EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: **ANUHCV 2013/0733**
Between

ABI BANK LIMITED

Claimant

AND

MITCHELL STUART
CARINA HARNEY-ROGERSON
BRIAN D'ORNELLAS

Defendants/
Ancillary Claimants

AND

TREVOR "TEDDY" SANTOS

Ancillary Defendant/
Applicant

Before:

Raulston Glasgow — Master

Appearances:
Alincia Williams – Grant for the Claimant
Septimus Rhudd along with Jermaine Rhudd for the Defendants/Ancillary Claimants
Stacey Richards Roach along with Bellina Barrow for the Ancillary Defendant/Applicant

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2014: November 7
2015: January 13;
April 14

RULING ON APPLICATION FOR AN EXTENSION OF TIME TO FILE ANCILLARY DEFENCE

[1] **GLASGOW, M:** The court has been presented with an application supported by (2) affidavits filed on November 10, 2014 by the ancillary defendant (hereinafter the applicant) wherein he asks for an

maintaining the security in such a manner that the interests of the Defendants would not be impaired or otherwise prejudiced."[1]

[5] The source of the respondents' grievance with the claimant is the claimant's relationship with the applicant herein. The respondents contend that the applicant was retained by the company to sell the lands pledged as security for the debt to the claimant. The aim was to apply the proceeds of the sale to the then outstanding balance of the loan. The respondent's state in their defence that the claimant then concluded an agreement with the applicant to sell the same property as it was entitled to do. However, they complain that the claimant authorised the applicant to sell the property at a price *"well below the market value."* This decision to sell below market value, they further aver, was influenced by one George Ryan, who was a principal shareholder of the claimant and who, the claimant knew, had a direct interest in the sale of the property below market value. They accuse the claimant of conducting the sale to benefit George Ryan.

[6] The foregoing limited recital of the respondents' defence is the kernel of the matters which impelled their march against the applicant. On January 8, 2014, one day after filing their defence, they filed the ancillary claim against the applicant. In the ancillary claim the respondents aver that they are directors and shareholders of the company. Sometime around June 16, 2011, the company entered into an agreement with the applicant *"whereby he was engaged as the sole/exclusive agent of the Company to effect a sale/purchase of the parcel of land owned by the Company..."* [2]

[7] The pleadings in the ancillary claim further reveal that the applicant and the company agreed to a sale price of $1,500,000.00. Offers below the agreed price were to be referred to the company for its review. The period of the agreement was stipulated to commence on June 16, 2011 and persist for a period of not less than (183) days. The agreement could be terminated by either party giving the other at least (60) days written notice prior to termination. By the respondents' estimate, the agreement would expire on or around October 19, 2012.

[8] During the currency of the agreement, negotiations commenced with one Reverend Stephen Andrews, Pastor of SJPC House of Restoration Ministries (SJPC) located on Launchland Benjamin

[1] Paragraph 5 of the defence filed on January 7, 2014
[2] Paragraph 4 of the ancillary claim filed on January 8, 2014

extension of time to file a defence to an ancillary claim. The affidavits reveal that on January 9, 2014 the applicant was served with a defence and ancillary claim filed by the defendants/ancillary claimants (hereinafter the respondents) on January 8, 2014. The applicant deposes that he took the documents to the office of counsel for the claimant in this matter. Counsel for the claimant advised that she would contact the claimant and revert to the applicant thereafter. The affidavit further discloses that counsel contacted the applicant by telephone sometime in October 2014. The call was made to inform the applicant that the claimant was not minded to instruct counsel to represent him in this action. He was asked to procure his own legal representative. The telephonic discourse also revealed that no responses or other documents had been filed in the proceedings on his behalf. The applicant further deposes that he contacted his present counsel immediately after concluding the conversation with counsel for the claimant. The present application was filed further to those instructions to counsel. Unsurprisingly, the respondents oppose the application.

BACKGROUND

[2] A short chronological outline is necessary to elucidate the present state of affairs. The claimant is a locally registered bank which entered into a loan agreement in May 2008 with a locally registered company, 8 x 8 Limited (hereinafter the company). The respondents are directors and shareholders of the company and guarantors of its debt obligation to the claimant.

