THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P 247 OF 2017

CLAIM NO CV 2016-04469

BETWEEN

WEBSTER BROWNE

(Substituted for Joan Alexander by Order of the Court of Appeal)

Appellant/Defendant

AND

NAWBERT RAMPERSAD

First Respondent/ First Claimant

TARAN RAMPERSAD

(Substituted for Chandrawatee Rampersad by Order of the Court of Appeal)

Second Respondent/Second Claimant

Panel: Justice of Appeal Moosai

Justice of Appeal Lucky

Justice of Appeal Dean-Armorer

Date of delivery: 23rd June, 2022

Appearances: Ms. Ruth E. van Lare instructed by Ms. Dzifa van Lare for the Appellant
Ms. Nalini Sharma instructed by Ms. Andrea Goddard for the Respondent

I have read the judgment of Dean-Armorer JA I agree.

_____

Moosai JA

I have read the judgment of Dean-Armorer JA. I also agree.

_____

Lucky JA

JUDGMENT

Delivered by M. Dean Armorer J.A

Introduction

1. In this appeal, the principal issue which engaged the Court's attention was whether the Judge was plainly wrong in refusing an adjournment, which had been sought on behalf of the late Joan Alexander, then the Defendant before the High Court.
2. In 2006, the late Joan Alexander had entered an into an agreement for the purchase land from Nawbert and Chandrawatee Rampersad, 'the Respondents'. Many years later, the Respondents instituted proceedings against Ms. Alexander. Upon her failing to file an appearance, the Respondents applied for judgment in default of appearance and of defence.

3. On the date of the hearing of the application for judgment, Ms. Alexander did not appear in Court, but was represented by someone, who claimed to have been her brother, and who applied for an adjournment on her behalf. The Judge refused the adjournment and entered judgment.
4. It is against the Judge's refusal that Ms. Alexander has appealed. Before the hearing of the appeal however, Ms. Alexander died and the Court made an order substituting Mr. Webster Browne.
5. In the course of arriving at this decision, we explored the factors, which ought to be taken into account by a trial judge in deciding whether or not to grant an adjournment.
6. We also considered the role of the first instance court in granting relief on a default judgment; whether declaratory relief was appropriate in such applications and whether a Judge was required to consider the merits of a claim, before granting relief.
7. As will become apparent below, we held the view that the Judge had wrongly exercised her discretion and had failed to take into account relevant factors. We held that, the Judge failed to consider whether the claim lacked merit and she failed to consider whether declaratory orders were appropriate to the claim before her.

Disposition

8. The Appeal is allowed and the orders of the trial Judge are set aside.
9. The claim is remitted to the Judge for further hearing of the application for an adjournment in accordance with the guidelines set out in this judgment.

Factual Background

10. Nawbert Rampersad and Chandrawatee Rampersad (the Respondents) are the registered owners of a parcel land in the ward of Tacarigua. The parcel comprises six (6) acres and thirty-two perches and is more particularly described in the Statement of Case filed on behalf of the Respondents in December 13, 2016.[1]

[1] ALL THAT parcel or lot of land comprising SIX ACRES AND THIRTY. TWO PERCHES be the same more or less delineated in the diagram attached to the Crown Grant in Volume XXXV folio 491 situate in the Ward of Tacarigua in the Island of Trinidad and bounded on the North by lands of Wellington Noel, by lands of Gunpot and by the Arouca River on the South by lands of Thos. Henry Jaran formerly part of Bon Air Estate and by the Arouca River

11. On August 16, 2006, the Respondents entered a Purchase Agreement with Joan Alexander, (deceased) for the sale of a portion of the land described above. According to the Purchase Agreement, the parcel which was being sold would comprise *"not less than three acres and not more than five acres of land …"* The agreement was not signed by Ms. Alexander but by a third party Clyde Edwards. The agreed purchase price was $275,000.00.
12. In February, 2006, prior to the execution of the Agreement, Ms. Alexander had paid to the Respondents the sum of $25,000.00 and in August, 2006, Ms. Alexander paid a further $50,000.00.
13. In March 2008, the Respondents received the permission of the Town and Country Planning Division to sub-divide their land into two plots. Two years later, on August 17, 2010, Mrs. Rampersad entered a handwritten supplemental agreement with Ms. Alexander in relation to 3.06 acres of land. With the second agreement, Ms. Alexander made a further payment of $22,000.00.
14. Without making any further payments however, Ms. Alexander lodged a caveat against the property, in December 2013.
15. The following year, 2014 saw an exchange of correspondence between the Respondents and Ms. Alexander. On May 19, 2014, Lal Krishna Doodnath of L. K. Doodnath and Co. wrote on behalf of Ms. Alexander requesting a return of her payments with interest. Mr. Doodnath indicated that the Rampersads, as vendors, had failed to obtain planning permission; had failed to provide approved portion plans for the parcel of land to be sold and had failed to furnish the certificate of title.[2]
16. In response, Attorney-at-law, Saisnarine D. Maharaj, wrote on behalf of the Respondents on June 12, 2014. Mr. Maharaj indicated that his instructions were that Ms. Alexander had been persistently in default and unable to complete. He also indicated that the items sought were available.
17. On October 2, 2015, Attorney-at-law, Andrea Goddard penned a pre-action protocol letter, calling upon Ms. Alexander to complete, in default of which legal proceedings would be instituted for the removal of the caveat. On December 13, 2016, the

