SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2004/0957

BETWEEN

RBTT BANK CARIBBEAN LIMITED

Claimant

AND

DEAN NICHOLAS

Defendant

Appearances:
Zaniada McNamara of Counsel for the Claimant
Wauneen Louis-Harris of Counsel for the Defendant

2014: September 18th 22nd

REASONS FOR DECISION

[1] This case, has not yet completed case management conference although filed in 2004. There have been preliminary applications filed by both parties that remain outstanding. These applications date from the year 2006. The proceedings cry out for status hearing and case management conference. No reasons have been proffered for the delayed hearings.

[2] The defence itself filed on the 4th August 2005, raises issues that if tried preliminary, may dispose of the claim in its entirety. Nevertheless for unexplained reasons even the hearing of that issue is outstanding. Another outstanding issue is a request for further information made by the defendant

and dated the 5th December 2005. The defendant had requested the following documents from the claimant, which he has alleged is necessary for his defence: —

1. Statements for the account related to the claim form and statement of claim from January 1998 to July 2005.
2. Further information regarding the accumulated interest and verification of the interest claimed.
3. Further information with regards to the principle amount and the exact figure of the principle.
4. Further information with regards to the time frame over which the amount of $24,835.77 has accumulated. From what exact date has this interest accumulated to give the amount of $24,835.77 as claimed in the claim form and statement of claim.
5. Copy of the overdraft facility agreement signed by the defendant.

[3] The claimant has failed to produce these documents in a timely manner or at all. An application was filed by the defendant in which it sought to enforce the request. The application was struck out for want of prosecution by Master Cottle on the 27th of March 2006 when the defendant failed to show and to prosecute the application. The letter requesting the information remained outstanding and on the 27th of November 2012, I ordered specific disclosure of these documents.

[4] In making the order, I was satisfied that the request for disclosure was not frivolous. Master Cottle in striking out the application did not interfere with the earlier letter of request. Also, the strike out order did not preclude a further application.

[5] The defence alleges that there is no outstanding debt and in any event the claimant's cause of action is prescribed. While it is for the defendant who has

asserted that he has settled the debt in its entirety to prove it, the issue of whether a claim is prescribed is a matter of fact and law. The documents that created the facility; the application of interest; a record of the payments made by the claimant are relevant to the issue in dispute and the inability to produce these documents at trial may compromise both parties in the proceedings. I ordered these documents disclosed by the 5th March 2013 as in my view, these documents were also necessary to the trial of the issue of prescription.

[6] The deadline drawn expired without disclosure. There is now before me an application by the claimant dated the 28th of November 2013, for an extension of time within which to comply with the order of the 5th of March 2013. My order had directed disclosure on or before the 3rd of April 2013. The claimant has offered the following reasons for its failure to comply: — (1) the date ordered for disclosure was Easter Monday when the registry was closed; (2) the claimant's archiving procedures resulted in a further delay of 24 hours, and forced the claimant to file its list of documents shortly after time had expired (3) in relation to other documents still not disclosed, the claimant has exhausted all efforts, but has been unable to locate the documents which have since been archived by the claimant.

[7] The application for extension of time is vigorously opposed by the defendant who himself met the court's timeline for disclosure. By affidavit filed on the 4th of December 2013, he challenged the claimant's allegation that it was compromised by the deadline falling on Easter Monday, as the claimant had not filed the documents even on the day following the public holiday. He submits that the affidavit filed by the claimant is unhelpful in explaining why the court's order was not complied with. He avers that the claimant just simply disobeyed the court's order whether it was deliberately, or through inadvertence. He supports his contention by showing that the documents that the claimant now seeks to disclose had been in the claimant's possession from as early as the 26th of June 2013 when an affidavit filed by the claimant

had improperly exhibited these very documents in an attempt to circumvent the claimant's breach of the order. Additionally he submits that he had not been given 7 clear days' notice of the application and that he had only had 3 days' notice. He states that on the 26th June 2013, the claimant had put him in a similarly compromising and prejudicial circumstance forcing the court to reprimand the claimant for attempting to file an affidavit exhibiting documents which ought to have been disclosed by the 3rd of April 2013. The defendant urges the court to consider that the application made is insufficient and that without a request for relief from sanctions the court is incapable of granting the requested relief.