[3] As a result of the company's default on the loan, the claimant pursued a sale of lands encumbered as security for the debt. The auction which was conducted on October 19, 2012 did not realise sufficient funds to liquidate the debt. The claimant demanded the balance thereof from the respondents. The respondents did not comply with the demand for payment and thus the claim herein was commenced on November 14, 2013. It was thereafter amended on March 4, 2014.

[4] The respondents filed a defence to the claim on January 7, 2014 in which they admitted signing the guarantees forming the basis of the claimant's action against them. However, the crux of their defence is that the claimant owed them a duty to make a reasonable effort to recover the loan amount and related costs. As an adjunct to this obligation, they argue, the claimant owed "*a duty to act in good faith at all times and have regard to the interest of the Company and the Defendants by*

Drive, St. John's. A written offer was received in January 2012from Pastor Andrews on behalf of SJPC. The company accepted SJPC's offer by way of letter dated January 20, 2012. It is noted that the lands on which SJPC is constructed are adjacent to the lands forming the subject of the sale agreement between the company and the applicant.

[9] By latter dated February16, 2012, SJPC informed the company that it could no longer meet the cost of the land and as such SJPC would not proceed with the agreement for sale. Nonetheless, the applicant was instructed by the company to continue the negotiations with SJPC.

[10] In or around March 2012, the applicant informed the company that George Ryan, a shareholder of the claimant "*would be involved in assisting with the financing of the purchase of the land by the Church.*"[3] Negotiations continued between the applicant and Pastor Andrews for SJPC. The respondents complain that information sensitive to the negotiations with SJPC was communicated to George Ryan. Things seem to have gotten even more complicated when the company received an email dated April 26, 2012 in which it was informed that "*Reverend Stephen Andrews was seeking financial assistance from some of his colleagues to facilitate the purchase. The said colleagues included the said George Ryan.*"[4] The company was advised by email dated June 18, 2012 that the applicant had requested that SJPC pay a deposit towards the purchase of the land and that the date for completing the sale would be extended.

[11] Thereafter the pleadings do not disclose what transpired with the sale negotiations but it is stated that the applicant entered into a written agreement with the claimant sometime prior to October 1, 2012 whereby it was agreed that the applicant would sell the lands on behalf of the claimant. Pursuant to this arrangement, an auction was conducted on October 19, 2012 and the lands were sold to George Ryan. The respondents claim that the lands were sold at a price of $16.14 which was way below the price of $20.00 being negotiated with SJPC. By virtue of the foregoing matters, the respondents complain that the applicant breached his contractual and other obligations to the company. The respondents have suffered loss due to the fact the claimant is now pursuing them on their guarantees. In the circumstances, they seek remedies of indemnification in respect of any

[3] Paragraph 9 of the Ancillary claim filed on January 8, 2014
[4] Ibid at paragraph 10

claims or demands made against them by the claimant. Alternatively, they request compensation for losses they have suffered by reason of the sale of the lands.

[12] The applicant has filed this application to be permitted to respond to the charges made by the respondents on their ancillary claim.

SUBMISSIONS

Applicant

[13] Initial submissions filed by the applicant on December 3, 2014 focused on the requisites of CPR 26.8 on the assumption that this was an application for relief from sanctions. However, at the first hearing of this matter on December 5, 2014 there was discussion on whether CPR 26.8 was applicable to proceedings of this nature. The applicant conceded that sufficient guidance was given in several cases including **C.O Williams v Inter – Island Dredging Co Ltd**[5] and **Attorney General v Keron Matthews**[6] that the application should be made pursuant to CPR 26.1(2)(k) whereby the court may *"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 applicant filed supplemental submissions on December 12, 2014 further to the concession recited in paragraph 13 above. In this regard, the applicant submits that in exercising the discretion to extend time to file a defence in this case, the court ought to consider (a) the length of the delay; (b) the reasons for the delay; (c) the chances of success and the degree of prejudice. The cases of **John Cecil Rose v Ann Marie Uralis Rose**[7] and **Nelson Springs Homeowners Association v Deon Daniel, Beachfront Condominium Holding CO. Ltd and Deon & Associates Ltd** [8] were cited in aid of these propositions.

