THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2016/0082

Between:

STEPHEN FIRST

First Claimant

CORPORATE CAPITAL (ASIA) LIMITED

Second Claimant

and

GREGORY GILPIN -PAYNE

1st Defendant

INTERNATIONAL INVESTMENTS & CUNSULTING LTD.

2nd Defendant

Before:
Master Fidela Corbin Lincoln

Appearances:

Mr. Tommy Astaphan QC with Mr. Chesley Hamilton for the Claimants
Mr. Dennis Merchant for the Defendants

2016: September 9

Extension of Time to File a Defence – Application for Extension of Time Filed Before Request For Judgment in Default – Whether Court Office Should Enter Judgment in Default When There is an Extant Application for an Extension of Time Filed Before the Request for Judgment in Default

[1] CORBIN LINCOLN M : The application fixed for hearing before the court is an application by the defendants for an extension of time to file a defence. However, on 25th April 2016, prior to the application being heard the court office entered judgment in default of defence against the defendants.

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[2] Before considering the substantive application the preliminary issues which arose at the hearing will be addressed.

The Default Judgment

[3] When the matter came up for hearing I informed the parties that I was considering making an order setting aside the judgment in default on my own initiative for the following reasons:

(1) The claim was filed on 11th March 2016. The acknowledgment of service filed by the defendants states that the claim was served on 21st March 2016.

(2) The time for filing a defence would therefore expire on 19th April 2016.

(3) On 18th April 2016, prior to the expiration of the time for filing a defence, the defendants filed an application for an extension of time to file a defence. The application was fixed for hearing on 14th June 2016.

(4) On 25th April 2016 the claimants filed a Request for Judgment in Default. The Request states:

> "We CHESLEY ONEAL HAMILTON AND ASSOCIATES….Solicitors for the claimants request entry of judgment against both the 1st and 2nd defendant in default of –
>
> ~~Acknowledgment of Service~~ ~~Yes/No~~
> Defence Yes/No

(5) The Request therefore states that the claimants are *not* requesting judgment in default of acknowledgment of service or defence. Notwithstanding this defective Request, the court office entered judgment in default on 13th May 2016.

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(6) More significantly, the court office entered judgment in default when there was an extant application by the defendants, filed before the Request, seeking an order extending time to file a defence.

[4] Learned Queen's Counsel for the claimants submitted that there is no Rule in the CPR which prevents the court office from entering judgment because an application for an extension of time to file a defence has been filed. Further there is no authority which states that the court office should not enter judgment in those circumstances.

[5] Having regard to the submissions by Learned Queen's Counsel and CPR 26.2 I informed the parties that the matter would be adjourned so that the parties would have an opportunity to make representations on the order which the court proposed to make of its own initiative.

[6] Learned Queen's Counsel stated that while he does not agree with the basis upon which the court proposed to set aside the default judgment the claimants would agree to the judgment in default being set aside. Accordingly the judgment in default was set aside by consent.

[7] Notwithstanding the setting aside of the judgment in default by consent I think it is important to place on record that there is in fact judicial authority for setting aside a judgment in default entered in the circumstances of this case. In St. Kitts Nevis Anguilla National Bank Ltd. v Caribbean 6/49 Limited [1] the claim form was served on the appellant Bank on the 23rd January, 2002. On 4th February, 2002, the Bank filed an acknowledgment of service indicating an intention to defend. The period limited for filing a Defence should have expired on 21st February, 2002. On 20th February 2002 the Bank filed an application to the court, supported by an affidavit, to strike out the statement of claim. Having filed their Notice of Application to strike out, the Bank's solicitors did not file any defence to the action. They took the view that they were entitled to a hearing of their application to strike out before the requirement for the filing of a Defence could arise. In the mean time however, their Application was not served on Caribbean's solicitors. By late February, 2002 therefore, as far as respondent's solicitors were concerned, there was simply a failure to file a Defence. Accordingly, on the 27th February, 2002 the

[1] SKBHCVAP2002/0006

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respondent sought and obtained a default judgment. The Bank's application to set aside the judgment in default was refused.