The relevant procedure

[8] Rule 26.7(2)of CPR 2000 is instructive. It provides:—

> "If a party has failed to comply with any of these rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply".
>
> Also instructive is Rule 28.13 which provides the consequences for failing to disclose under an order for disclosure. It provides:—
>
> " (1) A party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection"

[9] Relief from sanctions is governed by Rule 26.8 of CPR 2000. It provides that an application for relief must be made promptly; and must be supported by evidence on affidavit. The court's ability to provide relief is circumscribed. Relief may be granted only if the court is satisfied that —

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

Application to the proceedings

[10] The claimant has applied for an extension of time but in fact has not applied for relief from sanctions and the court is incapable of expanding the sphere of the current application so as to characterize it as an application for relief from sanctions.

[11] It is the usual and recommended practice that applications for an extension of time are made before time has expired. Where as in this case time has expired, and the rule as regards disclosure carries a specific sanction the party in default is caught by CPR 2000 Part 28.13, and 26.8 and the more appropriate application is one for relief from sanctions.

[12] In a recent case of ***Hallam Estates Ltd and Another v Baker*** [2014] EWCA Civ 661, [2014] All ER (D) 163 the civil division of the UK Court of Appeal in a decision delivered in May 2014 sets out the revised approach of the UK courts to extensions of time. The now entrenched approach favours the granting of requests for extensions which neither imperiled hearing dates, nor otherwise disrupt the proceedings. But despite this new approach, parties should disabuse themselves of the notion that applications for extensions of time are granted as a matter of course. That would go against the very grain of the mischief of CPR 2000. Certainly in cases where there is an imposed sanction either by a rule or by an order of the court, the obligation on a party seeking to extend time for compliance is even more onerous.

[13] In this case the stalling of the proceedings for almost 9 years seemed to have dated from the request for information. The delay in the provision of the information, just only in relation to the implications of the passage of time has certainly compromised these proceedings. I draw reference to See the dicta of Edwards J in **C.O. Williams Construction (St. Lucia) Limited v Inter-Island**

Dredging Co. Ltd HCVAP 2011/017. Which clarified that the courts discretion in relation to applications for extension of time should be exercised in keeping with the overriding objective. The current case is incapable of benefitting from that discretion. I am unable to discount the application of CPR 2000 Part 26.7 (2). Or to lift the sanction imposed by rule 28.13.

[14] The result of my conclusion is that the claimant is precluded from relying on or producing at the trial of these proceedings any documents in its possession as at the date ordered for disclosure that were not disclosed.

Short Service

[15] Although the issue of short service is now academic, I find that of the defendant is entitled to 7 clear days' notice of the hearing of the application for extension of time[1]. The defendant avers that he has been prejudice by the short service as he was given insufficient time to prepare his response. Despite these circumstances the defendant responded admirably. He narrowed the contentious issues formidably, guiding the court on the relevant rules and principles. Although it is of no consequence to my conclusions, I find that the defendant sufficiently mitigated any assumed prejudice so as to allow the court to discount the operation of the usual time frames for service.

The implications for trial

[16] With the exception of the banks methodology for calculating interest, the information requested by the defendant was directed at establishing the claimant's case against the defendant. The claimant is precluded from relying on the documents in its possession as of the 3rd April 2013 which have not been disclosed. Nothing prevents the defendant from adducing his own evidence in so as he has complied with the rules regarding disclosure, as to the payments made

[1] CPR 2000 Part 11.1 1.(1)

or his own obligations under any contract with the bank. Information on his loan contact should not be exclusively in the possession of the claimant, and I imagine that the defendant may well have evidence in the form of receipts or statements, check stubs and the like.

[17] The bank has indicated that there are other documents that it can no longer find due to its own archiving procedures and I rule that these documents are no longer in the bank's possession.

Conclusion

[18] I therefore dismiss the application for an extension of time as being inadequate and order that the claimant is non-compliant with the court's order of the 5th March 2013 and CPR 2000 rule 26.8, with the natural consequences to apply.

Costs

[19] Costs are awarded to the defendant in the sum of $750.00 to be paid within 14 days hereof.

[20] The proceedings are fixed for the hearing of the issue of prescription on the 27th of November, 2014 and for further case management conference.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER