



[2019] JMSC Civ 140

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2015 HCV 05173**

<b>BETWEEN</b>	<b>SONIC LTD</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>EARNEST NORRIS</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Stephanie Weir instructed by Shelards for the Claimant/Respondent**

**Mikhail Williams instructed by Taylor, Deacon and James for the Defendant/Applicant**

**Heard: May 21, 2019 and July 12, 2019**

**T. HUTCHINSON, J (AG.)**

**INTRODUCTION**

[1] This is an application by the Defendant to persuade the Court to exercise its Case Management Powers under Rule 26.1 and to extend the time within which he can file his defence. The Defendant initially made this application on the 16th of February 2017 but it did not proceed at that time. In the interim, the Claimant renewed its application for Judgment to be entered in its favour in default of a defence being filed on the 20th of July 2017, the original application having been denied on the 16th of February 2017.

[2] The application before the Court was re-listed for hearing on the 7th of March 2019 and an updated affidavit in support, as well as a draft defence which outlines a

defence under the provisions of the Limitations of Actions Act was filed on the 18th of February 2019.

- [3] The Application is opposed by the Claimant on the basis that they have done all that they need to do to obtain judgment in this matter. They have asked the Court to deny the application as to do otherwise would be to reward the Defendant for flouting established timelines.

## **BACKGROUND**

- [4] The Claimant in the instant case is a limited liability company incorporated in the Cayman Islands where it also has its registered offices. It is also the owner of land registered at Volume 1379 Folio 401 located in Golden Vale, Portland which it had purchased from Lascelles Panton.
- [5] Prior to the sale to the Claimant, Panton had leased the property to the Government of Jamaica (hereafter referred to as GOJ), who the Claimant states, had sublet portions to numerous tenants under the Land Lease Programme. Under this programme a number of individuals were permitted to enter the property to carry out farming activities, the Defendant being one such individual according to the Claim.
- [6] It is the Claimant's position that the lease was subsequently surrendered by the GOJ and his predecessor in title took back the property with the sub-tenancies created by the GOJ. It is also the Claimant's position that after the GOJ surrendered its lease, the Defendant remained as a tenant-at-will when the property was transferred to the new owners on the 30th of January 2012.
- [7] On the 20th of June 2012, the Defendant was served with a Notice to Quit and Deliver up possession of the land which he failed to comply with. On the 4th of November 2015, the Claimant filed suit to recover possession of the property.

- [8] An application was made for default judgment on the 20th day of July 2017 which was adjourned pending the hearing of the Defendant's application of an extension of time within which to file his defence.

## SUBMISSIONS

- [9] In the submissions made on behalf of the Defendant/Applicant, while conceding that the Claimant has done enough to obtain Judgment in Default, Counsel has asked the Court to bear in mind the principles enunciated in the Court of Appeal decision of ***Tanya Ewers v Melrose Barton-Thelwell [2017] JMCA Civ 26*** where the criteria required for the extension of time was considered at paragraph 29 of that judgment as follows;

This court has accepted that for applications for extension of time, within which to file a defence, a broad approach should be used. That approach should take in the circumstances of the particular case. In ***Fiesta Jamaica Limited v National Water Commission, [2010] JMCA Civ 4***, Harris JA, with whom the rest of the court agreed, said at paragraph [15] of her judgment:

*"The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the court's approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J., in a application for extension of time to appeal in the case of Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors. [(2000) Times, 7 March; All England Official Transcripts (1997-2008) (delivered 18 January 2000)]."*

In his judgment, Lightman J said, in part, at paragraph 8:

*"It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the*

*other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.”*

#### Length of delay

**[10]** In respect of the first criterion being the length of the delay, the Court has noted that the Claim herein was filed on the 4th of November 2015 and received by the Defendant/Applicant on the 6<sup>th</sup> of November 2015, after which an acknowledgment of service was filed on the 20th of November 2015. There was no defence filed by the Applicant and accordingly on the 6th of May 2016 the Claimant applied for Default Judgment. On the 16th of February 2017, this was refused based on their non-compliance with an order of the Court and a subsequent application for default judgment was filed on the 20th of July 2017. The Application herein was filed on the 16th of February 2017 and then re-listed on the 7th of March 2019. There is no question then that there has been delay on the part of the Defendant/Applicant.