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[5] SLUHCVAP 2011/0017
[6] [2011] UKPC 38
[7] SLUHCVAP 2003/0019
[8] NEHCV 2012/0016

[15] In respect of the length of the delay, the applicant submits that (9) months elapsed from the expiration of the time within which a defence should have been filed to the time of filing of the application. No comment is made on whether such a delay is inordinate for the purposes of the discretionary remedy sought herein. The applicant concedes that there has been some delay but urges the court to accept that the more relevant matter is *"whether the delay is excusable, in that the reasons for the delay are good and substantial."*

[16] The reasons for the delay have been extensively set out above at paragraph 1 of this judgment. There is, however, one element that caused the parties quite a stir. The applicant argues that the respondents failed to serve him with the original claim and statement of claim as amended. He was only served with the defence and ancillary claim. This, in his view, was an egregious breach of the provisions of CPR 18.13 (a) which mandates that *" an ancillary claimant who serves an ancillary claim on a person who is not already a party must also serve on that person a copy of every statement of case which has already been served in the proceedings.."* The applicant's view is that, like any other defendant, he is fully entitled to insist on proper service. The respondents' failure so to do has affected his right to be heard and has prejudiced his ability to properly answer the claim as he was not fully apprised of the full case against him. As a lay person he did not appreciate or fully understand that he had to file a defence or the full extent of that defence since he did not have sight of the main claim.

[17] In terms of his chances of successfully defending the counterclaim, the applicant submits that there is no relationship contractual or otherwise between himself and the respondents. In his written submissions, the applicant amplifies this posture by claiming that he has a good and arguable defence since *"the ancillary defendant is an agent for the claimant and at ... common law ... the only person who can be sued is the principal."* In further submissions filed on December 12, 2015, the applicant makes the further point that the respondents have brought a claim in their personal capacity against him *"even though any possible cause of action vests in the Company 8 x 8 Limited."* More specifically it is said that the applicant never entered into any arrangement or agreement with the respondents. The claim by the bank against the respondents does not raise a cause of action against the applicant. Accordingly the respondents have no right to bring the action in their own name.

[18] Alternatively the applicant stresses that he did not act dishonestly or in bad faith as he did not disclose any confidential information to prejudice the company's interest while he acted as its agent. They continue that, in any event, if he owed a duty to the respondents, they would have to show that they would have acted differently if they received the information they allege that the applicant withheld from them. They would have to show, for instance, that they would have sought and obtained a higher price for the property. Finally, it is said that even if a breach is shown, the applicant may only lose his right to claim a commission if he acted dishonestly and/or in bad faith which is a claim he vigorously disavows[9].

Respondents' response

[19] For their part, the respondents implore the court to find that the applicant has not shown that the court should be inclined to permit an extension of time to file and serve a defence. The submissions are as follows –

1. It is accepted that CPR 18.13 mandates that an ancillary claimant must also serve all the statements of case that have already been served in the proceedings. However, the rules do not stipulate when the ancillary claimant is to serve these documents. This silence in the rules on the time for service of the documents referred to in CPR 18.13 is to be contrasted with, for instance, the requirement in CPR 8.14 that "*service of the claim form* ***"must be accompanied"*** *by certain named documents"*[10]. Importantly, CPR 18.13 does not prescribe a sanction for non – service of those documents;

2. CPR 18.1 sets out the definition of an ancillary claim. As stated therein, the definition of an ancillary claim does not include a statement of case. The failure by an ancillary claimant to serve a copy of a statement of case as is required by CPR 18.13 *"is not fatal and does not relieve the ancillary defendant from the duty and obligation to enter an Acknowledgment of Service and, ultimately a Defence within the time stipulated by the Rules once he has been served with an ancillary claim. The Rules speak only to the consequences of failing to file a*

[9] For this proposition, the applicant relies on the case of Kelly v Cooper and another [1993] AC 205
[10] Paragraph 16 of the respondents' submissions filed on December 24, 2014

defence to an ancillary claim that has been served. The Rules do not extend to a failure to file a defence and ancillary claim ***and*** *a statement of case.*[11]" (Respondents emphasis);

