THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2008/0583

BETWEEN:

ANNETTE TUITT

Claimant

and

ABI BANK LIMITED

Defendant

Appearances:

Mr. Hugh Marshall Jr. for the Claimant
Mr. Conliffe Clarke for the Defendant

……
2010: October 7
October 20
……

JUDGMENT

[1] Michel, J.: The Claimant is a vendor who, having lived abroad for some time, returned to her native Antigua in or about 1984. From the time of her return to Antigua she has been living on the property which is the subject matter of this case, first as a tenant and then from 1994 as the owner. She purchased the property through loan financing from the Defendant in 1994, which has since held a charge over the property as mortgagee. From about 1998 the Claimant separated from her husband, who had previously assisted her with the servicing of her mortgage loan,

and thereafter she sometimes had difficulty paying the monthly instalments on her mortgage.

[2] On more than one occasion the Claimant defaulted in her loan payments to the extent that the Defendant took steps to foreclose on her mortgage and she had to make lump sum payments to the Defendant to avert foreclosure. In January 1999 she paid a lump sum of $20,000 and in May 2005 she paid a lump sum of $60,000 to clear arrears then due on her mortgage loan, together with interest and costs, but she was apparently defaulting in her instalment payments before, in between and after these two lump sum payments.

[3] In August 2008, when the Claimant attempted to make an instalment payment at the Defendant's premises towards her mortgage loan, she was informed by an employee of the Defendant that her account had been paid off. Upon further enquiry she was informed that her property had been sold at the instance of the Defendant and the proceeds of sale applied to her loan account.

[4] The Claimant denies ever having been notified of the intention of the Defendant to put her property up for sale in August 2008. She claimed that, by means of a letter sent to her lawyer in October 2008 by the Defendant's lawyer, she learnt that her property was sold by public auction on 12th August 2008, which sale she alleges was not in accordance with the requirements of the Registered Land Act, Cap. 374.

[5] On 9th October 2008 the Claimant instituted proceedings against the Defendant and against her neighbour, Gwendolyn Williams, who had purportedly purchased her property at the auction on 12th or 13th August 2008, challenging the actions of the Defendant and the said Gwendolyn Williams with respect to the purported sale and purchase of her property.

[6] After various interlocutory skirmishes and an attempt at mediation, the matter came up for trial on 4th February 2010, whereupon a Consent Order was entered into by the parties in the following terms –

"BY CONSENT IT IS ORDERED THAT:

1. The Claimant shall discontinue all action against the Second Defendant on or before the 5th day of February, 2010.

2. The Claimant do pay the Second Defendant's costs in the sum of $5,500.00.

3. The Claimant and the First Defendant agree to appoint an Independent Auditor to prepare an accounting of the monies due to the First Defendant by the Claimant in respect of the outstanding loan.

4. Within 42 days of the date of production of the said account, the Claimant shall pay the balance of monies found due to the First Defendant.

5. It is agreed and understood that time shall be of the essence in respect of 4 above.

6. Unless the Claimant complies with 4 above, the Claimant shall thereafter forthwith deliver vacant possession of the property registered and recorded in the Land Registry as follows:

| | |
|---|---|
| Registration Section | Five Islands |
| Block | 54 1690D |
| Parcel | 82 |

7. The Claimant shall accordingly thereafter forthwith remove the Restriction placed on the relevant Land Register. In default of which, the Registry is hereby directed to remove the same upon application of the First or Second Named Defendant.

8. In such an event of default, the Claimant shall pay to the First Defendant the prescribed costs of the action together with the costs of the accounting.

9. In the event that upon the accounting a difference is shown in favour of the Claimant relative to the sum stated as owed to the First Defendant as of the date of sale, the First Defendant shall pay the cost of the Second Defendant as agreed in paragraph 2 above.

10. The First Defendant shall forthwith insure the premises/property for the account of the Claimant."

[7] A draft report via email dated 23rd April 2010 was submitted by the agreed Independent Auditor and a final report dated 31st May 2010 was received by the Claimant on 3rd June 2010 pursuant to paragraph 3 of the Consent Order.