#### Explanation for delay

**[11]** In respect of the chronology outlined above, Counsel for the Defendant/Applicant takes no issue with the fact that there has been delay in making this application on the part of his client. What he has sought to do is to provide an explanation in respect of that delay in his submissions. It was submitted by Counsel that at the time that the Defendant filed the acknowledgment of service he was unrepresented and it was only on being served with the application for default judgment that he approached the Chambers of Taylor, Deacon and James. It was as a result of this consultation that the initial application for an extension of time to file a defence was filed on the 16th of February 2017 with an affidavit in support.

**[12]** It was within this same period that the Claimant had the hearing of their initial application for default judgment. Counsel has pointed out that the Claimant did not succeed on that day, not because of the late filing by the Defendant/Applicant, but

because they themselves had failed to comply with a Court order and he has asked the Court to take note of this when considering the period of delay.

- [13]** Counsel has been candid in his acceptance of the fact that the Defendant's application having been made, his Chambers had filed an application on the 14<sup>th</sup> of December 2017 to come off the record as a result of communication issues with the Defendant and this application was granted on the 14th of June 2018. He has pointed out however that any delays that this would have occasioned were addressed within a short period of time as the firm was back on record on the 13<sup>th</sup> of December 2018 and as such the Claimant would only have been inconvenienced on one occasion when the matter came up on the 26<sup>th</sup> of October 2018 when the Defendant was absent and unrepresented. The matter having been set for the 17<sup>th</sup> of December 2018, when they were newly back on record, the Defendant had to accept a cost order being made against him for this adjournment.
- [14]** On the 20<sup>th</sup> of February 2019, when the matter was next before the Court, they had filed an updated affidavit in support of the application to extend time and this application was in fact re-listed on the 7<sup>th</sup> of March 2019. On that occasion another cost order was made against them as a sanction for the further delay and inconvenience to the Claimant.
- [15]** As such, it is Counsel's submission that while there has been delay, it has not been a case of deliberate malingering on the part of the Defendant and once Counsel was back in the matter they sought to act as expeditiously as possible. Additionally, he submits, the Court has sought to do justice to the Claimant at every juncture in these proceedings in an effort to balance the scales by the making of costs orders as well as an unless order.
- [16]** Although Counsel has not sought to go through both affidavits in detail, I note that in the original affidavit which was filed on the 16<sup>th</sup> of February 2017 the Defendant/Applicant made reference to the reason for the delay. At paragraph 4 he stated that having filed the acknowledgement of service where he indicated that

he was defending the claim he thought that he had done enough to defend himself as he received no further documents. In assessing this explanation, I bear in mind the fact that he was unrepresented.

**[17]** In the same affidavit he stated that an action had also been brought against his father by the same Claimant and he had formed the belief that his matter would have been bound up in that of his father as the claim was in relation to the same plot of land. As such, he had formed the view that there was no need for him to do anything further unless contacted by the Court. These explanations were again advanced and expanded on in paragraphs 3, 5, 6 and 8 of the updated Affidavit of the 18th of February 2019.

**[18]** At paragraph 13 of the first affidavit, the Defendant/Applicant explained that the reason his draft defence was not prepared was due to the fact that he was financially incapable of retaining Counsel to do so on his behalf thereby raising issues of impecuniosity for the Court's consideration.

**[19]** In her response, Counsel for the Claimant has rightly pointed out that unlike the Defendant/Applicant they have sought to comply with the established rules and procedures and having waited for a period of almost four years they are entitled to their Judgment in Default. She has urged the Court not to grant the order sought by the Applicant. Counsel has highlighted that this wasn't a delay of a few months, it was a delay for an inordinately long period and the Applicant ought not to receive the benefit of the Court's discretion in such circumstances. Counsel has also submitted that there is no good explanation advanced for the delay in filing, neither has there been any explanation for the lapse of time between the original filing of Court Orders for the extension of time and the re-listing of same.

Prejudice occasioned

**[20]** On this point, Counsel for the Defendant/Applicant has referred to and relied on the fact that some of the delay was as a result of the Claimant's own failure to comply with an order of the Court. He also highlights the fact that in respect of the

delay brought about by the Defendant/Applicant the Claimant has received some redress by way of costs orders and an unless order made in its favour and as such has not been unduly prejudiced.