3. The respondents further emphasise that their position is *"reinforced"* by the provisions of CPR 18.5(1) which states that the ancillary claim must be served within (14) days of the filing of the defence. CPR 18.13 sets no such time frame and as such the ancillary claimant is not compelled to serve the documents therein mentioned at the same as he serves the ancillary claim or along with the same;

4. While the use of the word "must" in CPR 18.13 indicates a mandatory stipulation, there is no sanction for failure to serve the documents that the rule requires to be served. The failure to serve would amount to a procedural irregularity of the sort dealt with in the case of **Asia Pacific Cargo (HK) Ltd & Ors v Hanjin Shipping Co. Ltd & Ors**[12]

5. The applicant was served with the ancillary claim which clearly set out the steps to be taken by him if he wished to dispute the claim. If there were doubts or confusion about whether he had received all the documents, at the very least, he should have acknowledged service of the ancillary claim as was required. He failed to do so for (10) months. The applicant's affidavit evidence shows that he knew that he was served with court documents in the form of a defence and ancillary claim;

6. The applicant's affidavit evidence also indicates that he took the documents with which he was served to the office of counsel for the claimant. He does not say exactly when he did so. He has also failed to set out what steps he took after counsel promised to revert to him. In this regard he has provided the court with no evidence as to what efforts he made to follow up on the status of the documents. The notes to the defendant would have made plain to the applicant that there were consequences for his inaction. It is not sufficient for the applicant to sit back and do nothing because of his view that the statements of case had not been properly served on him;

[11] Supra at note 10
[12] [2005] EWHC 2443 (Comm)

7. The respondents continue that in any event the applicant took the documents to the very lawyer who issued the claim and as such there could be no confusion as to what was claimed in the main claim. The respondents ask the court to consider that the applicant has not answered whether (a) instructions ever given by him for the claim to be defended and documents filed on his behalf; (b) If such instructions were given, what transpired; (c) if no instructions were given, why was there a failure to give instructions?

8. The respondents ask the court to find that the applicant has not provided any good explanation for the failure to file a defence. His assertion that he was under the impression that he was being represented by counsel for (10) months and the failure to show any contact with counsel for that period of time are inadequate reasons for the purpose of the exercise of the court's discretion to grant an extension of time to file a defence;

9. In terms of successfully defending the claim, the respondents state that the applicant has made reference to a bald and skeletal outline of defence. His failure to attach a draft defence has left the court to speculate as to whether he has a good defence to the claim.

10. In further submissions filed by both parties on this issue, the applicant argues that he has placed enough information before the court on his affidavit and submissions for the court to be satisfied that he has a good defence to the claim. He commends the approach of the court in the case of **Doreen Leslie v Bradley Davis and Lex Clayton Davis**[13] In that case where the applicant sought to have a default judgment set aside, no draft defence was filed but the court considered the affidavit evidence filed by the applicant to determine whether there was a defence with a real prospect of success.

11. The respondents argue that this is not enough. While there is no mandatory requirement that the applicant file a draft defence on an application for an extension of time to file a defence, there is great utility in doing so. A draft defence provides the court with a clear indication of the applicant's response and the likelihood of its success. Where the applicant fails to file a draft defence, he should ensure that the affidavit evidence gives the court adequate information to assess any proposed defence. In this regard, it was submitted that

[13] SVGHCV 1998/0047

the applicant's affidavit was manifestly deficient in providing any information as to whether he had a reasonable prospect of success. This is to be contrasted with the **Doreen Leslie**[14] case where the court was given enough information on which it could assess the strength of the proposed defence;

DISCUSSION AND CONCLUSION

The applicable rules regarding ancillary claims

[20] This case brings in focus the provisions of CPR 18 on the filing, service and response to an ancillary claim. The applicable procedure for commencing an ancillary claim are found in CPR 18.4 which states –

