EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2015/0025

BETWEEN:

JOSEPH HYACINTH
Applicant/Intended Appellant

and

ALLAN JOSEPH
Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Ruggles Ferguson for the Applicant/Intended Appellant
Mr. Darshan Ramdhani, with him, Ms. Sabrita Khan-Ramdhani for the Respondent

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2016: January 25
June 20.

Civil appeal – Fixed date claim – Strike out of defence by judge – Entry of judgment in default of defence – Authority of judge to strike out defence and enter judgment in default on fixed date claim – Extension of time to appeal – Principles the court should consider in exercising discretion to grant an extension of time

On 6th December 2012, the respondent, Mr. Allan Joseph, filed a fixed date claim against the applicant, Mr. Joseph Hyacinth, and two others for possession of property at Edward Street, Gouyave in the parish of St. John, and other reliefs. The claim was served on the applicant on 13th December 2012 but he did not acknowledge service. On 2nd May 2013, the respondent applied to the court below for final judgment to be entered. On the same day, the applicant filed a defence and counterclaim.

The respondent's application for judgment was heard on 23rd January 2014. The learned judge struck out the applicant's defence and counterclaim and entered judgment for the respondent on the fixed date claim. On 2nd September 2015, some 20 months after judgment was entered, the applicant applied to the Court of Appeal for an extension of time to apply for leave to appeal against the judge's order. The applicant attributed this delay to his belief that the appeal had been filed by his attorney, when in fact it had not. The application was opposed by the respondent. The matter came up for hearing before the Full Court on 25th January 2016. Subsequent to the hearing of the appeal, the parties agreed that the Court should treat the hearing of the application for an extension of time to apply for leave to appeal as the hearing of the substantive appeal.

Held: granting the applicant an extension of time to appeal against the order of the learned judge made on 23rd January 2014; allowing the appeal and setting aside the said order; ordering that the defence and counterclaim filed by the applicant on 2nd May 2013 be deemed properly filed; ordering that the case proceed to case management and trial in accordance with the Civil Procedure Rules 2000; and ordering that the applicant pay the respondent's costs of the application to extend the time to appeal against the order of the learned judge in the sum of $ 1,000.00, that:

1. The court has a wide discretion under rule 26.1(k) of the Civil Procedure Rules 2000 ("CPR 2000") to extend the time for complying with any rule, practice direction, order or direction of the court, even if the time for compliance has passed. The matters which the court will consider in the exercise of its discretion are the length of the delay; the reasons for the delay; the chances of the appeal succeeding if the extension is granted; and the degree of prejudice to the respondent if the application is granted.

   Quillen and Others v Harney, Westwood & Riegels (No 1) (1999) 58 WIR 143 applied; John Cecil Rose v Anne Marie Uralis Rose SLUHCVAP2003/0019 (delivered 22nd September 2003, unreported) applied.

2. When a claim is commenced by a fixed date claim form, the defendant does not run the risk of judgment in default of defence because that procedure is not available to the claimant. As long as the defendant files his or her defence before the court enters judgment, either on the application of the claimant or at the first hearing of the fixed date claim form, the defence is properly filed. In this case, the claim was commenced by a fixed date claim form and the learned judge did not have authority to strike out the applicant's defence and counterclaim. The defence was properly before her and it should have been considered at the first hearing of the fixed date claim form on 23rd January 2014. Consequently, the applicant had good prospects of succeeding on the substantive appeal.

   Attorney General v Keron Matthews [2011] UKPC 38 applied.

3. Timelines in conducting litigation must be observed by a litigant but an attorney's error can be a good reason for missing a deadline and applying for an extension of time to appeal. However, the applicant must show that the delay was substantially

due to the conduct of the attorney and litigants must show some degree of vigilance in protecting their own interest. Failing to make at least periodic enquires with an attorney can result in the court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason. In this case, the applicant showed very little interest in defending himself against the respondent's claim. Accordingly, the reasons for the delay in applying for an extension of time were not sufficient to justify the long delay.

Martin v Chow (1985) 34 WIR 379.

