure to comply with a rule that stipulates a time for doing something. Service is absent from the Rule, according to his argument and there is no imposition of a time line for service, because service is absent from the rule. Neither can there be a rule that stipulates that something must be done, that "something" being service of the defence which is absent from the rule according to him. I therefore do not agree that Rule 26.9¹³ is applicable.
- [34] 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 form¹⁴.
- [35] On filing a defence, the Defendant **must** also serve a copy on every other party¹⁵. Although it appears that a time is not stipulated in which to serve the defence, as I have said above, one must take a common sense approach to the Rules. If the rule says that the period of filing a defence is 28days after service of claim form and another rule says one copy must be served on every other party. It follows that the defence should be served immediately after filing.

¹¹ *Part 26.8 of the CPR*

¹² *Part 26.9 of the CPR*

¹³ *Part 26.9 of the CPR*

¹⁴ *Part 10.3(1) of the CPR*

¹⁵ *Part 10.4 of the CPR*

[36] In the instant case the Amended Statement of Claim was served on the Defendants on 5th August 2008. The Claimant's lawyer granted indulgence to the Defendant's lawyer to extend the time for the filing of the defence. That time expired on or about 30th September 2008. It seems that a defence was filed by third Defendant on 26th September 2008. I say it seems, because this document was not on the court's file. A stamped copy was handed to me after the arguments in this case were concluded. Mr. Theodore argues that the defence by the third named Defendant was filed within the extension agreed by the parties.

[37] A Claimant is entitled to a judgment in default of defence if the period for filing a defence and any extension agreed by the parties or ordered by the Court has expired, and if necessary, the Claimant has permission of the Court to enter judgment¹⁶.

[38] In my opinion the Rules place a two fold obligation on the Defendant i.e. to file and serve. The Defendant cannot just file his defence and sit on it as it were and when the Claimant makes an application for default judgment says I have filed my defence, you are not entitled to default judgment. This defence, as I have said, was apparently filed on 26th September 2008 and up to the hearing of this application on 21st July 2010 the Claimant was, it seems unaware of it. This defence was not even exhibited with the application to extend the time in which to serve it.

[39] Mr. Theodore argues that in respect of the third Defendant the court ruled in *Coll v Tatum*¹⁷

“That if an application for judgment in default were made after a later acknowledgment of service, or a late defence, it may very well be dismissed with costs, even through technically justified.”

¹⁶ *Part 12.5 of the CPR 2000*

¹⁷ *High Court of Justice, Chancery Division No. 3 C 2001/04614*

[40] Mr. Theodore contends that the Court further ruled that if application for default judgment is made before the acknowledgement of service or the filing of a defence but a defence is filed before the hearing of the application, it is a matter for the discretion of the Court, but generally the discretion will normally be exercised in favour of extending time but the Defendant would normally have to pay at least some of the costs.

[41] Miss Verneuil in her Skelton Argument refers to 12.5 and argues that the Court Office **must** enter judgment for failure to defend if the Claimant proves that all the conditions under 12.5¹⁸ are satisfied. Learned Counsel contends that the equivalent to English Civil Procedure Rules Part 12.4 reads in part:

“...a Claimant may obtain a default judgment by filing a request.”

[42] She says under our CPR, the Claimant is entitled as of right whereas under the English system CPR there is a discretion. Therefore Coll’s case should be distinguished. I agree.

[43] Where does that leave the application of the third named Defendant for an extension of time in which to serve his defence?

[44] Learned Counsel Mr. Theodore contends that the Court has the power under Rule 26.1 (22)(k)¹⁹ to extend the time for compliance with any rule.

[45] It is settled law that the grant of an extension of time is a discretionary power. The exercise of that judicial discretion must be based on good cause. (see Harold Simon and Carol Henry Tracy Joseph²⁰).

[46] In order for the Court to exercise its discretion it will take into consideration (1) the length of the delay (2) the reasons for this delay (3) whether there is a good defence (4) the prejudice if any to the Claimant.

¹⁸ *Part 26.1(2) of the CPR 2000*

²⁰ *Civil Appeal No. 1 of 1995 (Antigua)*

[47] The claim was filed in this matter on 15th February 2008. The third named Defendant apparently filed a defence in September 2008 and as stated earlier was not served up to the time of the hearing of the application, one year and ten months have elapsed. This certainly constitutes an inordinate delay.