> *18.4 (1) A defendant may make an ancillary claim (other than a claim falling within rule 18.3)*[15] *without the court's permission if in –*
>
> *(a) the case of a counterclaim – it is filed with the defence; or*
> *(b) any other case – the ancillary claim form is filed before the case management conference.*
>
> *(2)Where paragraph (1) does not apply an ancillary claim may be made only if the court gives permission.*
>
> *(3)An application for permission under paragraph (2) may be made without notice unless the court directs otherwise.*
>
> *(4)The applicant must attach to the application a draft of the proposed ancillary claim form and ancillary statement of claim.*
>
> *(5)The court may give permission at the case management conference.*
>
> *(6)The court may not give permission after the first case management conference to any person who was a party at the time of that conference unless it is satisfied that there has been a significant change in circumstances which became known after the case management conference.*
>
> *(7)The ancillary claim is made in –*

[14] Supra note 13
[15] CPR 18.3 provides for claims where a defendant seeks an indemnity or contribution from a co-defendant

(a) the case of a counterclaim – when it is filed; and

(b) any other case – when the court issues the ancillary claim form.

[21] CPR 18.1 and 2 set out the types of claim that may be considered ancillary claims and how such claims ought to be treated. An ancillary claims is defined as

> *18.1 (1) ... any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes a –*
>
> *(a) claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and*
>
> *(b) claim by an ancillary defendant against any other person (whether or not already a party); and*
>
> *(c) counterclaim by a defendant against the claimant or against the claimant and some other person.*

[22] CPR 18.2 (1) states how ancillary claims are to be treated –

> *18.2 (1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as provided by this rule.*
>
> *(2) Particulars of an ancillary claim must be contained in or served with the ancillary claim form in Form 9.*
>
> *(3) An ancillary claim form must include –*
>
> *(a) the ancillary claimant's address for service in accordance with rule 3.11; and*
>
> *(b) a certificate of truth in accordance with rule 3.12*[16]

[23] In terms of service of an ancillary claim, CPR 18.5 provides that where the ancillary claim is made without the court's permission, as in this case, it must be served within (14) days of the filing of the defence. Where the ancillary defendant is not a party to the proceedings, the ancillary claimant must also serve all other statements of case previously filed in the proceedings or other documents ordered by the court to be served[17].

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[16] Note, however, that CPR 18.2 (4) excludes the procedures on the time within which a claim must be served, default judgments and admission (other than 14.1(1) and (2) and 14.3) from the procedure on ancillary claims.
[17] CPR 18.13

[24] Where an ancillary defendant is served with the ancillary claim and wishes to defend the action, a defence must be filed within (28) days after the date of service of the ancillary claim. An ancillary defendant who fails to answer the ancillary claim within (28) days is deemed to admit and may be bound by any decision or judgment made in the main action[18].

Extension of time to file a defence to an ancillary claim

[25] The applicant concedes that he has not complied with the rules on filing a timely defence to the ancillary claim. The parties also accept that there is no prescribed sanction to be applied for such failure. As has been said previously, "*Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.*"[19] The applicant has merely exposed himself to the vagaries of the outcome of the main proceedings[20]. While the rules are silent on the question of sanctions for failing to file a defence to a counterclaim, they do make provision to allow the defendant to file a defence after the period for compliance has passed. In this regard, an ancillary defendant may apply for an extension of time pursuant to CPR 26.1(2)(k) which permits the court to "*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*"

[26] There are no procedural guidelines in the rules themselves to delineate the matters for the court's consideration of an application under CPR 26.1(2)(k). There is however, case law guidance on the parameters of the discretion. On an application for extension of time to file an appeal in the case of **John Cecil Rose v Ann Marie Uralis Rose**[21], Sir Dennis Byron (CJ) said that

> *"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 are: (1) the length of the delay; (2)*

[18] CPR 18.12(2)
[19] Attorney General v Keron Mathews [2011] UKPC 38
[20] CPR 18.12
[21] SLUHCAPP 2003/0019. The application for extension of time of time to appeal was considered pursuant to CPR 62.16(1)(C) where the rules enact a discretion similar to CPR 26.1(2)(k).

the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the Respondent if the Application is granted." (My emphasis)

[27] Pereira J.A advised that the discretion, *"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 parties."*[22] Similar assistance was given by the dictum of the Court of Appeal decision in **C.O Williams Construction Co. Ltd v Inter Islands Dredging Co. Ltd**[23] where Edwards J.A concluded that *"'On an application for extension of time generally, where no sanction specified for failure to comply with a rule which prescribes the time limit, the court in the exercise of its discretion will consider (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."*

[28] On the present application, the evidence exposes that the applicant was served with the defence and ancillary claim on January 9, 2014. The defence was therefore to be filed on or before February 7, 2014. The application for an extension of time to file the said defence was filed on November 10, 2014, some (9) months after the defence was due. This delay is, on its face, quite an inordinate one. There must, therefore, be quite sound reasons to explain the failure to comply with the rules.