on the East by the Arouca River and on the West by lands of Thomasa Lacoa and by the lands of Thos. Henry Jaram formerly part of the Bon Air Estate and intersected by the Lopinot Road.

[2] See the Record of Appeal filed on September 4 ,2017 at page 30

Respondents made good their threat of legal action and filed the proceedings, which were considered by the Judge.

18. The Respondents sought the following relief:

> *"i. A declaration that the document entitled "Purchase Agreement" dated the 16th of August, 2006 purportedly made between Nawbert Rampersad and Chandrawatee Rampersad of the One Part and Joan Alexander of the Other Part, and the handwritten document dated the 17th of August, 2010 purportedly made between Joan Alexander of the One Part and Chandrawatee Rampersad of the Other Part are null and void, and are not binding on the Claimants or either of them;*
>
> *ii. A declaration that the Claimants are discharged from performance of the purported contract or contracts;*
>
> *iii. An order directing the Registrar General to remove the caveat lodged by the Defendant relevant to the Claimants' lands described in Certificate of Title Volume XXXV Folio 491,*
>
> *iv. A declaration that any payments made by the Defendant to the Claimants have been forfeited and the Claimants are entitled to retain same.*
>
> *v. Cost*
>
> *vi. Such further and/or other relief as to the Court may seem just."*

19. Ms. Alexander filed neither an appearance nor a defence. In response, the Respondents filed a Notice of Application seeking judgment in terms of their Claim form on the ground that there was default of appearance and defence.[3]

20. The Notice of Application for judgment in default was supported by the affidavit of attorney-at-law Andrea Goddard. The affidavit of Ms. Goddard was brief. She referred to the filing of the claim, the successful application for permission to dispense with personal service and to serve by pre-paid registered post. She stated further that the Defendant had failed to enter an appearance.

[3] The Notice of Application for judgment in default was filed on April 19, 2017

21. On June 23, 2017, the Application for judgment came up for hearing before the trial Judge. At the hearing, Mr. C. Husbands- Edwards appeared. He told the Judge that he was the brother of the Ms. Alexander and he asked for an adjournment on her behalf.

22. Ms Alexander herself had forwarded a letter to the Judicial Support Officer (JSO) to the Judge, on June 22, 2017. The letter was sent by fax and by email. Ms. Alexander wrote:

> "*PLEASE BE ADVISED THAT I CANNOT APPEAR IN COURT ON THIS DATE 06/23/2017 BECAUSE OF MEDICAL CONDITION PRESENTLY UNDERGOING IN KINGS COUNTY HOSPITAL…"*
>
> *THEREFORE I WOULD BE VERY GRATEFUL THAT THIS CASE BE ADJOURNED TO ANOTHER DATE…."*

The letter bore the stamp of a notary public. Ms. Alexander annexed a report dated May 30, 2017 from Kings County Hospital.

23. Ms. Alexander also asked someone to call on her behalf. The unnamed person spoke to judicial secretary, Irma Rampersad. Ms. Rampersad sent this email to the Judge's JSO, Marlene Dean:

> *"Today I received on overseas call from someone who called on behalf of Ms. Joan Alexander. Unfortunately, Ms. Alexander who is the Defendant in the matter is unable to attend Court on the 23rd June, 2017 because she is warded of the King's County Hospital and she does not have an attorney-at-law…."*

24. In spite of the above requests, the Judge refused the application for the adjournment and granted these orders in default of appearance:

> *"IT IS ORDERED AND DECLARED THAT:*
>
> *1. The document entitled "Purchase Agreement" dated 16th day of August, 2006 purportedly made between Nawbert Rampersad and Chandrawatee Rampersad of the One Part and Joan Alexander of the Other Part, and the handwritten document dated the 17th day of August, 2010 purportedly made between Joan Alexander of the One Part and Chandrawatee Rampersad of the Other Part are null and void, and are not binding on Claimants or either of them.*
>
> *2. The Claimant and either of them are discharged from performance of the said purported contract or contracts*

3. Any payments made by the Defendants to the Claimants have been forfeited and the Claimants are entitled to retain same.

4. The Registrar General is hereby ordered to expunge the Caveat lodged by the Defendant relevant to the Claimants' lands described in Certificate of Title of Volume XXXV Folio 491.

