THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-00307

BETWEEN

LYRIS SKINNER

1st Claimant

THECLAR SANDY

2nd Claimant

AND

DYNASTY HOLDINGS LIMITED

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Ms. Margaret Rose for the Claimants

Mr. Simon de la Bastide instructed by Alfonso and Co. for the Defendant

Reasons for decision

1. The defendant applied for an extension of time to file the defence. The claimants opposed it. The defendant's application was granted. The claimant has appealed that decision. The matter has a convoluted procedural history with prior procedural applications having been filed which were each contested.

Procedural history

2. The procedural history is comprehensivly summarized by the defendant in its written submissions as set out below.

(i) The proceedings were commenced by Claim Form filed on 26th January 2010 and served on the Defendant on 2nd February 2010.

(ii) On the 12th April 2010 the Defendant filed an application for an extension of time for the filing and service of its Defence to the 28th May 2010 ("the First Application for Extension of Time"). The grounds of that application were set out in the body of the application and supported by the affidavit of then instructing attorney filed on the 12th April 2010.

(iii) The First Application for Extension of Time was dismissed by the Court on the 26th April 2010.

At the time the First Application for Extension of Time was heard and determined the doctrine of implied sanctions still applied. Therefore the Court was required to apply that doctrine in determining the application. In **Andrew Khanhai v Prison Officer Darryl Cyrus and The AG Civ App No. 158 of 2009** and **The Attorney General of Trinidad and Tobago v Miguel Regis CA Civ 79 of 2011** the Court of Appeal held that the CPR imposed an implied sanction on a Defendant who failed to file his defence within the prescribed period (that prevented him from filing a defence) which could only be lifted by an order for relief from sanctions granted under CPR 26.7. Accordingly, at the time the First Extension of Time Application was heard the law (as then understood) was that the Court only had a discretion to grant that application if the Defendant could satisfy it that the application for relief from sanctions (which is what First Application for Extension of Time essentially was) was *inter alia* prompt, that there was a good explanation for the Defendant's default, that such default was not intentional, and that the Defendant had generally complied with all other rules and orders. The Defendant was unable to so satisfy the Court and therefore the First Application for Extension of Time was dismissed.

The decision of the Privy Council in **The Attorney General v Keron Matthews**[1], was subsequently delivered on **20 October 2011 w**hich clarified that the relief from sanctions provisions of the CPR do not apply on an application to extend time for the filing of a defence. Provided judgment in default has not been entered, the Court has discretion to grant an extension of time to file a Defence.

(iv) On the 29th September 2010, approximately 5 months after the dismissal of the First Extension of Time Application, the Claimants filed an application for judgement in default of Defence ("the Application for judgement"). Written submissions with respect to that application were filed by the Defendant on the 7th February 2011 and by the Claimant on the 10th February 2011.

In its written submissions filed in opposition to the 2010 Application for default judgment the Defendant submitted, inter alia:

(a) that under the CPR 12.5 a party obtained judgment by filing a Form 6 request for judgment with the Court;

(b) that the Claimants had not filed a Form 6 request for judgment;

(c) that there was no provision in the CPR for obtaining judgment in default of defence by way of an application to the Court such as the 2010 Application.

(v) At the hearing of the Application for judgment held on the **17th March 2011** both parties agreed that the Court should adjourn that hearing so as to allow the Claimants an opportunity to enter judgment in default of Defence by filing a Form 6 request for judgment. The Court therefore adjourned that hearing to allow the Claimants an opportunity to enter judgment in default of Defence in this way.

[1] (2011) UKPC 38.

(vi) The Claimants then filed a Form 6 request for judgment in default of Defence on the **4th April 2011.**

(vii) By Notice of Application filed herein dated the 31st May 2011 ("the Setting Aside Application") the Defendant, after learning that the Claimant had filed a Form 6 request for judgment, applied for an order that the judgment in default of Defence be set aside. The affidavits of Mr. Ghanny Mohammed and Ms. Anica Ghent were filed on 31st May 2011 by the Defendant in support of the Setting Aside Application and the affidavit of Ms. Lyris Skinner was filed on the 30th June 2011 by the Claimants in opposition to that application.

(viii) At the hearing held on the 31st May 2011 the Court ordered that the parties file written submissions in respect of the Setting Aside Application.