4. The court has a wide discretion to grant an extension of time to appeal when the applicant has good prospects of succeeding on appeal, even though he or she is guilty of inordinate delay without good explanation. Such applications should be dealt with justly in accordance with the overriding objective. In this case, although the applicant was late in applying and the reason for the delay, although plausible, was not acceptable, the applicant had good prospects of succeeding on the appeal and the respondent will not suffer substantial prejudice if the time for applying for permission to appeal is extended.

Quillen and Others v Harney, Westwood & Riegels (No 1) (1999) 58 WIR 143 applied; C.O. Williams Construction (St. Lucia) Limited v InterIsland Dredging Co. Ltd. SLUHCVAP2011/0017 (delivered 19th March 2012, unreported); Veronica Joseph v Alan Mark Julien/Phillip GDAHCV2010/0394 (delivered 30th January 2013, unreported) referred; ABI Bank Limited v Mitchell Stuart and others ANUHCV2013/0733 (delivered 14th April 2015, unreported) referred.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an application by Mr. Joseph Hyacinth ("the applicant") for an extension of time to apply for leave to appeal and for leave to appeal against the order of Mohammed J striking out his defence and counterclaim and entering judgment for Mr. Allan Joseph ("the respondent") on his fixed date claim form.

Background

[2] A brief chronology of the filing of documents in the court below is sufficient to give the background to the application:

(a) On 6th December 2012 the respondent filed a fixed date claim form against the applicant and two others claiming possession of property

located at Edward Street, Gouyave in the parish of St. John, damages for trespass, mesne profits, interest and costs.

(b) The claim form was served on the defendants on 13th December 2012. The first and third defendants did not file acknowledgments of service.

(c) On 2nd May 2013 the respondent applied for an order that final judgment be entered against the first and third defendants they having failed to file acknowledgements of service or defences. Later in the day on 2nd May, the applicant filed a defence and counterclaim stating that he has been living on a portion of the property since 1985; relying on the provisions of the Limitation of Actions Act;[1] and seeking a declaration that he is in possession of the portion of the property where he lives.

(d) The respondent's application for judgment was heard by the learned judge on 23rd January 2014. She struck out the applicant's defence and counterclaim and entered judgment for the respondent in accordance with the claims in the fixed date claim form.

(e) On 2nd September 2015 the applicant applied for an extension of time to apply for leave to appeal against the judge's order. The respondent filed a notice of opposition on 16th September 2015.

(f) On 22nd September 2015 a single judge of the Court of Appeal sitting in chambers ordered that the application be heard by the Full Court. The application was heard by the Court on 25th January 2016.

[3] It is not disputed that the judge's decision was an interlocutory order requiring leave to appeal and that the 14 day period fixed by the Civil Procedure Rules 2000 ("CPR 2000") for applying for leave to appeal expired on 7th February 2014.

[1] Cap. 173, Revised Laws of Grenada 2010.

The application was made on 2nd September 2015 and is therefore some 20 months out of time.

Principles for Extending Time to Appeal

[4] The court has a wide discretion under CPR 26.1(k) to extend the time for complying with any rule, practice direction, order or direction of the court even if the time for compliance has passed. The rule does not prescribe the matters that the court should take into consideration in dealing with an application to extend time, but these were established by Singh JA in Quillen and Others v Harney, Westwood & Riegels (No 1)[2] before the passing of CPR 2000. The principles in Quillen were adopted post CPR 2000 in a line of cases starting with John Cecil Rose v Anne Marie Uralis Rose[3] where former Chief Justice Sir Dennis Byron set out the principles as follows -

> "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) 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."[4]

[5] I will now apply these principles to the facts of this case beginning with the chances of success on appeal (if time is extended to apply for leave to appeal) because of the important role that this principle plays in this appeal.

Chances of Success

[6] Mr. Ruggles Ferguson who appeared for the applicant submitted that there are two issues to be considered in assessing the applicant's chances of success, namely:

(i) whether the learned judge had authority to strike out the applicant's defence; and

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[2] (1999) 58 WIR 143.
[3] SLUHCVAP2003/0019 (delivered 22nd September 2003, unreported).
[4] At para. 2.

(ii) whether the judge had authority to enter judgment for the respondent without a trial.