5. The Defendant do pay the Claimants prescribed cost in the sum of Fifteen Thousand and Thirty Dollars ($15, 030.00)."[4]

The Judgment

25. In her written Reasons dated August 16, 2016, the Judge explained why she refused the application for the adjournment and granted the relief as sought by the Claimant.

26. She alluded to the appearance of Mr. C. Husbands Edwards in court on June 23, 2017 but did not indicate whether she had asked the reason for the adjournment or whether Mr. Husbands-Edwards indicated the ground on which the adjournment was sought.

27. The Judge made no reference to the emails which passed between her secretary and her JSO. She crisply refused the adjournment for reasons stated at paragraph 5 of her Reasons:

28. She had this to say:

> *"The application was heard by me nearly two months after its service. When it came up before me there was no appearance entered and no affidavit in opposition. The defendant's brother Mr. C. Husbands Edwards was present in Court, which signalled to me that the Defendant received the application…."*

29. The Judge refused the application for an adjournment in these words:

> "*The Defendant's brother indicated that the Defendant wanted an adjournment. However, I was satisfied that the Defendant had adequate time to file an appearance or defend the action on two occasions namely after she was served with the Claim Form and Statement of Case and after she was served with the application. She did not take the opportunity to put forward her case on either occasion. I was of the view that to adjourn the application would not have furthered the overriding objective since the Claimants had*

[4] See the Record of Appeal at page 7

taken all the required procedural steps to prosecute their claim and they had given the Defendant more than adequate opportunity to defend."

The Appeal

30. On August 3, 2017, Ms. Alexander filed a Notice of Appeal. In summary, her grounds were directed to the failure of the Judge adequately to hear the application for the adjournment. In particular , by her Notice of Appeal , Ms. Alexander averred that the Judge failed to take into consideration all material factors ; to take into account the fact that the grant of the adjournment would have been at minimal cost to the Respondents and that there was no evidence that the Respondents would suffer prejudice as result.[5]

31. By an Amended Notice of Appeal, Ms Alexander expanded the grounds of appeal.[6] By the amended grounds, Ms. Alexander averred that the orders of the Judge were inconsistent with ***CPR***. The amended grounds also impugned the substantive orders made by the Judge and asserted that the Judge was wrong to hold that the two contracts were void and that the caveat should be expunged.[7]

The Appellant's Submissions

32. The Appellant filed two sets of written submissions.[8] These were supplemented by *viva voce* submissions at the hearing of the Appeal.

33. Mrs. Van Lare, for the Appellant, submitted that the Judge failed to take into account all relevant factors in refusing the application for the adjournment.

34. She submitted further that the Claim was deficient in material respects, in that the Claimants had failed to produce their Certificate of Title, WASA clearance, and an up-to-date receipt for the payment of land and building taxes. They also failed to serve a Notice to Complete on Ms. Alexander, so as to make time of the essence. Mrs. Van Lare submitted that the Court, when faced with an application for judgment in default of

[5] See pages 1 -6 of the Record of Appeal
[6] The Amended Notice of Appeal was filed on September 1, 2017
[7] The Amended Grounds are set out in the Appendix to this judgment
[8] The Appellant's main submission was filed on June 6, 2021. Supplemental submissions were filed for the Appellant on November 12, 2021.

appearance or defence , must first ensure that the claim is complete and good in itself. If there is a defect of substance, the Court ought to dismiss the application.

35. Mrs. Van Lare argued further that the Judge was not entitled to grant a declaration without a full investigation of the matter.

Submissions for the Respondents

36. Three sets of Written Submissions were filed on behalf of the Respondents. In addition to her main Skeleton Submission[9] , Ms. Sharma, Counsel for the Respondents also filed submissions in reply to the Appellant's additional submissions.[10] Counsel presented *viva voce* submissions at the hearing of the Appeal and, with the Court's leave, filed brief additional submissions to answer new authorities advanced on behalf of the Appellant.[11]

37. Ms. Sharma for the Respondents pointed to clause 4 of the Agreement of August 16, 2006 and submitted that the Vendor was not under any obligation to furnish an abstract of title to the Purchaser and that time was of the essence by virtue of clause 8 of the Agreement. She contended that the Respondents were always willing to complete.

38. Ms. Sharma observed that the legal authorities made a distinction between a contract for the sale of land, where time is made of the essence and a contract for the sale of land , where no such clause was included and submitted that where time is made of the essence by the contract, this could only be varied by way a supplemental agreement signed by the parties.

39. Ms. Sharma pointed out that as of 3rd March, 2011, the purchaser was not in a position to complete and that the Vendor was entitled to treat the Agreement as at an end and to forfeit the deposit.