**[21]** Counsel for the Claimant/Respondent on the other hand has highlighted the period of time that the Claimant has been waiting to have this matter disposed of something that they submit could have occurred earlier had the Defendant/Applicant not had a parting of ways with his Counsel.

### Merits of the Defendant's Case

**[22]** In respect of this requirement Counsel for the Defendant/Applicant referred to and relied on a number of paragraphs in the updated affidavit which was filed on the 18th of February 2019. He pointed out that at paragraph 3 the Defendant has always asserted that his right to remain on the property was linked to that of his father on whose portion of the land he had his house. In paragraph 5 he noted that the valuation done for the purposes of the Court matter shows two houses on the same plot of land and he outlined that his father had occupied these premises for over 38 years. In his draft defence he also outlined that he personally had resided on the land with the permission of his father and had resided there undisturbed for over 25 years all while exercising acts consistent with ownership which included the construction of his house.

**[23]** Counsel submits that in stating this he has set out a positive defence under the Limitations of Actions Act as he also engaged in actions taken to exercise control over the land and keep trespassers away. It was also submitted that the Applicant has raised the principle of Laches by the pegging of his period of occupation to that of his father.

**[24]** In concluding his submission on this point, Counsel stated that the primary consideration is the real prospect of success in defending this claim, a probability which he asserts is evident not just on the draft defence but also on the affidavit evidence to which the defence is attached. Counsel submits that the assertions in

the affidavit and draft defence are in fact unchallenged as the Claimant elected not to take issue with same when they failed to file an affidavit in response in spite of being given the opportunity to do so.

- [25]** On this issue Ms. Weir submitted that the Applicant/Defendant like his father had been a sub-tenant of the Government of Jamaica pursuant to a lease which had been granted by the Claimant's predecessor in title. Having been put in occupation by the government in conditions where sums would have been payable, the Defendant and his father before him acquired no legal rights but were tenants at will when the Claimant acquired possession. She also noted that the Defendant/Applicant's defence relied too heavily on that of his father's occupation of the property and not his own.

Effect of the delay on public administration

- [26]** In addressing this issue, Counsel for the Defendant/Applicant has stated that the delay has not had an adverse effect on public administration and draws support for this submission from the decision of Palmer J in Claim No. 2015 HCV 05729 an action which involves this Claimant against 25 Defendants in relation to the same plot of land. The Judgment was delivered on the 3rd of January 2019 and one of the Judge's orders was for the consolidation of that claim with the other claims filed by the Claimant against the other residents of Golden Vale, Portland.
- [27]** Counsel has highlighted that this action as well as that brought against the father of the Defendant relate to the land in Golden Vale. In continuing to pursue the matters separately, it is submitted that the Claimant has failed to comply with a clear order of the Court. Counsel submits that this approach by the Claimant would be more likely to have an adverse effect on public administration as the Court is still being asked to deal with individual claims instead of a consolidated one even though the cause of action and defences are likely the same.

Importance of compliance with time limits

[28] Counsel for the Defendant/Applicant has frankly accepted that his client is in breach of the established timelines but he submits that this failure in and of itself shouldn't determine the matter.

The resources of the parties

[29] On this final requirement, it is the submission of Counsel for the Defendant that this only arises if the Claimant were alleging prejudice such as impecuniosity or a depletion of resources as a result of the delay. He asserts on this point that in any event the Court does not act in a vacuum and can make its own assessment/determination of the resources of the respective parties in coming to its decision.

**LAW/DISCUSSION**

Filing a Defence

[30] In respect of the legal requirement for the filing of a defence there is no dispute between the parties that this timeline is clearly set out at rule 10.3(1) of the CPR which provides;

10.3 (1) The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form.

[31] In the instant case, the Defendant/Applicant accepts that the claim form and accompanying documents were served on him on the 6th of November 2015. The acknowledgment of service was prepared and filed on the 20th of November 2015 but no defence was filed within 42 days.

Consequences of Failure to File Defence/Judgment in Default

**[32]** In respect of the consequences for a Defendant's failure to file a defence, Part 12 provides;

12.5 The registry must enter judgment at the request of the claimant against a defendant for failure to defend if;

- (a) the claimant proves service of the claim form and particulars of claim on that defendant; or
- (b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and
- (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
- (d) that defendant has not (i) filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6));
- (e) there is no pending application for an extension of time to file the defence.

