

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

NEVHCV 2012/0016

BETWEEN:

NELSON SPRINGS HOMEOWNERS ASSOCIATION

Claimant

and

[1] DEON DANIEL

[2] BEACH FRONT CONDOMINIUM HOLDING CO. LTD

[3] DEON & ASSOCIATES LTD

Defendants

Before:

Ms. Agnes Actie

Master [Ag.]

Appearances:

Ms. Kurlyn Merchant for the Claimant

Mr. Vincent Byron for the Defendants

2012: November 5;
2013: March 14.

JUDGMENT

[1] **ACTIE MASTER [AG.]:** By Claim Form with Statement of Claim filed on 13th May 2012 the claimant claims against the defendants for trespass and damage to the claimant's sewage and waste treatment plant which is located on the defendants' property.

[2] One of the reliefs sought by the claimant is a declaration that the sewage plant is part of the common areas transferred to the claimant by the defendants.

- [3] The claim form was preceded by an injunction granted by the court on 2nd February 2012 restraining the 2nd defendant from obstructing the claimant's access to the treatment plant.
- [4] The Order directed the applicant to file and serve a claim by the 13th day of February 2012. The claimant in compliance with the order filed a claim form on 13th February 2012 but served the defendants on 15th February 2012.
- [5] By Order dated 15th March 2012 Redhead J granted an order dissolving the ex parte injunction.
- [6] By application with affidavit in support filed on 16th March 2012 the claimant applied for a default judgment for failure by the defendants to file a defence.
- [7] An acknowledgment of service of the claim form on behalf of the 1st defendant was filed on 20th April 2012.
- [8] The 1st, 2nd and 3rd defendants filed a defence on 25th May 2012.
- [9] By notice of application with affidavit in support filed on 25th May 2012 the 1st, 2nd and 3rd defendants applied for an extension of time pursuant to **CPR 2000 26.2(k)** for compliance with **CPR 2000** Rule 10.3 to file and serve the defence or in the alternative validating the filing and service of the defence on 25th May 2012 and for relief from sanctions.
- [10] The defendants having regard to the Privy Council decision in **A.G. of Trinidad & Tobago v Keron Matthews** withdrew the application for relief from sanctions.

The issues

- [11] The issues to be determined are whether the court should exercise its discretion in granting an extension of time within which to file a defence or whether judgment in default should be entered in favour of the claimant.

- [12] **CPR 2000** Rule 10 contains rules in relation to defences and provides that a defendant may apply for an order extending the time for filing a defence. (Rule 10.3(9)). The general rule as is that the period for filing a defence is 28 days after the date of service of the claim form (Rule 10.3(5)). **CPR 2000** Rule 12 contains rules in relation to default judgments. It provides that, if requested by the claimant to do so, the court office must enter judgment if the defendant fails to enter an appearance where the time for doing so has expired (Rule 12.3) and the defendant fails to file defence where the time for doing so has expired (Rule 12(4)).
- [13] The rule governing extension of time exists in Rule 26.1(2)(k) of the **Civil Procedure Rules 2000** (“**CPR 2000**”) which states:
- “26.1(2) Except where the these rules provide otherwise, the court may –
...
(k) extend or shorten the 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.”
- [14] The rule governing the granting of the extension of time to file a defence is silent on the criteria to be taken into account in exercising the discretion in granting the extension of time, compliance with any rule or practice direction and to extend the time for serving a defence. The Court in such circumstance is guided by the overriding objective of the rules as being to enable the court to deal with cases justly and expeditiously. Rule 1.2 states the Court must seek to give effect to the overriding objective when it (a) - exercises any discretion given to it by the Rules; or (b) interprets any rule.”
- [15] In **Carleen Pemberton v Mark Brantley**, Her Ladyship the Honourable Madame Justice Pereira as she then was states that the discretionary power, although a very broad one, cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well-established principles. Overall, in the

exercise of the discretion the court must seek to give effect to the overriding objective which is to ensure that justice is done as between the parties.

[16] At paragraph 13 she states that much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise.

[17] In **John Cecil Rose v Anne Marie Uralis Rose**, Byron CJ as he then was on an application for an extension of time to appeal said;

“Granting the extension of time is a discretionary power of the Court which will be exercised in favour of the applicant for good and substantial reasons. The matters which the court will consider in the exercise of its discretion (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’ .

[18] The principles enunciated in **Rose v Rose** and **Carleen Pemberton** were also adopted by Edwards JA as she then was in the case of **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.**

The Length of the delay

[19] The 1st defendant on 20th April 2012; 35 days after the claimant filed a request for a default judgment on 16th March 2012, filed an acknowledgment of service of the claim form. The defendants on 25th May 2012 filed an application for an extension of time to file a defence, some 71 days after the service of the claim and after the claimant’s request for the default judgment for failure to file a defence. The claimant states that despite the defendants becoming aware of the application for the default judgment this still did not propel the defendants to file the defence and the application for the extension of time.