40. Ms. Sharma distinguished the authorities of ***Mungalsingh v Juman***[12] ***Bidassie v Sampath***[13]***.*** Counsel contended that there was no sharp practice on behalf of the Respondents and that their need to complete was reasonable.

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[9] The Respondents' Skeleton Submissions were filed on June 25, 2021

[10] The Respondents' submissions in reply to the Appellant's additional submissions were filed on November 17, 2021

[11] Additional Written Submissions with the Court's leave were filed on November 19,2021

[12] Mungalsingh v Juman [2015] UKPC 38

[13] Bidaisee v Sampath (1995) 46 WIR 461

41. Ms. Sharma submitted that the Appellant had not provided good reason for the adjournment for which she had applied. Ms. Sharma addressed the Court on the issue of prejudice and alluded to the caveat, which Ms. Alexander had lodged against the property on December 18, 2013 and the fact that as a result of the caveat, the Respondents have not been able to deal with the property.

42. As to the merits of the Defence, Ms. Sharma submitted that no useful purpose would have been served by allowing the Appellant an opportunity to engage an attorney-at-law, since Ms. Alexander had no defence.

43. In her additional written submissions, Ms. Sharma alluded to the principle advanced by Mrs. Van Lare that a vendor may only retain money paid as a deposit and not to instalments towards the purchase.

44. In response, Ms. Sharma argued that clause 6 of the First Agreement treats all payments as deposits. The terms of Clause 6 are set out below:

> *"In the event that the Purchaser makes default in completion of the sale on the date herein before stipulated or is otherwise unable to fulfil the terms and conditions of the Agreement, the deposits made by the Purchaser to the Vendor shall be forfeited."*

Ms. Sharma argued that Clause 6 treated all payments on deposits.

45. In her Supplemental Reply Submissions Ms. Sharma answered the contention that the Judge ought not to have made declaratory orders. Counsel argued that the contention had no basis in law and that the Court was entitled to make declarations where there was no possible defence or where there were no factual disputes or where the denial of relief would cause injustice to the Claimants.

Issues

46. The central issue in this appeal is whether the Judge was plainly wrong in exercising her discretion against granting Ms. Alexander's request for an adjournment.

47. Additionally, there were four ancillary issues, which were all related the central issue. They were:

- whether the Judge was entitled under ***CPR***[14] to simply grant the relief or whether she was required to consider the merits of the Claim.
- whether the Claim was deficient and should have been dismissed
- thirdly whether the Judge could properly have granted declaratory relief on an application for judgment in default of appearance.
- whether the Claimant was entitled to forfeit all of the payments which had been made by Ms. Alexander.

Discussion

The Central Issue

48. In contending that the Judge had wrongly refused the adjournment, Mrs. Van Lare, for the Appellant, relied on Canadian and UK authorities. These authorities set out the factors which a Court should consider in deciding whether to grant a request for an adjournment.

49. In 2010, the Alberta Court of Queen's Bench reviewed the Canadian authorities in ***ATA v Alberta (Information and Privacy Commissioner) 2010 AQBD 599.***[15] At paragraph 7 of her judgment, Madam Justice J. B. Veit referred to the case of ***Al-Enzi v. Gyurik***[16] as setting out the general principles governing applications for adjournments in civil matters. Justice Veit quoted these words from ***Al-Enzi v. Gyurik***:

> *"…. [the] trial judge enjoys wide latitude in deciding whether to grant or refuse the adjournment of a scheduled civil trial. In exercising this discretion, the court must balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. Considerations that are relevant include: (1) the overall objective of Civil proceedings i.e. a just determination of the real matters in dispute; (2) the prejudice caused by refusing or granting an adjournment: (3) the ability of a litigant to pay a previous cost order not yet paid: (4) the reason why a litigant is not ready for trial on the trial date, (5) the length of the*

[14] Civil Proceedings Rules 1998 (as amended)
[15] ATA v Alberta (Information and Privacy Commissioner) 2010 AQBD 599
[16] 2010 ONSC 3313

adjournment requested and the disruption to the court's trial schedule; and (6) the need to effectively enforce court orders."

50. In the following year, the Alberta Court again considered the proper exercise of the judicial discretion to grant or to withhold an adjournment. The Alberta Court of Queen's Bench in ***Lameman v Alberta [2011] ABQB 40***, reviewed the cases on the discretion to grant an adjournment in civil cases and stated (at paragraph 33) as follows:

> *"….one can see that a court might consider the following factors when considering whether it should exercise its discretion to grant an adjournment:*
>
> 1. *courts should make a just determination of the real matters in dispute and they should decide cases on their merits;*
> 2. *the prejudice caused by granting or denying the adjournment*
> 3. *the applicant's explanation for not being ready to proceed*
> 4. *the length of the adjournment the applicant is seeking and the consequent disruption of the court's schedule*
> 5. *the importance of effectively enforcing previous court orders"*