[8] On Friday 16th July 2010 the Claimant's Counsel informed the Defendant's Counsel that the monies due (as per the final report of the Independent Auditor) were received by him from the Claimant for payment to the Defendant, but was informed that the Defendant was not minded to extend the time for payment provided for in the Consent Order. Notwithstanding, on Monday 19th July 2010 the Claimant's Counsel forwarded to Counsel for the Defendant a letter containing a banker's cheque in the sum of $113, 988 stipulated by the Independent Auditor as the full amount due by the Claimant to the Defendant, together with the insurance premium due in respect of the property. The letter requested that the payment be accepted despite the delay. The cheque was however returned to the Claimant's Counsel by letter dated 21st July, which letter was received on 23rd July 2010.

[9] On 20th July 2010 the Claimant made application to the Court for an order that time be extended for the Claimant to comply with paragraph 4 of the Consent Order and that the Claimant be granted relief from any sanctions by the Court pursuant to Rule 26.7 of the Civil Procedure Rules 2000 (CPR), or pursuant to the Court's inherent jurisdiction, for failure to comply with the aforementioned Consent Order. The Claimant averred in her affidavit in support of her application that the delay was not

intentional, was not for an unreasonable period, has occasioned no prejudice to the Defendant and that the Claimant would be significantly prejudiced if the application was not granted.

[10] An affidavit was filed on behalf of the Defendant on 24th August 2010 opposing the Claimant's application and asking the Court to dismiss the application.

[11] In the affidavit filed on behalf of the Defendant it was averred that the payment by the Claimant to the Defendant (as per paragraph 4 of the Consent Order) should have been received by 13th July 2010, was not received by the Defendant's Counsel until 19th July 2010, was promptly returned upon being received, and that as a result the Defendant is prejudiced by the Claimant's noncompliance.

[12] A supplemental affidavit was also filed on behalf of the Defendant on 5th October 2010 claiming that the Defendant would be prejudiced if it accepted the amount paid by the Claimant, as per the determination by the Independent Auditor of the amount due to the Defendant, in that the amount does not account for various fees and other expenses paid by the Defendant upon the sale of the property by public auction.

[13] The Claimant's application came before the Court for its determination on 7th October 2010, whereupon an oral submission was made on behalf of the Claimant by her Counsel, Mr. Hugh Marshall Jr., and on behalf of the Defendant by its Counsel, Mr. Conliffe Clarke. An application by Mrs. Stacey-Ann Saunders-Osbourne to make a submission on behalf of the former Second Defendant, Ms. Gwendolyn Williams, was denied by the Court on the basis that by Notice of Discontinuance filed on 8th March 2010, pursuant to the Consent Order dated 4th February 2010, Ms. Williams ceased to be a party to this case and so has no locus standi in the matter, notwithstanding her obvious interest in its outcome.

[14] In his submission, Learned Counsel for the Claimant urged the Court to either vary the Consent Order to alter the date for making payment under paragraph 4 of the Order or give the Claimant relief from sanctions for her failure to comply with paragraph 4 of the Consent Order in terms of making payment within 42 days of the date of production of the account.

[15] In his submission, Learned Counsel for the Defendant urged the Court not to vary the terms of the Order which was a Consent Order agreed to by all parties and their Counsel and the variation of which is sought by one party only. Counsel also submitted that the application for relief from sanctions under Rule 26.8 of the CPR could not be granted because this rule related to the Court's case management powers which were not exercisable with respect to a final judgment such as the Consent Order in this case.

[16] The Court agrees with Learned Counsel for the Defendant that the Consent Order should not be varied without the agreement of the parties thereto. The Court also adopts the language of Halsbury's Laws of England, Fourth Edition, Volume 26, Paragraph 556 as follows: "As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality, but it is subject to a number of exceptions." None of the exceptions are, however, applicable on the facts of this case.

[17] The Court does not however agree with Learned Counsel for the Defendant that the application for relief from sanctions can not be granted because Rule 26.8 relates to the Court's case management powers which are not exercisable with respect to a final judgment. The Court accepts the submission of Learned Counsel for the Claimant that there is a difference between the provisions of Part 27 of the CPR dealing with the case management conference and the provisions of Part 26 dealing with the Court's case management powers generally and that the Court's case

management powers extend to final as well as interlocutory orders. The Court can therefore, in the circumstances of this case, grant to the Claimant relief from sanctions pursuant to Rule 26.8.