(ix) On the 18th November 2011 the Claimants filed written submissions in opposition to the Setting Aside Application and the Defendant filed written submissions in support of that application.

(x) At paragraphs 6 and 7 of the Claimants' written submissions it was revealed for the first time that the Registrar of the Supreme Court had issued a Notice of Query in respect of the Claimants' request for judgment and accordingly there had been no judgment entered in this matter.

(xi) At the hearing of the Setting Aside Application held on the 10th January 2012 the Court stated (having considered the evidence and written submissions filed in respect of that application), that had judgment in default been entered in these proceedings it would have been prepared to set same aside.

(xii) In an attempt to progress the matter Counsel for the Defendant submitted that in light of the information that judgment in default had not in fact been entered, the Court ought to treat the Setting Aside Application as an application for an extension of time for the filing of the Defence, and, given that the Court was satisfied that had judgment in default been entered there would

have been good grounds to set it aside, the Court ought to grant such an extension. At that point Counsel for the Claimants indicated to the Court that the Claimants objected to an extension of time being granted and wanted an opportunity to resist the Defendant's application for an extension of time for filing the Defence.

(xiii) In those circumstances the Court indicated that the Defendant ought to file a formal application seeking an order for an extension of time for filing a Defence in these proceedings.

3. It is clear therefore that:-

i. The application for an extension of time was filed **after** an application to set aside judgment was filed and heard. It was revealed during the arguments on that application that in fact, though judgment had been applied for, it had not been entered.

ii. Having heard full argument and considered written submissions the court indicated that it would have been prepared, had a judgment been entered, to set it aside.

iii. In those circumstances, as the defendant wished to file a defence, and the claimant objected to it being filed, an application to extend time for the filing of the defence was necessary.

4. The claimant's objections were based upon its contention that the relevant factors were

a. the length of the delay

b the reasons for delay

c. the chances of the claim succeeding

d. the prejudice to the claimant if the application were to be granted,

and that when the evidence in relation to these matters was considered it weighed against the exercise of the court's discretion in favour of the defendant's application.

The length of the delay

5. The claimant based its submissions on its assertion that an inordinate amount of time had elapsed between the time when the defence was due and the date of the application on the mistaken belief that the period was actually 7 ½ months – (from February 11 2010, (the date of

the entry of appearance) to September 29th 2010, (when the claimant filed an application for judgment in default of defence).

6. The claimants expressly abandoned reliance on periods of delay after September 29th 2010 when the heavily contested procedural applications began engaging the attention of the court.

7. In fact the time in issue was actually from March 2nd to the date of the first application for an extension of time on April 12th 2010 – less than 6 weeks. Commendably, the claimant volunteered at the hearing of the instant application that the period of delay was not in fact 7 1/2 months as it had initially contended.

8. It contended however, that as a similar application had been refused - the law at that time being that the implied sanction regime applied, and the defendant not having qualified for relief from sanctions, that the doctrine of res judicata applied.

9. It cannot be that a court is precluded from applying the law as established by an appellate court on a further interlocutory application if it has previously ruled on a similar application on a different state of the law, and in fact that doctrine does not apply to interlocutory applications.

10. It is well established that the dismissal of a interlocutory application is not final, and will not bar a further application on the ground of res judicata, particularly where the further application is made on the basis of a change in the law that has occurred since the original application was determined. See **The doctrine of res judicata** by Spencer Bower, Turner, and Handley 3rd ed. at para 172 **page 82-83.**

11. Further, the law having changed, the defendant did not have to satisfy the stringent criteria of CPR Part 26 for the grant of an extension of time.
The court was entitled to take into account the entire procedural history of the matter .In so doing it was entitled to consider what was the relevant period of delay by the defendant, to consider all

the material filed before the court from inception of the matter, and to consider whether in all the circumstances to exercise its discretion to grant the defendant an extension of time to file its defence.

12. Thus in **Rohini Khan v Neville Johnston CV2009-02311** (unreported) at pages 2-3 the trial judge in considering the issue of reasonable delay noted that, "*the delay is explained as resulting from attorney's office administration difficulties. … I consider that occasional glitches in the running of an attorney's practice may occur, falling short of negligence or even inadvertence, which may impact on time frames set by the rules. The delay from June 18th to July 5th has been candidly and adequately explained. I consider that the defendant acted as soon as reasonably practical in the circumstances set out above*."