51. Mrs. Van Lare referred as well to the English case of ***Bilta (UK) Ltd and Others v Tradition Financial Services[17]. Bilta*****,** having been delivered in 2021, was a very recent decision. The UK Court of Appeal there considered whether the trial Judge was wrong in deciding to refuse an application for an adjournment on the ground of the absence of a key witness. Lord Justice Nugee, delivering the majority decision, examined the authorities and summarised the principles in this way:

> *"I consider the authorities below, but it may be helpful if I indicate my conclusions on the relevant principles at the outset. These are that …. the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances;…"*

52. Nugee L.J. then considered the meaning of "fair" in the context of granting an adjournment. He continued at para 30 in this way:

> *…. the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the*

[17] Bilta (UK) Ltd (in Liquidation) and Others v Tradition Financial Services Ltd (2021) EWCA Civ 221

inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness;…. if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for.

53. Finally, parties relied on the decision of our Court of Appeal in ***Ryan Wellington v. A.G.***[18] In ***Wellington,*** the trial judge had been unpersuaded by an application for an adjournment on the ground that the Claimant was in Australia. Hearing a procedural appeal, a panel of three judges unanimously allowed the appeal. Mendonça JA, delivering a viva voce ruling on behalf of the panel had this to say:

"What is missing here is, really, proper consideration of all the matters that should have been taken into account in considering the overriding objective, including whether the parties would be on an equal footing as a consequence of the adjournment. "

54. Mendonça JA continued:

"We see nothing entering the Judge's consideration as to how the administration of justice would be affected by a short adjournment; that obviously, the matter being put off, would have occasioned further costs in the matter. How that could have been compensated by, say an order as to costs. Was it a proportionate response, given the amount of money involved and the inevitable outcome of refusing the adjournment or any consideration of the financial positions of the parties?"

"In our view, ensuring that it was dealt with expeditiously, obviously, an adjournment would delay the hearing of the matter, but a short adjournment; is that so out of the question that there cannot be an expeditious hearing of the matter? In any event, expedition is only one factor".

[18] Ryan Wellington v. A.G. CA P 072 of 2016

55. We proceed to assess the relevance of these authorities. The decision to grant or to refuse an adjournment is one to be exercised according to the Judge's discretion. Such discretion must be exercised judicially. (See ***Serge Barrette v R***[19]***).*** The exercise of a Judge's discretion will not lightly be set aside and only so, if found to be plainly wrong. The Appellate Court will not interfere *"unless it can be demonstrated…*that *the trial judge disregarded or ignored or failed to take sufficient account of relevant considerations or regarded or took into account irrelevant considerations ….or that the decision was otherwise fundamentally wrong ……"* See ***A.G .v. Miguel Regis*** [20]

56. When the Court exercises its discretion to grant or to refuse an adjournment, the authorities suggest that the Court should take into account the competing interests of the parties and the likelihood of prejudice to either party if the adjournment is either granted or refused.

57. A judicial exercise of discretion will also take into account the impact on the administration of justice, for example whether the adjournment will have the effect of contributing to an existing backlog or will have the effect of delaying other trials.

58. A judicial exercise of discretion will certainly enquire into the reason for the adjournment and the length of time for which it is being sought.

59. Applying the foregoing to the instant appeal, we find that the Judge disregarded relevant facts. She was confronted with application for adjournment. She did not enquire as to the reason for the adjournment or the length of time for which the adjournment was being sought.

60. Because she had not ascertained the reason for the application for the adjournment she did not take the reason into account. She did not consider three messages which were sent to her, that is to say one through her JSO, one through her secretary and JSO and the third through Mr. C Husbands Edwards, Ms. Alexander's brother.

61. Without considering the messages that had been sent to her, and without factoring into her deliberation, the allegation of that Ms. Alexander was severely ill, the Judge arrived at the conclusion that Defendant had adequate time to file an appearance and a defence. For this reason alone, we find that the Judge's exercise of her discretion was plainly wrong.

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[19] Serge Barrette v R [1977] 2 S.C.R 121

[20] A.G .v. Miguel Regis Civ App 79 of 2011

62. The Judge's written Reasons also did not reflect a consideration of competing risks of prejudice or an assessment of how those risks might be realised by her decision. The Judge relied only on the overriding objective. She did not enquire and did not consider what prejudice might have accrued to Ms. Alexander, if not granted an adjournment and whether the magnitude of that prejudice outweighed the prejudice which would be suffered by the Respondents, if an adjournment were granted.

63. Although this Court cannot conceive of what prejudice could accrue to the Respondents by an adjournment of no more than two weeks, it does not fall to this panel to substitute its opinion for that of the Judge. Suffice it to say that there is no indication that the Judge took the issue of prejudice into account at all and in so far as she thus failed, she was plainly wrong.

