THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES

Claim No. SVGHCV2011/0241

Between:-

OLIVE PEGGY DEFREITAS

Claimant

And

GEROLD GELLIZEAU

Defendant

Appearances:
Mr. Joseph Delves of Counsel for the Claimant
Mr. Parnel R Campbell QC with Ms. Mandella Campbell of Counsel for the Defendant

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2017: November 20
December 7
2018: April 24

DECISION

[1] **WALLACE, M.:** Two applications came before the court for hearing. The Claimant's Application for Assessment of Damages dated the 31st day of October 2017 and the Defendant's Application to Set Aside the Claimant's Notice of Application for Assessment of Damages dated the 10th day of November 2017 ("this Application"). On the date for hearing, both of the applications were set down and the court decided to hear this Application first.

BACKGROUND

[2] The Claimant brought proceedings against the Defendant in this court for, inter alia, possession of certain property and damages for trespass. On 31st July 2017, the Learned Trial Judge found for the Claimant and made an Order which provided, inter alia, as follows:

> "*Gerold Gellizeau shall pay damages to Olive Peggy Defreitas for trespass, to be assessed* ***on application to be filed and served on or before 31st October, 2017***." (Emphasis added).

THIS APPLICATION

[3] The Claimant filed the application for Assessment of Damages on 31st October 2017.

[4] However, the Claimant did not serve the application until three (3) days later, on 3rd November 2017.

[5] On 10th November 2017 the Defendant filed this Application on the basis of the Claimant's non-compliance with the deadline in the Order of 31st July 2017.

[6] At the first hearing of this Application on 20th November 2017, the Claimant resisted it and orally sought leave for an extension of time within which to apply for the Assessment of Damages.

[7] On that date I ordered that the parties file and serve written submissions together with authorities in respect of this Application.

THE SUBMISSIONS

[8] The Defendant submitted that the Claimant did not establish "*a good and substantial reason*". The available authorities have established that except for cases of "unless" orders and kindred specific fetters upon the Court, applications for extension of time are within the broad discretion of the Court and should be based on a balancing exercise considering the individual case, so that fairness and justice are achieved.

[9] With respect to the facts of this case, the Defendant invited the Court to consider that the Claimant had 3 months to comply with the order of 31st July 2017. Having provided no sound reason for the delay, she should be deemed to have forfeited the right to do so out of time. Moreover, the penal notice which was directed at the Defendant's obligations under the 31st July 2017 Order should similarly apply to the Claimant's obligations under the said order. Both parties were given deadlines. The deadlines were mandatory and ought to be treated as an "unless" order stipulation. Further, the Claimant was tardy in seeking the extension of time.

[10] The Defendant conceded that it is a matter for the exercise of the Court's discretion. He however avers that the only prejudice that wascaused by the delay was the costs in instructing Counsel to resist the late application.

[11] Counsel for the Claimant conceded that her application for Assessment was served three days late but that it was not filed out of time. In any event, while the order of 31st July 2017 set a date for service, it has no sanction. It is only where both a date has been set and a sanction has been stated that Civil Procedure Rules 2000 (CPR) Rule 27.8 (4) requires that a party must apply for extension of time and relief from sanctions (See **C.O. Williams v Inter-Island Dredging**[1])

[12] Counsel further submitted that in the circumstances of this case, the Court's power to strike out for non-compliance with a rule, direction or order, the nuclear option, is rarely exercised if there are other appropriate remedies available to it which are more appropriate (See **George Allert et al v Matheson et al**[2]). The Court, she said, can give other directions or make orders for the purpose of managing the case and furthering the overriding objective of dealing with cases justly.

[13] With respect to the oral application for extension of time, Counsel for the Claimant submitted that the Court can refuse to strike out even if there is no formal application to be relieved from sanction. The relevant consideration is "*whether the mischief sought to protect against is curable, whether the failure can be remedied within a reasonable time, and whether it is in the interest of justice to exact a disproportionate punishment*." Moreover, an application, even one as serious as one for relief from sanctions, can be made orally.

[14] Additionally, the Civil Procedure Rules 2000 (as amended) do not specify any criteria for granting an application for extension of time, but when considering whether or not to extend time, the Court must give effect to the overriding objective.

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[1] HCVAP 2011/017

[2] GDAHCVAP 2014/007

LAW AND ANALYSIS

[15] CPR 1.1 (1) provides that the overriding objective of those Rules is to enable the court to deal with cases justly.

[16] CPR 26.1 (2) (k) and (w) provide as follows:

> "Except where these rules provide otherwise, the court may –
> (k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time forcompliance has passed;
> (w) …take any other step, give any other direction, or make any other order for the purpose ofmanaging the case and furthering the overriding objective."

[17] CPR 28.(4) states that "a party who applies after that date must apply for –
(a) an extension of time; and
(b) relief from any sanction to which the party has become subjectunder these Rules or any court order."

[18] The question is what are the factors to be taken into account in the exercise of the court's discretion.