On appeal, the honourable Mendonca JA, dismissing the appeal, reaffirmed this position stating, "*reasonably practicable… acknowledges that there will be, as the judge put it, glitches in attorney's office…. It's a less trying standard than, say, if you have to have an exceptional reason or a very good reason… 'reasonably practicable' seems to me to suggest a more mundane type of standard that you will look at these things and the way things might work.*"

13. In that case the test was *reasonably practical* under CPR Part 13(3) (1) (b).

Under CPR Part 10 (3) (6) it is contemplated that a single request for an extension of time for filing a defence can be granted by consent of attorney for an opposing party, without the need for the involvement of the court, for a period of up to 3 months, and no higher standard than reasonable practicability appears from or is implicit in that rule.

b **The reasons for delay**

14. The reasons for delay up to the first application for an extension of time on April 12th 2010 were that attorneys at law had recently come into the matter, they required instructions, and that attorney at law for the defendant had been unavoidably out of office as a result of a medical situation which arose on March 26th 2010. The letter requesting an extension was issued within the initial time limited for defence. This is a sufficient reason for any delay in the filing of that application. Thereafter the matter was prolonged by the claimants' unsuccessful attempts to

enter judgment against the defendant. The claimant appeared to forego reliance on any period while the matter was engaging the attention of the court in this regard.

The defendant, having been subject to the implied sanction regime, and having failed to satisfy the then applicable requirements of Part 26 (7), could do nothing further except wait to have judgment entered, and then seek to set it aside, which was the course it adopted.

Any delay after the initial application was the result of having to wait for the entry of judgment against it. Delay in having the judgment entered was, of course, attributable to the claimant.

c. T**he chances of the claim succeeding**

15. The court had already heard full argument on the application to set aside judgment and had indicated clearly that such an application would have succeeded if there had in fact been a judgment entered.

d. **The prejudice to the claimant if the application were to be granted**

16. The claimant in those circumstances would suffer no greater prejudice if the defendant were allowed an extension to file its defence as any judgment entered was liable to be set aside. Further, the defendant expressly undertook not to rely upon any notice issued by it subsequent to the filing of the proceedings and confirmed that any such notice would not feature in its defence. Still further the defendant was put on terms in that in default of filing its defence by June 14th 2012, the claimant would be at liberty to enter judgment against it.

Conclusion

17. The matter risked sinking into legal limbo, as

i. The judgment sought to be entered by the claimant had not been approved by the Registrar.

ii. The defendant wished to defend the claim but it was being contended that it was precluded from so doing as a result of a 6 week delay.

iii. The court had already considered a fully argued application to set aside judgment and expressed the view, after hearing full argument that the defendant would have been entitled to have set aside any judgment entered against it.

iv. In the instant case an initial request for an extension had been made on March 1st 2010 for an extension of 8 weeks, and had not been granted the courtesy of a response until March 24th 2010.

18. Therefore, even if the defendants were not granted the extension sought to file a defence, and the claimants eventually persuaded the Registrar to enter judgment, that judgment was liable to be set aside for the reasons set out by the defendant in its written submissions filed on that issue. It was within this court's discretion to accept delay of 6 weeks, and all subsequent delay, in the peculiarly convoluted circumstances of this case, as being explained sufficiently by the affidavit of instructing attorney, and the procedural history evident from the file.

19. Allowing the extension sought avoided the procedural quagmire that the claimants found themselves in - with an application to the Registrar to enter judgment that hadn't after, motre than a year, been entered, and which, if or when entered, would be liable to be set aside.

20. Allowing a defence to be filed allowed the real issues of fact between the parties to be ventilated at trial on the basis of evidence tested by cross examination, rather than allowing the claimant to hold onto to a tenuous and temporary advantage enjoyed as a result of a 6 week adequately explained delay, relatively minor in the scheme of things, as they have transpired in this matter.

21. In these circumstances the following orders were made

IT IS ORDERED that:

1. Time is extended for filing and service of the Defendant's Defence to on or before 14th June 2012;

2. In default of filing its Defence the Claimant is to be at liberty to seek to enter judgment on its claim;

3. Costs of this application to be costs in the cause.

Dated this 26th day of June 2012

Peter A. Rajkumar

Judge