Reasons for the delay

[29] The applicant's reasons for failing to file a defence in the time limited by the rules to do so have been comprehensively recited above in this judgment. The reasons can be subsumed under 2 heads – (1) the respondents' failure to serve him with the statements of case beside the defence severely affected his ability to respond to the claim; and (2) the applicant was not informed until

[22] Carleen Pemberton v Mark Brantley [2011] ECSCJ 229
[23] Supra, note 5

very late in the day that counsel for the claimant did not represent him. I will address each reason in turn.

Failure to serve all the statements of case

[30] I disagree with the respondents' view on the necessity to serve the applicant with the entire proceedings in this matter. The respondents have hinged their arguments on CPR 18.5 which lays out the procedure as to what documents are to be served on an ancillary defendant and the period within which those documents should be served. CPR 18.5 is not the end of the matter. CPR 18.13 contains additional procedural steps to be followed where the ancillary claim is to be served on an ancillary defendant who is not already a party to the claim. In those cases the ancillary claimant must serve the ancillary defendant with all other statements of case filed in the matter. The common sense of this requirement ought to be too apparent to need restating. As the applicant quite rightly pointed out, the provision permits the ancillary defendant to see the entire case to date. It may certainly inform whether the ancillary defendant wishes to respond to the claim and if so, the nature of the response. I find that CPR 18.5 must be read together with CPR 18.13 in the case of an ancillary defendant who is not already a party to the proceedings. This interpretation would give effect to the objectives of bringing the entire proceedings to the notice of the ancillary defendant. I do not see the benefit of the reasoning that the other statements of case may be served at some time after service of the ancillary claim. It must be the case that in reading the provisions of CPR 18.5 and 18.13 conjunctively that an ancillary defendant must serve all the statements of case to date on an ancillary defendant at the same time as the ancillary claim is served. The respondents in this case took the trouble to serve the defence. It has not been explained why they chose not to serve the other statements of case.

[31] Some fortification for my view may be found in From 9 of the rules which is the prescribed from used in this case to bring the ancillary claim to the attention of the applicant. The form expressly informs an ancillary defendant that *"copies of the defendant's statement of case (the defendant's defence) and* ***of all other statements of case that have been filed in the proceedings*** *are also served with this notice."* (My emphasis).

[32] The applicant's reasoning is that the failure to serve the other statements of case is a sufficiently good reason for failing to file a response to the ancillary claim. This is an unacceptable stance to take regarding the rules. While I am of the firm view that the respondents cannot cherry pick which parts of the rules to observe, I am equally of the opinion that the applicant could not ignore the rules based on the respondents' delinquency. As correctly stated by the respondents, the form with which the applicant was served told him in explicit language the steps he should take to respond to the claim and the consequences of failing to do so. That he calculatedly chose not to follow those guidelines ought not to redound to his benefit[24].I say calculatedly because there is no evidence before this court that the applicant sought counsel or took any steps with respect to the court documents he received other than to lodge them with counsel for the claimant. At the very least, he was required to acknowledge receipt of the documents.

[33] I find therefore that in this case the failure to respond to the proceedings because the applicant was not served with all the other statements of case was not a good reason for failing to file a defence to the ancillary claim.