[18] For the Court to grant relief from sanctions pursuant to Rule 26.8, the Claimant must comply with the requirements of the rule. In accordance with paragraph (1) of Rule 26.8 the application must be made promptly and must be supported by evidence on affidavit. This was complied with by the Claimant in this case who made application on 20th July 2010, after the payment tendered on 19th July was not accepted, and the application was supported by evidence on affidavit filed on 20th and 27th July. In accordance with paragraph (2) the Court must be satisfied that the failure to comply with the Order was not intentional, that there is a good explanation for the failure and that the Claimant has generally complied with all other relevant rules, practice directions, orders and directions. From the evidence presented and the submissions made to the Court in this matter it would appear that the Claimant's failure to comply with paragraph 4 of the Consent Order was not intentional, that she did have a good reason for her failure to comply and that she had generally complied with other relevant rules, orders and directions in the matter. In accordance with paragraph (3) of Rule 26.8, when considering whether to grant relief, the Court must have regard to 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. Taking these factors into consideration, in particular, the draconian impact on the Claimant of not granting the relief, with the result that she would lose her home of twenty six years and a property in which she has obviously invested significantly, because she was one to six days late in making a payment, the Court is of the view that relief ought to be granted to the Claimant. (And I say one to six days because the Claimant alleges that the payment was due as of 15th July and that Counsel for the Defendant was informed on 16th July that the payment was available; while the

Defendant alleges that the payment was due as of 13th July and that payment was tendered on 19th July; so depending on which dates are accepted the period of delay can be between one to six days.)

[19] The Court's consideration of the factors mentioned in paragraph (3) of Rule 26.8 does take into account that the parties consented to time being made of the essence in respect of paragraph 4 of the Consent Order, which would have been a manifestation of the urgency which they attached to the fulfilment of the obligation contained in paragraph 4, and the Court has determined that a period of between one to six days to remedy a failure to comply in the circumstances of this case is within a reasonable time. This aside, the Court's jurisdiction to grant relief from sanctions is not ousted by the stipulation in the Consent Order that time shall be of the essence in respect of paragraph 4 of the Order; that stipulation only serves to constrain the exercise of the Court's discretion in a manner that recognises the urgency attached by the parties to the fulfilment of the obligation in paragraph 4 within the time stipulated.

[20] Before dealing with the final paragraph of Rule 26.8, mention should be made of the Supplemental Affidavit in Response filed on behalf of the Defendant in which it is averred that the Defendant will be prejudiced if it were to accept the amount tendered by the Claimant, because no account is taken of the various fees and other expenses paid by the Defendant upon the sale of the property by public auction. The fact is though that this alleged prejudice does not arise from the delay in the payment of the sum of $113,988 and the Defendant would not have been paid these fees and expenses if the payment of $113,988 had been made on or before 13th or 15th July 2010. The Defendant is not therefore prejudiced in that regard by the one to six day delay in the payment of the $113,998.

[21] The final provision of Rule 26.8 deals with the issue of costs, with paragraph (4) stating that the Court may not order the respondent (the Defendant in this case) to pay the applicant's costs (the Claimant in this case) in relation to any application for

relief unless exceptional circumstances are shown. There are no exceptional circumstances shown on the facts of this case to justify an order for the Defendant to pay the Claimant's costs, and each party to the proceedings will therefore bear her or its own costs in relation to this application.

[22] The Court's order is as follows:

1. The payment tendered by the Claimant to Counsel on behalf of the Defendant on 19th July 2010 in the sum of $113,988 is hereby deemed to constitute satisfaction of the judgment of the Court contained in paragraph 4 of the Consent Order dated 4th February 2010.

2. The Claimant is hereby directed to pay over to the Defendant forthwith the sum of $113,988 tendered on 19th July 2010.

3. The Claimant is hereby relieved from any sanctions arising from the late payment of the sum of $113,988.

4. Each party shall bear her or its own costs.

Mario Michel
High Court Judge