THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO.: 266 OF 2004

BETWEEN:

R. THEODORE L.V. BROWNE
LAURA BROWNE

Claimants

v

IONA WILLIAMS AKA IONA OLLIVER

Defendant

Appearances:
Mr. C.D. Dougan Q.C for First Claimant
Mrs. K. Bacchus-Browne for Second Claimant
Mr. E. Robertson for the Defendant

2005: 19th January

DECISION

[1] On the 25th May 2004 the Claimants filed a claim. They sought the following relief:

1. A Declaration that the Claimants are the absolute owners of a concrete dwelling house situate at Diamond in the State of Saint Vincent and the Grenadines and are entitled to possession thereof.

2. An Order for recovery of possession of the said dwelling house.

3. Damages for trespass.

4. An Injunction compelling the Defendant to break down an incomplete concrete structure she recently began building on the Claimants' land or alternatively an Order by the Court that the Claimants their servants and or agents with the assistance of the Court Bailiff breakdown same.

5. An Injunction restraining the Defendant whether by herself her servants and or agents or whosoever from crossing the Claimants' land situate at Diamond being twenty four thousand six hundred and thirty five square feet (24,635 sq ft) as are more particularly described in Deed of Conveyance No. 1858/1999.

6. Costs.

[2] On the same date the claimants also applied for an injunction to compel the defendant to demolish a structure that the defendant had begun to construct on the land. On 27th May 2004 Bruce-Lyle J granted the injunction ex parte. The defendant who had been served with notice of the application for the injunction on 26th May 2004 did not attend the hearing.

[3] No defence was entered to the claim. More than four (4) months later the claimants applied to the Court for judgment in default of defence under CPR 2000 part 12.10 (5). At the hearing of that application the Court ordered that the defendant deliver up possession forthwith and pay damages for trespass assessed at $12,000.00 in addition to costs of $5,000.00. This order, having been made on 4th November 2004 and entered on 12th November 2004, was served on the defendant on 17th November 2004. The defendant now applies to have that order set aside. By her application dated 6th December 2004 the Defendant also seeks leave to file a defence out of time as well as a stay of execution of the order.

[4] Mr. Robertson for the defendant advanced several grounds in support of the application to set aside the order.

[5] Firstly, he says that the claim is in essence a claim for possession of land. Such a claim ought to be made by fixed date claim form according to Part 8.1 (5) and under CPR 2000 Part 12.2 judgment in default of defence is not available if a claim is a fixed date claim.

[6] Mr. Dougan Q.C. in response points out that the claimants are seeking more than just possession of land and as such have properly commenced this matter by claim form. The restriction on getting a default judgment in a fixed date claim for possession of land is to prevent a claimant from getting an administrative judgment entered by the Court Office under CPR 12.5. The Court views these matters as being so serious that the intervention of a judicial officer is required before such a judgment can be obtained.

[7] In the instant case the claimants did not merely request an administrative judgment from the Court Office. The application for judgment is made under CPR 12.10 (5). I am persuaded that the position advocated by Mr. Dougan is to be preferred. I hold that this mixed claim could properly be started by a claim form.

[8] Mr. Robertson also argues that the statement of claim was not accompanied by a certificate of truth. This he says is fatal to the claim. The Court file reveals that the statement of claim of the claimant is in fact accompanied by the requisite certificate of truth. When this was pointed out to Mr. Robertson his response was that such certificates were not served on the defendant with the claim form and other documents. It is difficult to understand why the claimants would serve the claim form and statement of claim without the certificate of truth which had been filed at the same time. In the circumstances I cannot agree that such a failure to serve the certificate is fatal to the claimants' case – if indeed there was such a failure. I pause to note that the defendant has given no evidence that the certificate was not served. Only Mr. Robertson says so from the bar table. But Mr. Robertson also said from the Bar table that the very order that he is applying to set aside was never served on the defendant. This was later rescinded by Mr. Robertson as an error on his part. It may be that the alleged failure to serve the certificate is a similar error.

[9] I go on to consider the substantive application to set aside the order. CPR 2000 Part 13.3 (1) sets out the factors to be considered.

[10] The defendant must apply promptly. Here Mr. Robertson says that the application coming some 19 days after finding out that judgment had been entered is prompt. Mr. Dougan Q.C. says that this is not "as soon as reasonably practicable." I agree. The delay in applying is unreasonably long in the circumstances. While this is a factor to be taken into account it is not conclusive.

[11] In Rahman v Rahman (1999) LTL decided on 26th November 1999 the Court is considering the nature of the discretion to set aside a default judgment. The Court concluded that the Court must consider the nature of the defence, the period of delay, any prejudice the Claimant is likely to suffer if the default judgment is set aside and the overriding objective. The United Kingdom Court of Appeal approved the following principles in Thorne PLC v McDonald (1999) CPLR 660.

(a) While the length of any delay by the defendant must be taken into account any pre – action delay is irrelevant;
(b) Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
(c) The primary considerations are whether there is a defence with a real prospect of success and that justice should be done; and
(d) Prejudice (or absence of it) to the claimant also has to be taken into account.

[12] In her affidavit in support of her application to set aside the judgment the defendant says that she did not file a defence in time because her counsel had agreed an extension of time to file the defence with counsel for the claimant. Under CPR 2000 Part 10.3 (7) the maximum period of any extension of time to file a defence is 56 days. Part 10.3 (8) requires the defendant to file details of any such agreement.

[13] No such details have been filed. In any event the application for judgment in default was filed more than four (4) months after the claim was served. In short the defendant's affidavit reveals no reason for the delay in filing a defence. From the Bar table Mr. Robertson offered another reason for the delay – he says that he needed time to research

the defence. He says he still has not completed that research. Unfortunately this is not evidence I can consider – and I do not consider this a good explanation for the failure to defend in time.

[14] I turn to consider the merits of the exhibited draft defence. The test is laid out in International Finance Corporation v Utexafrica Sprl [2001] CLC 1361. The defence must have a prospect of success which is better than merely arguable. In this case the defence is that the defendant occupies the land by virtue of long possession. She exhibits a "Deed of Settlement". She swears that the land was formerly in the possession of her grandmother but she has been in possession for eleven (11) years before the issues of the claim. This is less than the required period of 12 years for limitation.

[15] When I consider all of the elements I have outlined above I conclude that the justice of this case requires me to refuse the defendant's application. I do not find that she has applied with sufficient promptness. I do not find that she has offered a good explanation for her failure to defend in time. I do not consider that her defence promises a real prospect of success. Accordingly the application to set aside the judgment is refused. I make no order as to costs on this application.

Brian S. Cottle
MASTER