Striking out the defence

[7] The applicant's defence was due on 10th January 2013. He did not comply with this deadline and on 2nd May 2013 the respondent applied for judgment in default of defence. Later that same day the applicant filed his defence. Mr. Darshan Ramdhani who appeared for the respondent contended that the judge was correct to strike out the defence and enter judgment for the respondent on 23rd January 2014 because up to that time the applicant had not applied for an extension of time to file the defence (or for an order that the defence be deemed to be properly filed). This brings into sharp focus whether the judge was authorised to strike out the defence and enter judgment for the respondent.

[8] The claim was commenced by a fixed date claim form claiming possession of property occupied by the respondent and others. This is the correct procedure for claiming possession of property.[5] Having struck out the defence, the judgment that was entered could only have been a judgment in default of defence under CPR 12.5(c)(i) which authorises the court office to enter judgment in default of defence where the defendant's defence has been struck out. Mr. Ferguson submitted that the striking out was erroneous for three reasons:

(i) a judgment in default of defence where the defence has been struck out should be entered by the court office and not the judge;

(ii) more importantly, CPR 12.2 provides that: 'A claimant may not obtain default judgment if the claim is [brought by]: … (b) a fixed date claim'; and

(iii) in any case the defence was properly filed and was pending before the judge when the fixed date claim came on for its first hearing on 23rd January 2014.

[5] See: CPR 8.1(5)(b).

[9] The first reason is not correct. The application for judgment was made for 'some other remedy' under CPR 12.10(4) and the application was correctly made to the court pursuant to CPR 12.10(5).

[10] The second reason is correct. A plain reading of CPR 12.5(c)(i) and CPR 12.2 is that a default judgment is not available when the claim is commenced by fixed date claim form.

[11] Mr. Ferguson supported the third reason why the striking out of the defence was erroneous by reference to the Privy Council decision on appeal from the Court of Appeal in Trinidad and Tobago in Attorney General v Keron Matthews.[6] He submitted that the case stands for the proposition that the Civil Procedure Rules do not have a sanction for not filing a defence within the time prescribed by the rules and that the consequence of not filing within the prescribed time is that the claimant can apply for or enter judgment in default of defence. The advice to the Board was delivered by Lord Dyson who said at paragraph 16:

> "There is no rule which states that, if the Defendant fails to file a defence within the period specified by CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the Defendant fails to file a defence within the prescribed period: r 10.3(5) provides that the Defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing the defence has expired and the defence has not been served, the court must enter judgment if requested to do so by the Claimant."

The provisions of the Trinidad and Tobago Civil Procedure Rules that Lord Dyson relied on are substantially the same as the equivalent provisions of the Eastern Caribbean CPR and the case supports Mr. Ferguson's submissions that the only consequence that a defendant to an ordinary claim is exposed to before he files his defence is that the claimant can apply for judgment in default of defence. When the claim is commenced by a fixed date claim form, as in this case, the defendant does not run the risk of judgment in default of defence because that

[6] [2011] UKPC 38.

procedure is not available to the claimant. So long as he files his defence before the court enters judgment, either on the application of the claimant or at the first hearing of the fixed date claim form, the defence is properly filed.

[12] The answer to the first of Mr. Ferguson's two issues in paragraph 6 above is that the learned judge did not have authority to strike out the applicant's defence and counterclaim. The defence was properly before her and it should have been considered at the first hearing of the fixed date claim form on 23rd January 2014.

The entry of judgment

[13] It follows from the finding that the judge was not authorised to strike out the defence that the procedure that she should have followed at the first hearing of the fixed date claim form was to treat the applicant as a defendant who was entitled to defend the claim, treat the hearing as a case management conference and give directions for the continued hearing of the claim. What the judge should not have done was to treat the applicant as a person in default and proceed to dispose of the case and give judgment for the respondent on the basis of the claim form and the respondent's affidavit in support, both filed on the 6th December 2012.

[14] The resulting judgment is irregular and is liable to be set aside by this Court. In the circumstances, I think that the applicant has good prospects of succeeding on appeal if he is granted leave to appeal.

[15] Before leaving the issue of good prospects, I should mention in passing that the common positon on the pleadings to date is that the applicant is in possession of the disputed property. The applicant has pleaded in his defence that he has been in possession for over 30 years, he disputes that the respondent has a claim to the property and asserts that the provisions of the Limitation of Actions Act apply to the claim. Prima facie this shows that he has a viable defence to the actual claim. He should not be driven from the judgment seat except for very god cause.