The Reasons for the Delay

- [20] The defendants' application and the supporting affidavit of Deon Daniel state inter-alia that the failure to comply with the rules was not intentional but was occasioned by the claimant's contempt of court. The defendants state that His Lordship Mr. Justice John Benjamin in granting the *ex parte* injunction ordered the intended claimant to file and serve a claim form by the 13th February 2012. In breach of the said order, the defendants allege that the claimant did not serve the claim form until the 15th day of February 2012.
- [21] The defendants further submit that it is a courtesy in the best tradition of the bar and part of the etiquette of the legal profession to which counsel for the defendants is accustomed that a claimant noticing that a defendant has omitted to file and serve his defence is alerted to his oversight by the claimant. The defendants contend that they reasonably expected the claimant, being in contempt of court for breaching the court's order to serve a claim form by a specified date would apply to the court to purge its contempt but the claimant has not done so and is still in contempt of court.
- [22] The claimant in response states that if the defendant did indeed take issue with the failure of the claimant to file and serve its claim form by a certified date the defendants had ample recourse under CPR to make the necessary application to the court. The claimant in response submits that the defendants have failed to put forward a good reason explaining the delay and accordingly the delay is inexcusable.
- [23] I find the explanation given by the defendants for the inordinate delay in filing the acknowledgment of service and a defence untenable in the circumstances. Such an excuse does not promote the overriding objective of the **CPR 2000**. The claimant filed the statement of claim on 13th February, the last day ordered by the Honourable Judge by which to file and serve the claim. The claim was served on the defendants on 15th February 2012. No reason was given by the claimant for serving the claim on the defendants 2 days after the date ordered by the court.

However the 2 days late service in my mind is not a justifiable excuse for the defendants to flagrantly breach the mandatory timelines prescribed by the rules to file a defence. It is to be noted that the claimant request for entry of the default judgment was filed on 16th March 2012. The first defendant filed an acknowledgement of service of the claim on 20th April 2012, some 47 days from the time prescribed by the rules for filing of an acknowledgment of service by a defendant. The evidence before the court reveals persistent flagrant breaches of the rules by the defendants. The timelines for compliance are clearly outlined in **CPR 2000** and counsel is expected to comply with the timelines with or without courtesies extended by counsel on the opposite side.

The Prospect of success

- [24] The defendants contend that the claim for a declaration that the sewerage plant is part of the common area transferred to the claimant by the defendant is being challenged on the ground that the plant is physically located on land separate and apart from the condominium development. The defendants further contend that the land could not have been transferred by any of the defendants since the land was owned by a third party.
- [25] The claimant in response submits that the sewerage plant forms part of the condominium development for the proper disposal of waste from properties owned by the individual home owners of the Nelson Springs Condominium who make up the association pursuant to the **St. Christopher and Nevis Condominium Act** Cap 10.03. The claimant states in the claim that by virtue of the memorandum of transfer of each purchaser and member of the homeowners association has the common use and enjoyment of the common areas including the sewerage and waste treatment plant. The claimant further submits that it would be a breach of building regulations to construct any property without making adequate provisions for disposal of sewage and waste. Section 801 of the **St. Christopher and Nevis Development Control and Planning Act** cap 20.07 makes provision for a developer to provide sewage and waste disposal.

[26] The claimant in keeping with the environment of condominiums is seeking relief from the court to grant a declaration that the sewage plant is part of the common areas transferred to the claimant by the defendants.

The degree of prejudice

[27] The defendants merely states that the claimant cannot be prejudiced if the extension of time is granted but have not provided any convincing reasons why the court should exercise the discretion in their favour.

[28] The filing of the request for default judgment is a direct benefit afforded to the claimant for the defendants' inordinate delay and failure to comply with the rules. The defendants filed a defence on 25th May 2012 on the same date with the application for an extension of time to file the defence. Upon review of the defence filed by the defendants it appears at paragraph 1(d) that the defendants accept that the sewage plant forms part of the common areas of the development but states that the ownership of the land is vested in a third party and could not have been transferred.

[29] In the Privy Council case of **The Attorney General v Keron Matthews** (2011) UKPC 38 allowing an appeal and confirming the decision of Gobin J where it was held that the court has a discretion to extend the time for serving a defence where an application for default judgment was made prior to the defendant's application for an extension of time to file a defence. In that case heavy reliance was placed on the issue that the extension would cause no prejudice to the claimant, whereas refusal of an extension would deprive the defendant of the opportunity to defend the claim.

[30] The granting of an extension of time is an element of discretion to be exercised in keeping with the overriding objective in dealing with cases justly and expeditiously. The defendants have not acted promptly in keeping with the timelines provided by **CPR 2000**. There is no proper explanation given for failure to file the defence

within the time prescribed by the rules. The explanation given for failing to file a defence is not in my opinion, a good explanation for the breach. However the justice of the situation seems to be that there appears to be credible defence if the defendants can prove that the land on which the sewage treatment plant is located is owned by a third party and as a result could not have been transferred to the claimant.

[31] The claimant in its claim is seeking a declaration that the sewage plant is part of the common areas transferred to the claimant by the defendants. If there is merit in the defendants assertion that the sewage plant is located on property owned by a third party then the granting the declaration may be unenforceable if ownership is vested in a third party who is not a party to the claim.

[32] The egregious behaviour of the defendants in the inordinate delay and the reasons for the breach of the provisions of **CPR 2000** cannot be overemphasised in the circumstances of this case. However that behaviour would not, without other injustice, be enough to deny the defendants the right to defend the claim in disputing ownership of the property. It is only on this ground that the court is minded to grant the extension of time.

Order

[33] Upon review of the facts and authorities it is ordered that;

- (1) The defendants' application for an extension of time to file and serve the defence is granted.
- (2) The defendants are to serve the defence filed on the 25th May 2012 on the claimant within 7 days of this order.
- (3) The claimant may file and serve a reply to the defence within 14 days after the date of service of the defence (**CPR 2000** 10.9). Thereafter the matter is to be listed for case management in accordance the rules.
- (4) Costs in the sum of \$1,500 to be paid by the defendants to the claimant within 21 days of this order.

Agnes Actie
Master [Ag.]