**[33]** In respect of this application, the Claimant/Respondent rely on 12.5(a) to (d)(i) as grounding their submissions. While it is accepted by the Defendant/Applicant that all the conditions set out at that part of the rules have been met, they have reminded the Court that note has to be taken of part 12.5(e) as there is a pending application for an extension of time, as such any order which would be made in favour of the Claimant would have to be deferred until this application has been resolved.

Extension of time

[34] On the question of the Court's power to extend/enlarge time as requested by the Defendant/Applicant, Rule 26.1 (2)(c) of the CPR provides:

*"(2) Except where these Rules provide otherwise, the Court may - (c) 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"*

[35] In considering the approach to be taken, useful guidance is provided in **Leymon Strachan v The Gleaner Company Limited and Stokes (Motion No 12/1999, judgment delivered 6 December 1999, page 20)**, a decision which was Pre-CPR. Panton JA, as he then was, set out the principles that should guide the Court in considering an application to extend time generally:

*"The legal position may therefore be summarised thus:*

- (1) Rules of Court providing a time-table for the conduct of litigation must, prima facie, be obeyed.*
- (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.*
- (3) In exercising its discretion, the Court will consider - (i) the length of the delay; (ii) the reasons for the delay; and (iv) the degree of prejudice to the other parties if time is extended.*
- (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."*

[36] Further assistance on this point is provided to the Court by the dicta of Brooks JA in the decision of **Hoip Gregory v Vincent Armstrong** [2013] JMCA Civ 36 where he stated at paragraph 7;

*'With regard to the overriding objective, the court should include in its consideration the principle that time limits established by the CPR should be observed.*

[37] Having made this pronouncement as to the importance of timelines, he went on at paragraph 8 to say;

*'It is also fairly well established that the court will not apply a rigid formula to these considerations but should consider that each case will turn on its own peculiar facts and the overall impact of a refusal or a grant of the application should be considered (See **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors All England Official Transcripts (1997-2008) (delivered 18 January 2000)**)*

- [38] The effect of these utterances makes it clear that while the Courts agree with the Claimant that there should be strict observation of timelines, when it comes to applications under 26.1(2)(c) the failure of the applicant to comply with same ought not to determine the matter without more, as each case has to be examined on its own merits to determine whether the application should be granted.
- [39] It is clear from an examination of all the relevant factors that although the Defendant/Applicant has taken his time to make this application to the Court, his delay has not been the sole reason for the Claimant's inability to obtain Judgment in their favour. An examination of the record confirms that the matter had previously been scheduled for an application for default judgment and it was the Claimant's own failure to comply with orders of the Court that prevented the matter proceeding.
- [40] In respect of the Defendant's explanation for his delay, as mentioned above, he made reference to his misunderstanding of the process at the time he filed the acknowledgment of service, his impecuniosity which prevented him instructing Counsel to act on his behalf and his belief that his matter was so intricately connected to that involving his father that he didn't need to do anything in respect of this claim. These explanations can be summarised as amounting to an ignorance of the law and an appeal to be exempted from the sanctions that would follow.
- [41] While it is recognised that ignorance of the rules and procedure themselves is not in and of itself a good excuse, I am guided by the dicta of Harris JA in **Ewers v Barton-Thelwell** supra which states as follows;

'The learned judge seems to have given undue weight to the length of the delay and does not appear to have given much, if any, weight to two crucial criteria. Firstly, the learned judge did not consider the merits of Ms Williams' case. Secondly, the learned judge also did not demonstrate that she took into account the justice of the case, balancing the potential loss to Ms Williams' estate against the potential loss to Mrs Barton-Thelwell'

[42] Accordingly, in coming to a decision as to whether the time should be extended, it is important to give due consideration to the merits of Mr. Norris's case as outlined in his affidavit as well as in his draft defence, as well as to the justice of the case. It is his position that he has acquired an interest in the property as a result of the time that he has been in undisturbed possession tacked on to the length of time his father's 'possession' which he says spanned a period of 38 years.

[43] In the *Ewers* decision, the acquiring of possession in this manner was examined and it was noted as follows at paragraph 47;

Textbooks and case law support the principle that the continuous exclusion of the owner of the paper title, albeit for periods of less than 12 years, by successive connected occupants, may operate to oust the title of the owner of the paper title, if those periods add up to 12 years or more. The principle describes the "tacking" of the periods of trespass.