Notice from counsel for the claimant

[34] I agree with the respondents that this is not a good reason for failing to file a defence. The applicant's evidence is that he took the documents with which he was served to the office of counsel for the claimant and left them there. There is no evidence that he sought to retain counsel's services. He was content to rely on the assurances of counsel that her client would be contacted to determine whether counsel should represent him. There is no evidence that he reached out to counsel after this conversation or that he reached out to any other legal practitioner to resolve the issue of responding to the claim. He could have responded to the claim without legal

[24] See Anselm v Balthazar & Balthazar DOMHCV 2013/0201 for some discourse on the issue of the non service of documents. However, some caution may be given to litigants that in some cases the failure to serve the requisite court forms may affect the viability of proceedings. See some discussion in this regard in the Privy Council decision of Strachan v Gleaner Company Limited and Stokes [2005]UKPC 33 at paragraph 25 et seq

counsel had he so chosen. But nothing was done until counsel for the claimant contacted the applicant after approximately (8) months to inform him that she was not authorised to represent him in the proceedings. It was at that juncture that the applicant depones that he was propelled into action. There is no evidence as to when in October he was contacted by counsel for the claimant but it took until November 10, 2014 for the applicant to seek permission to file a defence. The reasons for dilatory conduct in respect of compliance with the procedural rules must be good and substantial. I have no hesitation in finding that the applicant has fallen far short of this standard.

Chances of success if the extension is granted

[35] The parties debated whether a draft defence should have been filed in this matter. The extensive arguments regarding this issue have been narrated at paragraph 19 of this judgment. I would commend the filing of a draft defence as the most appropriate practice in cases of this nature. The applicant is seeking the court's imprimatur to defend the claim. One of the basis on which he seeks to do so is the fact that his defence has more than a fanciful chance of success. It ought to be self apparent that a draft defence setting out the proposed terms of the very defence would provide the strongest support to this contention.

[36] The applicant asks the court to adopt the approach of Thom J (as she then was) in the **Doreen Leslie** decision but I believe the applicant should have done so with more caution. In the **Doreen Leslie** case, her Ladyship Thom J (as she then was) was presented with satisfactory details in the affidavit of the applicant in that case to assist her in forming a solid view of the applicant's defence. The applicant's affidavit is very scant. At paragraph 9 of the affidavit, the applicant says

> *"However I have a good defence of this matter. Upon a review of the claim I am advised by counsel that the Ancillary Claimant claims that as a consequence of a breach of contract/breach of fiduciary duty between me and the Company, the Ancillary Claimants have suffered loss and damages. I am further advised that there is no relationship either in tort or contract between me and the Ancillary Claimants and there is no cause of action against me disclosed by the Ancillary Claim."*

[37] It is hardly surprising therefore that much of the applicant's proposed defence which has been recounted at paragraphs 17 and 18 of this judgment was contained in further submissions. I am by no means endorsing the proffering in submissions of matters that properly belong in a defence. However, much of the objections in this case revolve around fairly well known legal principles which are adequately set out in the combination of the applicant's affidavit evidence and submissions. In terms of the substance of the proposed defence, I find great force in the points raised by the applicant, the essence of which is that the ancillary claim is unsustainable against him. The terms of the ancillary claim have been repeated fully at paragraphs 6 et sequentia of this judgment. Those pleadings disclose a contractual relationship between the company and the applicant. In fact, the respondents make it clear at paragraph 1 of the claim that they are they are directors and shareholders of the company. The pleadings describe in detailed fashion the nature of the company's agreement with the applicant, the events which transpired throughout that relationship and the applicant's alleged breach of his several obligations to the company.

[38] The pleadings on the ancillary claim disclose that wrongs may have been committed against the company. The only pleading in respect of the personal interest of the respondents is set out at paragraph 19 of the ancillary claim where after stressing that the applicant "*is in breach of the Agreement made with the Company on June 16, 2011...*', the respondents aver that the applicant is *"thereby liable to indemnify the Defendants in respect of any claims or demands made against them, and/or to compensate them for any losses resulting from the said sale..."* In essence, the respondents are asking the court to grant them relief for losses on their personal guarantees to the claimant which losses they have allegedly suffered as a consequence of the alleged breaches of the applicant's commitments to the company. This proposition only has to be stated for its inherent difficulties to become perceptible. It ought to be quite evident that based on the concept of its separate legal persona any wrongs done to the company are wrong committed against the company in its capacity as a separate legal individual and are not wrongs for which the members or directors may seek personal redress. It is therefore said that, as a matter of locus standi, the company is the proper claimant on any claim for wrongs done to the company. This principle is of ample antiquity that it should not escape the notice of litigants today[25]. There are of course accepted exceptions to this rule which may permit the applicant to, for instance, bring a derivative

[25] What is commonly referred to as the rule in Foss v Harbottle (1843) 2 Hare 461

claim pursuant to section 239 of the Companies Act. This is clearly not the case in these proceedings[26]. The action against the applicant in its present form may therefore be misconceived. The applicant may stand a better than fanciful chance of successfully defending the claim.