[8] In the course of his judgment Saunders J.A (Ag) stated:

> *"Before examining the learned Judge's reasons it is important to re-emphasise an important philosophical change that has been brought about by the new CPR. It is that fundamentally, responsibility for the active management of cases now resides squarely with the court. Here we had a situation where an application was filed and was awaiting the fixing of a hearing so that a Judge in Chambers could decide whether or not the statement of claim should be struck out as being an abuse of the court's process. This application was followed by a later application or request to the Registrar to enter a judgment in default of Defence. If the earlier application to strike out the Claim had been heard first and decided in the bank's favour then there would have been no claim for which to enter default judgment. The suit would have been put to an end. That possible outcome was sufficient in itself to have dictated that the striking out application should have been heard first. Because the later application/request was first entertained, the result was to conclusively deny the bank of its right to a hearing of what was a serious application and one that could have resulted in the dismissal of Caribbean's entire claim.*
>
> *The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first in time. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the court office to ensure that sequence resulted in a denial of justice to the bank.*
>
> *When seen in that light it is clear that the learned judge ought to have exercised his discretion in favour of setting aside the default judgment so as to relieve the bank of the prejudice it had suffered. "*

[9] Apart from the defects in the request for judgment in default, there was an extant application for an extension of time to file a defence at the time the request for judgment in default was filed. By dealing with the request which was filed after the defendants' application the court office effectively denied the defendants the right to a hearing the outcome of which would impact the future course of the proceedings. The court office in my view therefore erred in entering the

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judgment in default in those circumstances and this of itself was a sufficient basis for setting aside the judgment in default.

The Defence

[10] On 13th June 2016 the defendants filed a defence and counterclaim. Learned Queens Counsel submitted that the defence should be struck out as it is not properly before the court since the defendant requires permission from the court to file a defence after the time for filing expires.

[11] The court pointed out that in view of the case of AG v Keron Matthews[2] the defendants did not require permission to file a defence. Learned Queens Counsel submitted that based on the same case the defendants were not permitted to file a defence without permission and also could not file a defence after a Request for judgment in default had been filed.

[12] In Keron Matthews Lord Dyson stated:[3]

> *"It is central to the claimant's argument that a defendant cannot file and serve a defence once the time for doing so has passed. Rule 10 does not say so in terms, but it is submitted that it is to be interpreted as if it had done so. If the position were otherwise, the defendant would have an unlimited right to file a defence at any time before judgment is entered. If that were the case, what purpose would be served by having rules which impose a time limit for the filing of a defence? Furthermore, it is significant that there is no provision corresponding with rule 9.3(3) in relation to the filing of a defence. Thus an application to file a defence out of time where the agreement of the claimant has not been obtained is not merely an application under rule 10.5. It is in reality an application for relief from the automatic sanction imposed by the rules. In short, it is submitted on behalf of the claimant that rule 26.6 and 26.7 are designed to ensure compliance with all the time limits provided by the rules of court, court orders and practice directions.*
>
> *I would reject these arguments largely for the reasons given by Mr Knox QC. First, a*

[2] [2011] UKPC 38
[3] ibid paragraphs 13-14 and 16

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defence can be filed without the permission of the court after the time for filing has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises. If, as in the present case, judgment has not been entered when the defendant applies out of time for an extension of time, there is no question of any sanction having yet been imposed on him…

There is no rule which states that, if the defendant fails to file a defence within the period specified by the 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 with the prescribed period: rule 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 a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant."

[13] In the circumstance I am not satisfied that there is any Rule which required the defendants to obtain permission to file a defence. Further, I have found nothing in the Keron Matthews case which establishes that the defendants were required to get permission to file a defence after the time for so doing had expired or once a Request for judgment in default had been filed.