Megarry and Wade, the learned authors of *The Law of Real Property*, seventh edition, at paragraph 35-021, state the principle thus:

*"...a squatter has a title based on his own possession, and this title is good against everyone except the true owner. Accordingly, if a squatter who has not barred the true owner sells the land he can give the purchaser a right to the land which is as good as his own. The same applies to devises, gifts or other dispositions by the squatter, and to devolution on his intestacy: in each case the person taking the squatter's interest can add the squatter's period of possession to his own. Thus if X, who has occupied A's land for*

*eight years, sells the land to Y, A will be barred after Y has held the land for a further four years.”*

[44] At paragraph 48 the Court continued;

Sampson Owusu, the learned author of Commonwealth Caribbean Land Law, opined at page 272 that:

*“A squatter who does not remain in adverse possession for the full limitation period acquires title which is therefore transmissible to his heirs on intestacy or devisee or which can be alienated by him to another person whose title matures if the paper owner is kept out of the property for the whole limitation period....”*

[45] It was also noted that in ***Allen v Matthews [2007] EWCA Civ 216; (2007) 2 P and CR 441*** at paragraph [85], Lawrence Collins LJ said, in part:

*“A person seeking to establish title to land by adverse possession must show that for the requisite period of time (1) he had factual possession of the land; (2) he had the requisite intention to possess (animus possidendi); and (3) his possession of the land had been “adverse” within the meaning of the Act. In relation to factual possession the test is whether the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.*

*As to intention, what is required is not an intention to own or even to acquire ownership, but an intention to possess to the exclusion of all others, including the owner with the paper title. See ***Powell v McFarlane (1977) 38 P&CR 452, 471; Buckingham County Council v Moran [1990] Ch. 623, 639-643; J.A. Pye (Oxford) Ltd v Graham [2002] UKHL 30, [2003] 1 AC 419, paras 32, 41. As in *Lambeth London Borough Council v Bigden [2000] EWCA Civ 302, (2001) 33 HLR 43, it is not necessary for the adverse possession to be by one person for the whole of the period. As long as the period of adverse possession is continuous, the adverse possession of successive squatters may be aggregated.**** (Emphasis supplied)*

[46] Based on that assessment, contrary to the submissions of Counsel for the Claimant, Mr Norris could properly claim the benefit of tacking his possession to that of his father. By continuing in possession of the land as an adult and even constructing his own home on the land, the law makes it clear that Defendant can rely on the combination of the period of his possession along with that of his father to accumulate the required period of 12 years in order to defeat the Claimant’s

paper title. By stating this he has raised a defence of merit that ought properly to be considered by a tribunal of fact.

## CONCLUSION

[47] Having reviewed the evidence which has been put forward in this matter as well as the applicable rules and cases on the point, it is clear that although the delay on the part of the Defendant has been substantial it has not been the most egregious. Additionally, there is a defence on the merits that ought to be considered by the Court and in this regard I adopt the words of Brooks JA at paragraph 12 in *Hoip Gregory v Vincent Armstrong* [2012] JMCA App 21 where he stated;

‘It has been said that parties ignore the rules of procedure of the Supreme Court at their peril (per Panton P in *Golding and Another v Simpson-Miller SCCA 3 of 2008 (delivered 11 April 2008)* at paragraph [15]). A similar observation may be made about non-compliance with the rules of this court. Nonetheless, there are circumstances, which sometimes arise, that require a defaulting applicant to succeed, despite his default. In some of those circumstances, practicality demands that successful result’.

[48] I am satisfied on a balance of probabilities that this is an appropriate matter for the exercise of the Court’s powers to extend the time to allow the Defendant to file his defence. I am also persuaded that the over-riding objective weighs in favour of same taking into account the justice of the case and balancing the potential loss to the Defendant as against the potential loss to the Claimant.

[49] Accordingly, the Court makes the following orders;

1. The Defendant is permitted to file his Defence to this claim within 21 days of the date of this order
2. No order as to costs.

3. If the Defendant/Applicant fails to comply with order 1 his statement of case stands struck out.
  4. Defendant's Attorney to prepare file and serve order herein.
- [50]** I note that the Claimant has asked for costs to be awarded in the event the ruling was in favour of the Defendant/Applicant, having considered this submission and the approach of the Court to date in respect of previous costs orders against the Defendant, I am not persuaded another cost order against the Defendant should be made on this occasion.