Length of Delay and Reason for Delay

[16] The delay in this matter is 20 months between the judge's order striking out the defence and the applicant's application to apply for an extension of time to apply for permission to appeal against the order. This is an inordinately long delay and can only be justified if there is a good reason for the delay.

[17] The applicant's reason for the delay is that immediately after the judge struck out his defence and entered judgment against him he told his attorney to appeal the judge's decision and the attorney agreed to file the appeal. Thereafter he was laboring under the belief that the appeal had been filed. He only realised that the appeal had not been filed when he was served with a copy of the judgment '… a few days ago, in August 2015…'[7] By then the attorney who he had instructed to file the appeal was no longer available and he took the judgment to another lawyer who in turn referred him to his current attorney. His current attorney told him that no appeal had been filed against the judge's order and that he had to apply to the court for an extension of time to apply for permission to appeal the judge's order. The application for extension of time was filed on 2nd September 2015.

[18] By this explanation the applicant is laying the blame for the delay squarely at the feet of his former attorney. There are numerous cases in the English speaking Caribbean dealing with the issue of litigants missing deadlines because of their attorney's error. The principles that emerge from the cases are that timelines must be observed but an attorney's error can be a good reason for missing a deadline and applying for an extension of time to appeal. The applicant must show that the delay was substantially due to the conduct of the attorney. Each case must be decided on its own facts and the court must exercise its discretion in accordance with those facts. In Martin v Chow,[8] a decision of the Court of Appeal of Trinidad and Tobago, Bernard JA summed up the position at pages 386-387 as follows:

[7] Affidavit of Joseph Hyacinth (sworn to on 1st September 2015 and filed on 2nd September 2015).
[8] (1985) 34 WIR 379.

> **"**Courts today are loathe to drive litigants from the judgment seat without affording them, within reason, an opportunity to ventilate their cause; but, at the same time, the courts must, of necessity, seek to balance this against their paramount duty to insist on the observance of the rules, or otherwise there would be "no timetable for the conduct of litigation"… In our opinion, in matters of this kind … the proper approach should be that as laid down by Lewis J in *Evelyn v Williams* (1962) 4 WIR 265. Each case must be looked at on its own particular facts and the discretion must be exercised in relation to those facts, bearing in mind that at all times the burden will be on the applicant to show that the delay was due substantially to the offending act of the legal practitioner."

[19] I appreciate that the applicant in this case is a fisherman and spends long periods of time at sea. But he has shown little interest in defending himself against the respondent's claim. It is very easy for him to say that he handed the matter of the appeal over to his attorney. But in a situation where he became aware that judgment had been entered against him in January 2014, it behoved him to make enquiries over the next 20 months as to the progress of the appeal. A short delay for this reason may have been acceptable, but a delay of 20 months displays little, if any, regard for the court system. Litigants must show some degree of vigilance in protecting their own interest. It is not sufficient to simply hand the matter over to the attorney and wait for extended periods to see what happens. Failing to make at least periodic enquiries can result in the court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason.

[20] I find that the applicant's reasons for the delay in applying for an extension of time are not sufficient to justify the long delay in applying.

Prejudice

[21] The respondent has been aware for some time that the applicant and others are occupying the disputed property. In November 2007 his attorneys wrote to the applicant and his wife accusing them of being trespassers on the property. The applicant's attorneys replied to that letter on 20th November 2007 informing the

respondent's attorneys that the applicant grew up on the property and has been in occupation for over 30 years and that he had no intention of leaving the property. The letter also denied the respondent's claim to the property. It took the respondent another five years to file a claim for the property. The respondent's attempts to remove the applicant from the property has not been characterised by alacrity and he will not suffer any prejudice that cannot be compensated in damages and costs if the time for applying for leave to appeal is extended.

Exercise of Discretion

[22] The Quillen case sets out the factors that the court should consider in dealing with an application to extend the time for appealing. These factors have been interpreted by the courts to mean that the court should consider each case on its own facts and deal with them justly and in accordance with the overriding objective. This comes from the judgment of Edwards JA in C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.[9] when she said:

> **"**Dealing with cases justly when giving effect to the overriding objective requires that applications for extension of time be dealt with in accordance with those recognized principles subject to any relevant Practice Direction or Rules of the Supreme Court that may exist. I would hold that the preferred approach when considering applications for extension of time for the time being, is reflected in the decision in *Carleen Pemberton v Mark Brantley*, subject to any relevant Practice Direction or Rule of the Supreme Court."