Prejudice if the application is granted

[39] This matter has not proceeded beyond the case management conference. The applicant would suffer the risk of a judgment against him if he is not permitted to defend the ancillary claim. On the converse side of things, the respondents are entitled to insist that they rely on the applicant's marked disinterest in defending the claim for nearly (10) months. I do not consider the prejudice to the respondents to be insuperable.

The exercise of the discretion in this case

[40] In deciding whether to exercise its discretion in favour or against the request of the applicant, the court must evaluate all matters in order to achieve a just outcome. In the circumstances, I find the delay to be exceedingly inordinate. The reasons for this delay are equally unacceptable. No good or substantial reason has been provided for the protracted disregard of the rules. However as was said in the case of **Quillen and Others v Harney, Westwood & Riegels (No 1)**[27] which was relied on in the case of **C.O Williams v Inter-Island Dredging Co Ltd**[28] even if there are no substantial reasons for the inordinate delay, if there appears to be a defence with a reasonable chance of success, the application ought to be allowed. Indeed this was the approach adopted in the cases of

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[26] Section 239 reads - (1) Subject to subsection **(2),** a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the court for leave to bring an action
in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which such company or any of its subsidiaries is a party. (2) No action may **be** brought, and no intervention in an action
may be **made,** under subsection **(1)** unless the court is satisfied (a) that the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (I) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;
(b) that the complainant is acting in good faith; and
(c) that it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued

[27] (1999) S8 WIR 143

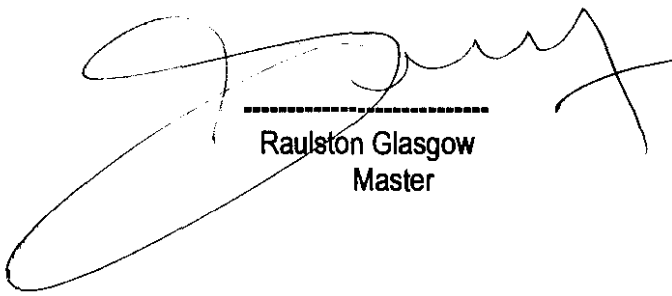
[28] Supra note 5

Veronica Joseph v Alan Mark Julien/Phillip[29] and **Nelson Springs Homeowners Association v Deon Daniel, Beachfront Condominium Holding CO. Ltd and Deon & Associates Ltd**[30]

Conclusion

[41] I have found above that the delay in this case and the reasons are unacceptable. However, I have also looked at what is proposed as a response to the claim. The applicant will do well to articulate the seemingly trite principle of law in a much better fashion. But it seems obvious to me that the respondents may face considerable difficulty maintaining their claim against the applicant in the present state of the pleadings. In the circumstances, with some reluctance, I grant the application to extend time to file a defence to the counterclaim. My reluctance stems from the fact that I do not wish to convey to the applicant that his conduct in this matter has been given a cloak of propriety. This application is granted for the sole reason that I believe that, as was instructed in the **Quillen** decision, permission ought to be granted where the defence has a reasonable chance of success. I am not unmindful of the fact that the respondents have proceeded for several months with the impression that the applicant did not wish to defend the ancillary claim. They have been put to the expense of defending this application. Accordingly, the applicant is to meet the respondents' cost on the application assessed in the sum of $1500.00. The respondents are to make available to the applicant all other statements of case filed in this matter within 7 days of today's date. The applicant is to serve the defence to counterclaim within 21 days of service by the respondents of the other statements of case. Thereafter, the matter will take its normal course in accordance with the dictates of the CPR. I further order that the costs awarded to the respondent must be paid by the applicant on or before the date for further case management of this matter, failing which any defence to the counterclaim filed by the applicant will be struck out.

[42] I thank counsel for their assistance.



Raulston Glasgow
Master

[29] GDAHCV 2010/0394
[30] Supra note 8