[19] While the case of **George Allert et al v Joshua Matteson et al**[3] deals with the principles that are relevant to applications to amendment of pleadings, it is instructive ingiving some guidance to a lower court considering an application to strike out. I am required to give consideration to whether striking out the application is proportionate to the Defendant's failure to seek an order to extend the time for service of the application for assessment[4].The Court of Appeal in that case also confirms the court is enjoined by CPR 26.1(2)(w) to take any other steps, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective[5].

[20] There was no express sanction for failure to file the Application for Assessment of Damages. Counsel for the Defendant seemed to suggest that as a "mandatory direction" the order to file and serve by a certain date was in the genre of "unless orders" by implication.

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[3]Supra, Note 2
[4]Supra, Note 2 at para 62 and 63
[5]Supra, Note 2 at para 65

[21] In **Robin Mark Darby v Liat (1974) Limited**[6] an order for security for costs was made against the appellant on 17th November 2010. The Order required the appellant to give security within 28 days failing which the appellant's claim would stand as struck out. The appellant, who had previously complied with all rules, orders and directions of the court, failed to provide security within the requisite time limit. At a later date, the appellant was able to and did provide such security. On 28th January 2011, an application for relief from sanctions was made by the appellant. The affidavit in support of the application was made by an attorney at law on behalf of the appellant who resides in Switzerland. The application was opposed by the respondent.

[22] The Master therein considered that promptness was a requirement of an application for relief from sanctions. Further, being concerned that counsel appearing was one and the same as the attorney-at-law who swore the affidavit in support of the application, thus accorded little or no weight to the explanation proffered by the appellant. The Master denied the application and ordered that the appellant's claim remain struck out and ordered that costs be paid to the respondent. The appellant appealed.

[23] It should emphasize that in the referenced case there was a sanction for noncompliance. Notwithstanding that critical fact, Pereira JA, as she then was, granted relief and stated:

> "…where relief is sought to relieve against that consequence which on any view is a draconian one although a proportionate and justifiable response as explained above. Where one applies for relief from the sanction, all the factors and circumstances must be taken into account. A relevant consideration must be whether the mischief which the order sought to protect against is curable. Notwithstanding that relief is sought after the sanction is said to have taken effect it is still open to the court, as it should be, in recognition of and giving full effect to the broad and fundamental principles of access to justice, to grant relief where the justice of the case requires.[7]

[24] I agree with Counsel for the Claimant that the order of 31st July 2017 specified a date for service but had no sanction. It is therefore only in the circumstances where the order specifies a sanction for non-compliance and/or the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 27.8(4) requires that the party must apply for an extension of time and

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[6] HCVAP 2012/002

[7] Supra, Note 6 at paragraph 13

relief from the sanction (See **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd**[8].)

[25] In **C.O. Williams**[9] the Court of Appeal held that:

> "On applications for extension of time generally, where no sanction is specified for failure to comply with the rule which prescribes the relevant time limit, the court, in the exercise of its discretion, will consider: (1) the length of the delay; (2) the reasons for delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice if the application is granted".

CONCLUSION

[26] Ultimately the Court has discretionary powers to extend time under these circumstances. I accept that I should exercise my discretion in this particular case to ensure that justice is done between the parties.

[27] Even if I were to agree that there is an implied sanction for failure to comply, in my judgment I can consider an application for relief from sanctions. I can then exercise my discretion whether or not to grant relief there from and can extend the time, whether or not the application is made before or after the date for compliance has passed and whether or not a formal written application has been made.

[28] The Defendant was served on the 3rd November 2017. That was three (3) days after the time stipulated by the Court Order. The Claimant proffered through the Affidavit of Lanique Lewis filed on 17th November 2017 that the delay was caused by a delay in collecting a copy of the filed Application from the court registry further delayed by her illness. In essence there was a "lack of diligence" on her part.

[29] In my considered view that three (3) days' delay was not inordinate and the failure was remedied. Moreover, the Defendant was not prejudiced by the delay.

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[8] HCVAP 2011/017, at paragraphs 3 and 56(3)
[9] Supra, Note 7

[30] I have considered the case of **Dianne Margaret Quinn v Pres-T-Con Ltd**[10] in which the Privy Council had to grapple with an application that was five (5) days late. Among the factors the court considered was whether any prejudice was caused to the defendant. There is no evidence to show that the expiry of the three (3) days had caused, or could have caused, any prejudice of any kind to the Defendant in the case at bar. Notwithstanding the Defendant's assertion that he was prejudiced with respect to the costs in instructing Counsel to resist the late application, I find that the Defendant has suffered no real prejudice.

[31] The Defendant orally applied for an extension of time. This application can be entertained by me whether it is made before or after the time for compliance has passed. I shall allow the extension of time and the service on 3rd November 2017 shall be and is deemed proper.

[32] The court's order is therefore as follows:

1. The Application for Assessment of Damages filed on 31st July 2017 and served on 3rd November 2017 is hereby deemed to be duly filed and served pursuant to the Order made on 31st July 2017.

2. There shall be no order as to costs of this application.

Yvette A Wallace
Master (Ag)

BY THE COURT

Registrar

[10][1986] 1 W.I.R 1216