The Application for an Extension of Time to File a Defence

The Applicable Law

[14] CPR Part 10.3 provides for the period in which a defence must be filed. CPR 10.3 (9) states than a defendant may apply for an order extending the time for filing of a defence but does not set out any criteria for the exercise of the discretion.

[15] CPR Part 26.1(2)(k) also gives the court the power to extend the time for compliance with any rule even if the application for an extension is made after the time for compliance has passed.

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[16] CPR 26.9 states that where the consequence of failure to comply with a rule, practice direction or order has not been specified by any rule, practice direction or court order the court may make an order to put matters right.

[17] It is now well established that the absence of express criteria does not mean that there is no criteria for determining applications for extension of time.[4] In Carleen Pemberton v Mark Brantley Saint Christopher and Nevis[5] Pereira J.A stated that the discretionary power under CPR 26.9 is a broad one which:

> *"…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 this discretion, the court must seek to give effect to the overriding objectives which is to ensure that justice is done as between the parties.*
>
> *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 consideration of the realistic (as distinct from fanciful) prospect of success."*

[18] There is therefore no exhaustive list of factors to which the court should have regard. Among the factors to be considered are: (1) the length of the delay; (2) the reasons for the delay; and (3) the degree of prejudice if the application is granted.[6] The court must also have regard to the overriding objection in the exercise of its discretion.

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[4]C.O Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd, Saint Lucia, HCVAP2011/017; Carleen Pemberton v Mark Brantley Saint Christopher and Nevis, HCVAP2011/009

[5]Saint Christopher and Nevis, HCVAP2011/009, paragraphs 12-14.

[6]Rose v Rose Saint Lucia Civil Appeal No. 19 of 2003; C.O Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd, Saint Lucia, HCVAP2011/017.

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Length of The Delay

[19] The defendants' application for an extension of time was filed prior to the expiration of the time fixed by the CPR for filing a defence. I therefore do not find that there was a delay in filing the application.

[20] The defendants' application for an extension of time stated that they required 30 days to file a defence given the circumstances outlined in the affidavit. The defence was however filed on 18th June 2016 almost one month later than the time which the defendants stated they would need to file a defence. There is no evidence of the reason for this delay and in my view, in the absence of any explanation for this length of delay, the delay is inordinate.

Reasons for the Delay

[21] The defendants' evidence in support of the application for an extension of time to file a defence is contained in an affidavit of Mr. Jermaine Chiverton. The material parts of the affidavit state:

> " 4. Defendants timely filed and served their Acknowledgment of Service of Claim on April 4, 2016.
>
> 5. Defendants' Defence is due on April 18, 2016.
>
> 6. Counsel has only been recently retained by Defendants.
>
> 7. The testimony of one of the witnesses who is critical to preparing Defendants' Defence and Counterclaims has been out of the jurisdiction since the Claim was served on Defendants and will be returning on or about April 19, 2016."
>
> 8. Counsel for Defendants will require at least thirty days to prepare the Defence and Counterclaims for Defendants.
>
> 9. This is the first request for an extension made by either Defendant."

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[22] Learned Queens Counsel for the claimant submits that:

(1) Counsel being recently been retained is not a reason.
(2) Further, there is no evidence of what date counsel was retained.
(3) Paragraph 7 of the affidavit in support says that a witness is out of the jurisdiction. This is of no moment and cannot be used as an excuse for filing within time particularly where there is no evidence of who the witness is and why the witness cannot be communicated with via electronic correspondence.

[23] I agree that there is no evidence of when counsel for the defendants was instructed so as to enable the court to ascertain the length of time which counsel had to prepare the defence. However, it does not appear to me to be of any moment precisely when counsel was instructed in view of the fact that the crux of the application appears to be that the key person from whom instructions were required to prepare the defence was out of the jurisdiction *since the claim was served* and was not expected to return until around 19th April 2016. In my view this is a reasonable explanation for the delay in filing a defence.

[24] Even if this did not amount to a good reason this would not of itself be sufficient to cause the court to refuse to exercise its discretion in favour of granting an extension of time. All the circumstances must be taken into consideration.