[48] In an affidavit sworn on 22nd April 2010 by Jon Lane Pettigrew, the third named Defendant in support of the application for extension of time in which to serve the defence.

[49] In paragraph 3 of his affidavit, he swore on oath:

“I have never been served with the Claim Form or the Statement of Claim in this matter.”

[50] This is untruthful. As his then lawyer Mr. Mark Maragh in an affidavit sworn and filed on 27th May 2010 at paragraph 2 thereof he averred:

“In or about the month of April, 2008 the third named Defendant, Jon Lane Pettigrew, attended our offices with the Claim Form, Statement of Claim and other documents attached thereto...”

[51] In that same affidavit Jon Lane Pettigrew denies that he has ever employed Jean John, the person on whom the process server swore that the claim form and statement of claim were served.

[52] Jon Lane also swore on that affidavit that he got to learn about the claim and instructed the firm of Mc Namara & Co.

[53] So Jon Lane Pettigrew in an application in which he is asking the court to exercise its discretion in his favour, to extend the time for him to serve his defence, he begins with a lie in a brazen attempt to mislead the court.

[54] In the same affidavit Jon Lane Pettigrew deposed that his defence was filed in September 2009. (In actual fact it was September 2008). He was informed that the Registry was on strike and it was some considerable time before he was able to retrieve the file copy from the Registry. He did not say when he was able to obtain the filed copy from Registry. I reiterate his defence was filed in 2008, it was not until 22nd April 2010 that application was made for an order to extend time for serving of the defence.

[55] Finally, this applicant gives as his reason for not serving the defence:

(1) The confusion which was going on in the Registry at the time the defence was filed.

(2) The delay between the time that the defence was presented and the time that it was returned contributed to the oversight.

[56] These to my mind are non-reasons. As I have said above he has failed to say when the file copy of the defence was returned to him and an oversight. Oversight on the part of his lawyer could never be a good reason. (**see Harold Simon and Carol Henry Tracy Joseph Supra**).

[57] In order for the Court to exercise its discretion in favour of an applicant to extend time in which to comply with an order or a Rule of the Court. The applicant must show by affidavit evidence, good and substantial reasons for the delay.

[58] In my judgment the affidavit evidence of this applicant cannot be said to show good or even substantial reasons for the delay. The affidavit filed in support of the application is nothing more than an attempt at making excuses and laying blame on others for his failure to serve his defence on time.

[59] This matter was filed over 2 years ago and through no fault of the Claimant is being prolonged and will be prolonged further by this application. The claim is based on a contract entered into between the Claimant and the Defendants in

2002. In the interest of Justice to the Claimant and also the Defendant this must be brought to a resolution.

[60] Finally Mr. Theodore referred to Part 1.1(2)²² and argues that in deciding whether or not to exercise its discretion to extend time to serve the defence the Court must seek to give effect to the overriding objective. He says that this case is of great importance to each of the Defendants since it brings into question their character and professionalism and moreover the claim is for a large sum of over \$4 million dollars.

[61] In my judgment this court in giving effect to the overriding objective cannot ignore well established principles of law or ride rough should over Rules of Court. See *Taxan Management Limited et al v Pacific Electric Wire & Cable Company Limited*²³ at page 15 paragraph 57 Lord Collins observed:

“But the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: Raja v Van Hoogstraten (No 9) [2008] EWCA Civ1444, [2009] 1 WLR 1143. That decision concerned the ex debito justitiae. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court’s inherent jurisdiction.”

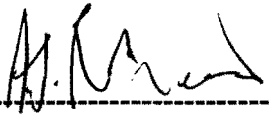
[62] So too, the overriding objective, as with the inherent jurisdiction of the Court cannot be used to lay down procedures which are contrary to or inconsistent with the rules. In view of the foregoing the application of third named Defendant for an extension of time in which to serve his defence is refused.

²² *Part 1.1(2) of the CPR 2000*

²³ *(2009) UKPC Appeal No. 0018 of 2009*

[63] The statement of claim having been duly served on all three Defendants, the Claimant is entitled to enter judgment against all three Defendants for failure to defend.

[64] Costs to the claimant on the basis of prescribed costs.

A handwritten signature in black ink, appearing to read 'A. Redhead', is written over a horizontal dashed line.

Albert Redhead
HIGH COURT JUDGE(AG)