64. Ms Sharma for the Respondents argued that an examination of the documents which were annexed to Ms. Alexander's letter belied the allegation that she was severely ill. That may very well be accurate. The probability or improbability of the truth of Ms. Alexander's excuse was, however, a matter for the trial Judge. There was nothing to suggest that the Judge conducted such an exercise and in so far as she failed to do so, the exercise of her discretion was flawed.

65. We therefore hold the view that the Judge failed to take into account relevant factors and her decision was accordingly plainly wrong.

Second Issue: Declaratory Relief

66. The law concerning the grant of declarations by way of default judgments, was authoritatively considered in ***Pan Trinbago v Keith Simpson[21], Denise Hernandez, Maurice Alexander and Steadson Jack[22],*** where Justice of Appeal M. Mohammed referring to the words of Buckley L.J. in ***Wallersteiner v Moir***[23] distilled the principle of law in this way:

> "*The Court ought not to make declarations of right either on admission or in default".*

[21] Pan Trinbago Civ App No S-027 of 2013
[22] Civ App No. S-027 of 2013
[23] [1974] 1 WLR 991

67. Mohammed JA quoted these words of Buckley L.J.

> *"if declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence,…[W]here relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation."*

68. Mohammed JA set out as well the differing view of Scarman L.J. in ***Wallersteiner***[24] and had this to say:

> "*Scarman L.J. saw the position as being less rigid and considered that it would open to the court to grant a declaration by consent where that was necessary do justice between the parties…"*[25]

69. Mohammed J.A. quoted these words of Scarman L.J.:

> *"….the duty of the court is to exercise caution before committing itself to sweeping declarations; to look specifically at each claim, and to refrain from making declarations, unless justice to the claimant can only be met by so doing. Generally speaking, the court should leave until after trial the decision whether or not to grant declaratory relief and, if so, in what terms…." [Emphasis added]*

70. Mohammed JA referred ***Claude Denbow & Ano. v The AG of T&T***[26] and to these words of Pemberton J (as she then was):

> *"DECLARATORY RELIEF*
>
> *Much has been written on this special jurisdiction of the Court to grant declaratory relief…… Suffice it to say that in the absence of special or exceptional circumstances, or in appropriate cases, such as where there is no possible defence or where there are no factual disputes and the denial of such relief will cause the claimant an injustice the Court will not readily grant declaratory relief based on admissions." [Emphasis added]*

[24] Ibid
[25] Pan Trinbago Civ. App No S-027 of 2013
[26] Claude Denbow v A.G. C.V. 2005-00740

71. Ultimately, Mohammed JA held, in ***Pan Trinbago,***[27] that the declaration was necessary to do justice in that particular case to ensure that the first respondent is afforded his right to contest the elections, in accordance with the Constitution.

72. In our view, the above authorities effectively discourage declarations in the context of default judgments, unless the Judge is satisfied that there is no possible defence, no factual dispute or the denial of such relief will cause the Claimant an injustice.

73. In the instant appeal, one finds that the Judge, by her order dated June 23, 2017, made two declaratory orders at paragraphs 1 and 3 respectively. It is clear that there was no general prohibition against the Judge granting the declarations which were sought. Before doing so however, the Judge ought to have satisfied herself that there were no factual disputes or that there was no possible defence and that to withhold the declarations would have resulted in an injustice to the Respondents.

74. In our view, it would not have been possible for the Judge to arrive at any of these conclusions without hearing from Ms. Alexander or her representatives. There were any number of possible submissions that could have been made, had the adjournment been granted. These obviously would have included the submissions, which were made on appeal, that the claim itself was unmeritorious. The Judge ought not to have granted any declarations without giving comprehensive consideration to the claim, including the representations on behalf on the Defendant.

75. It is therefore our view and we hold that the Judge was plainly wrong to grant declaratory relief, without having heard the Defendant.

Third Issue: Whether the Judge should have considered the merit of the Claim

76. We proceed to consider the second issue, that is to say whether the Judge was plainly wrong by failing to consider the merits of the claim before entering judgment in default of appearance.

77. The Court's power to enter default judgment is conferred by Part 12 of ***CPR,*** the provisions of which are set out below. ***CPR,*** at Part 12 .3 addresses the entry of a default

[27] Civ App No S-027 of 2013

judgment where no appearance has been filed, while Part 12.4 provides for entry of judgment for failure to file a defence. These provisions are set out below.

CPR Part 12

"Conditions to be satisfied-judgment for failure to enter appearance

12.3 At the request of the claimant the court office must enter judgment for failure to enter appearance if -

(a) the court office is satisfied that the claim form and statement of case

have been served;

(b) the period for entering an appearance has expired;

(c) the defendant

i. has not entered an appearance;
ii. has not filed a defence to the claim or any part of it;
iii. where the only claim is for a specified sum of money, apart from costs and interest, has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it; or
iv. has not satisfied the claim on which the claimant seeks judgment; and

(d) (where necessary) the claimant has permission to enter judgment.

Conditions to be satisfied - judgment for failure to defend

12.4 At the request of the claimant the court office must enter judgment for failure to defend if –

(d) the defendant

i. has not served a defence to the claim or any part of it;
ii. where the only claim is for a specified sum of money, has not filed or served on the claimant an admission of liability to pay

all of the money claimed, together with a request for time to pay it; or

iii. has not satisfied the claim on which the claimant seeks judgment; …."

78. It is clear from the provisions above that Parts 12.3 and 12.4 contemplate default judgments as of right where there is failure to enter an appearance or to file a defence. The rule stipulates that the Court office must enter judgment. It is however equally clear that default judgments referred to at parts 12. 3 and 12.4 pertain to claims for specified sums of money. Part 12.3 and 12.4 clearly have no relevance to the instant appeal, where the Respondents /Claimants have sought declaratory relief.

79. Part 12.7 provides for the nature of default judgments and is set out below:

"Nature of default judgment

"12.7 (I) Default judgment shall be

a) on a claim for a specified amount of money judgment for the

payment of that amount at the time and rate specified in the request for judgment;

b) on a claim for possession of land- judgment for possession on a date to be specified in the request;

c) on a claim for an amount of money which is not specified-judgment for the payment of an amount to be decided by the court;

d) on a claim for goods ….

(3) Where a claim is partly for a specified sum and partly for an unspecified sum the claimant may abandon the claim for the unspecified sum and enter default judgment for the specified sum.

(4) Default judgment where the claim is for some other remedy shall be such

judgment as the court considers the claimant to be entitled to.

80. In our view, part 12.7(4) is clearly applicable to these proceedings, where the relief sought does not fall among those itemised at 12.7(1). Here one finds no claim for a

specified sum of money, nor for possession of land nor for goods. The claim is for declaratory relief and therefore falls within "*some other relief*" envisaged by part 12.7(4). In such event, the rule requires that judgment be such as the court considers the claimant to be entitled to.

81. In this event, the Court is not mandated to enter judgment, but to grant such relief as the Court considers the claimant entitled to. So that whereas the earlier rules mandated the entry of judgment, Part 12.7(4) mandates a consideration of the claimant's entitlement.

82. The court must not merely regard the defendant's default in filing an appearance or defence, but must examine whether the claimant is entitled to judgment and to the relief which they seek.

83. In the present appeal, there was no indication that the Judge considered whether the claim lacked merit or whether she was satisfied that the claimant had established grounds for judgment. According to her written reasons, the Judge went no further than considering the fact that the Claimant had taken all required procedural steps and that the Defendant had at her disposal adequate time to file its Defence.

84. It is therefore our view that the Judge fell into error in her failure to comply with Part 12.7(4) of ***CPR.***

85. Attorneys-at-law for the Appellant have gone further and have argued that the Judge should have found that the claim lacked merit, had she considered the obligations placed by the case law on a vendor who seeks to forfeit the purchaser's deposit because of a failure to complete on time.

86. Mrs. Van Lare presented a two-fold argument. The first limb of her argument was that vendors were required to provide notice that they were making time of the essence, and that the Respondents had failed in that obligation. The second limb of the argument was that even if time had been made of the essence, the Respondents, as vendors could not forfeit the deposit since they had not provided essential documents for completion of the contract.

87. The learning in this regard may be found in the authoritative pronouncements of their Lordships in a trilogy of cases, two of which were relied upon by the Appellant:

- ***Bidaisse v Sampath*** (1995) 46 WR 463
- ***Chaital v Ramlal*** [2003] UKPC 12

- ***Mungalsingh v Juman*** [2015] UKPC 38

88. The first of the trilogy, ***Bidaisee v Sampath***[28] was decided by their Lordships in 1995. Bidaisee and Sampath had purchased 90 acres of agricultural land in equal shares. Four years later, Sampath agreed to sell his half share to Bidaisee with a specified completion date of July 31, 1977.

89. There was no completion by the agreed date. Almost two years later solicitors for Sampath sent a notice to Bidaisee demanding completion within 6 days.

90. There being no completion, Sampath sold the land and Bidaisee instituted proceedings for specific performance. Bidaisee was unsuccessful at both the High Court and the Court of Appeal.

91. At the Judicial Committee, Lord Nichols of Birkenhead, on behalf of the Board, noted the acceptance of the parties that it was open to the vendor to serve a notice making time of the essence. The point taken before their Lordships was that the short period of 6 days was unreasonably short and rendered the notice ineffectual.[29]

92. Lord Nicholls stated that the principle to be applied was that in considering whether notice was reasonable, the Court will consider all the circumstances of the case. His Lordship recounted the salient aspects of the history of the dealings between Sampath and Bidaisse. On behalf of the Board, Lord Nicholls had this to say:

> *"Their Lordships consider that it was open to the courts below to conclude that this was reasonable notice in the circumstances. The demand, for in effect, immediate completion did not come as a bolt out of the blue. The plaintiff was fully aware of the Defendants wish and financial need to complete without any further delay…."*[30]

Their Lordships noted that there was nothing to suggest sharp practice.

93. It is our view that ***Sampath v Bidaisee***[31] does not assist the Appellants. We agree with Ms Sharma that in the present appeal, as in ***Sampath v Bidaisee***, there were nothing to suggest that the Respondents acted in a 'sharp' or unconscionable manner. Moreover,

[28] [1995] 46 WIR 463
[29] Ibid.
[30] (1995) 46 WR 463 at 465f
[31] Ibid

the length of time that has lapsed since the first agreement, would be a factor in considering whether notice by a pre-action protocol letter was unreasonable.

94. ***Chaitlal v Ramlal[32],*** relied upon by their Lordships in ***Mungalsingh v Juman[33],*** establishes that it is not open to a vendor to serve notice to a complete making time of the essence until good marketable title had been shown.

95. In brief, ***Chaitlal v Ramlal*** was an action for specific performance by a purchaser, under an agreement for the sale of land.

96. The question, as formulated by their Lordships was whether, at the time when no abstract or document of title had been delivered to the purchaser, the vendor was entitled to give him notice making time of the essence. Their Lordships answered this question in the negative and dismissed the vendor's appeal.

97. In ***Mulgalsingh v Juman***,[34] Mr. Juman had paid 10% as a deposit towards the purchase of a parcel of land from Mr. Mungalsingh. When attorney-at-law for Mr. Mungalsingh called upon Juman to complete, Mr. Juman's attorney-at-law indicated that the vendor's failure to provide the WASA certificate and a receipt for Land and Building Taxes (a Land Tax Receipt) were causing the delayed completion of the transaction.

98. Lord Neuberger, in the course of his judgment considered the manner in which parties could make time of the essence. Citing ***Emmet and Farrand On Title***, Lord Neuberger set out two terms, implied by law, into an agreement for sale: (i) that good title must be shown within a reasonable time and that completion should occur as soon as good title is shown

99. Lord Neuberger referring to the expert evidence of solicitor Mr. Chadeesingh, had this to say:

> *"In the present case it appears to the Board that the evidence of Mr. Chadeesingh coupled with the fact that unpaid water rates and land tax can lead to distraint on, or even the sale of , the relevant property, renders it impossible for Mr. Mungalsingh to challenge the Judge's conclusion that in*

[32] [2003] UKPC 12
[33] [2015] UKPC 38
[34] [2015] UKPC 38

Trinidad and Tobago the vendor must produce the Documents before good title is shown."[35]

100. Lord Neuberger continued,

"In those circumstances, it was not open to Mr. Mungalsingh to serve notice to complete, making time of the essence….as he had not shown good title by that date…."[36]

101. ***Mungalsingh v Juman***[37] in our view stands as powerful authority for the proposition that a vendor who has not produced the WASA certificate has failed to provide good title and cannot make time of the essence.

102. The trilogy of cases set out the essential elements, which must be present before a vendor can demand completion of an agreement for sale. Among these elements was the requirement of WASA clearance, which, in the submission of the Appellant, had not been provided, before the Respondents sought to make time of the essence.

103. The Judge, at least, had an obligation to consider the effect of the absence of such a critical document (WASA clearance) in determining whether she would have granted relief. There is no evidence that she did so. Whether the Judge would have granted relief, notwithstanding the absence of WASA clearance would be a matter for her discretion, in respect of which we are slow to interfere. However, her failure, to even consider, whether or not the claim was meritorious constituted a failure to take a relevant consideration into account. In our view, this resulted in the flawed exercise of her discretion.

Conclusions

104. Accordingly, it is our view and we hold that the exercise of the Judge's discretion to refuse the adjournment as sought by Ms. Alexander was plainly wrong and ought to be set aside.

105. We do not consider that it is necessary for us to determine what portions of the payments constitute deposits or what portion is susceptible to being forfeited. This will

[35] Ibid at paragraph 22
[36] Ibid at paragraph 23
[37] Mungalsingh v Juman [2015] UKPC 38

require an examination of the facts and in particular an interpretation of the purchase agreement. This, in our view should properly be left to the trial Judge.

106. The Appeal is allowed. The orders of the trial Judge are set aside and the matter is remitted to the Judge for further hearing of the application for an adjournment in accordance with the guidelines set out in this judgment.

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Dean-Armorer JA[38]

[38] Judicial Research Counsel- Mrs. Aleema Ameerali-Roop