The Degree of Prejudice

[25] The affidavit filed by the defendants does not provide any evidence of prejudice which will be suffered by the defendants if the application is not granted. It is evident however that if the application is not granted the defendants would be unable to defend the allegations made by the claimant.

[26] The claimants filed no affidavit in answer to the application and the claimant has therefore provided no evidence of prejudice which they would suffer if the application is granted. The only evident prejudice in my view is that the late filing of the defence has and will delay the

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progression of the claim. The delay of the proceedings which may prejudice the claimants can in my view be compensated in costs.

[27] Weighing the prejudice likely to be suffered by the parties it is my view that the defendants would suffer greater prejudice if the application is not granted.

The Merits of the Defence

[28] There is no express requirement for the court to consider the merits of the defence in determining an application for an extension of time to file a defence. The court however has a very broad discretion and in considering all the circumstances may consider the merits of the defence. In my view, at this stage of the proceedings, unless it can be said that an application to strike out the claim or for summary judgment would succeed it would not be proper to refuse the application for an extension of time to file a defence on the basis of the merits of the defence.

[29] The claimants are seeking damages for libel contained in a letter. The alleged libelous letter contains serious allegations against the claimants. The defendants do not deny publication but plead justification. [7] It will be for the claimant to provide reasonable evidence to support the plea of justification. I am unable to conclude at this stage that the defence discloses no grounds for defending the claim or has no real prospect of success.

The Overriding Objective

[30] The overriding objective of the CPR is to enable the court to deal with cases justly. This includes:

(1) ensuring, so far as is practicable, that the parties are on an equal footing;
(2) saving expense;
(3) dealing with cases in ways which are proportionate to the –
    (i) amount of money involved;
    (ii) importance of the case;

[7] Paragraph 10 of the defence states that the words complained of are true.

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(iii) complexity of the issues; and

(iv) financial position of each party;

(4) ensuring that it is dealt with expeditiously; and

(5) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[31] Considering the overriding objectives so far as applicable I have considered that:

(1) It would be unequal not to permit the defendant to file a defence and thus allow the claimants to obtain judgment in default without its case being tested.

(2) The failure to file a defence has resulted in costs being incurred by the claimant to file a request for judgment in default and to oppose the application and by the defendant to file the application. The claimant would of course be entitled to costs on this application. However, there is no evidence of any additional costs which would be incurred by either party if the application is granted.

(3) It can be said that the late filing of the defence has caused the matter not to be dealt with expeditiously in that it may have delayed the first case management conference. I note however that the application for an extension of time was filed in April 2016 but was not fixed for hearing until June 2016 – 2 months later. Had the matter been fixed for hearing in a timely manner the matter may not have suffered as long a delay as it has.

[32] Having taken into consideration all the circumstances, and notwithstanding the length of the delay in filing the defence, I am minded to exercise my discretion in favour of the defendant and grant an extension of time to file a defence.

Costs

[33] This is not an application decided at a case management conference. The claimants are awarded assessed costs pursuant to CPR 65.11 (3).

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[34] CPR 65.11 (4) states that:

> "In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

[35] If the parties are unable to agree on costs within 21 days the parties shall make written representations with respect to the quantum of costs that should be awarded to the claimants.

[36] It is therefore ordered as follows:

1. The defendants are granted an extension of time to 13th June 2016 to file a defence.
2. The defendants shall serve the defence filed on 13th June 2016 on the claimants within 5 days.
3. The claimants are at liberty to file a reply within 14 days of service of the defence.
4. If the parties are unable to agree on costs within 21 days the parties shall make written representations with respect to the quantum of costs that should be awarded to the claimants and the costs shall be determined at the next hearing. The representations shall be filed at least 7 days before the date of the next hearing.
5. The court office shall fix a date for the first case management conference.
6. The defendants shall have carriage of this order.

Fidela Corbin Lincoln
Master

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