[23] Edwards JA referred to the case of Carleen Pemberton v Mark Brantley[10] where the Pereira JA suggested a flexible approach to these applications:

> "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. Another very important factor, for example, where the application, as here, is to extend time to appeal, is a

[9] SLUHCVAP2011/0017 (delivered 19th March 2012, unreported) at para. 54.
[10] SKBHCVAP2011/0009 (delivered 14th October 2011) at para 13.

consideration of the realistic (as distinct from fanciful) prospect of success."

[24] These passages and many others give general guidance on how to deal with applications for extension of time. Turning to the facts of this case, it is apparent from the findings above that the applicant has good prospects of succeeding on appeal and there will be no substantial prejudice to the respondent if the extension is granted. However, the applicant was late in applying by a considerable amount of time and the reason for the delay, though plausible, is not acceptable.

[25] The courts have been faced with this situation where the applicant cannot satisfy all the criteria for being granted an extension of time to appeal. Most notable is the Quillen case itself where Singh JA, after setting out the four criteria that the court should consider, continued:

> "The discretion to be exercised is unfettered and should be exercised flexibly with regard to the facts of the particular case and with the main concern to ensure justice for both sides. If, prima facie, the proposed appeal appears hopeless, the application should be denied despite the fact that there may have been substantial reasons for the delay in bringing the application. On the other hand, if there were no substantial reasons to justify an inordinate delay, but prima facie there appeared to be some merit in the proposed appeal, the application should be granted."

The delay in Quillen was six months, which the Court of Appeal found to be inordinate and not properly accounted for. Notwithstanding these findings, the court granted the extension of time to appeal because they found that '…there appeared to be some merit in the proposed appeal…'[11] In Edgecombe and another v Freund[12] the Court of Appeal quoted the passage from Singh JA in Quillen with approval[13] but found that in addition to the long, unexplained delay, the trial judge's finding that the applicant's chances of success on appeal were 'less than minimal'[14] was correct and dismissed the appeal against the judge's

[11] At p. 145.
[12] SLUHCVAP2001/0009 (delivered 25th March 2002, unreported).
[13] Ibid at para. 7.
[14] Ibid. at para. 9.

refusal to extend the time for appealing. In other words the delay in applying was not salvaged by the quality of the proposed appeal.

[26] Extensions of time to appeal have been granted on the basis of the applicants' good prospects of succeeding on appeal in Veronica Joseph v Alan Mark Julien/Phillip[15] and ABI Bank Limited v Mitchell Stuart and others.[16] I am sure there are others.

[27] The principle that the court has a wide desertion to grant an extension of time to appeal when the applicant has good prospects of succeeding on appeal, even though he or she is guilty of inordinate delay without a good explanation, is firmly a part of the law and practice in the Eastern Caribbean and I would apply it in this case. The applicant has good prospects of succeeding on the appeal and the respondent will not suffer substantial prejudice if the time for applying for permission to appeal is extended. I would therefore allow this appeal with the usual costs consequences.

[28] Subsequent to the hearing of the appeal the parties agreed in correspondence with the Chief Registrar that this Court should treat the hearing of the application for an extension of time to apply for leave to appeal as the hearing of the substantive appeal. This is very sensible.

Order

[29] I would make the following orders:

(1) The appeal is allowed and the applicant is granted an extension of time to appeal against the order of the learned judge made on 23rd January 2014 striking out the applicant's defence and counterclaim and entering judgment for the respondent.

[15] GDAHCV2010/0394 (delivered 30th January 2013, unreported) (Ellis J).
[16] ANUHCV2013/0733 (delivered 14th April 2015, unreported) (Glasgow M).

(2) The said order entered against the appellant on 23rd January 2014 is set aside.

(3) The defence and counterclaim filed by the applicant on 2nd May 2013 is deemed to be properly filed.

(4) The case shall proceed to case management and trial in accordance with CPR 2000.

(5) The applicant shall pay the respondent's costs of the application to extend the time to appeal against the order of the learned judge in the sum of $1,000.00.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal