THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NUMBER: SKBHCV2020/0159
BETWEEN

RUDOLPH MORTON

Claimant

-and-

FRIGATE BAY DEVELOPMENT CORPORATION

Defendant

Appearances:

Keisha Spence and Jason Hamilton for the Claimant; and
Garth Wilkin for the Defendant

2021: October 12, 2021 – Written submissions
November, 03

DECISION
Defendant's applications for extension of time and to appoint expert

[1] **PARIAGSINGH, M (Ag.):** - Before the Court are three applications. The first and second applications are applications for extensions of time. The third application is an application to appoint two experts on behalf of the Defendant.

APPLICATIONS FOR EXTENSION OF TIME:

[2] The first in time was filed on June 18,2021. It sought an extension of time to comply with an order of this Court made on June 01, 2021. The first direction issued was for disclosure on or before June 26, 2021. The first application was therefore filed 8 days

before the any issue of non-compliance or sanction arose. In the first application the Defendant sought an extension until July 14, 2021 to comply with the first direction.

[3] Although other consequential extensions were sought in respect of further directions in the order of June 01, 2021, they are not material to the issue to be decided.

[4] On July 14, 2021 the date by which the Defendant sought to have time extended, the Federation was still under certain restrictions. The second application was filed on July 14, 2021, the day the Defendant first sought an extension until. An extension until July 30,2021 was sought. At the time the second application was made, the first application had not been disposed of. The Defendant nonetheless filed its list of documents on July 30, 2021.

[5] When a sanction has not bitten the threshold requirements for the grant of relief from sanctions do not apply. The Court treats the application as an application for an extension. The Court looks at what is fair in the circumstances having regard to the overring objective which is to deal with cases justly. Dealing with cases justly does not only involve procedural fairness nor does it involve the Court looking at an application with narrow targeted vision on procedure. It is balance of what is fair and balancing prejudice.

[6] The Claimant has made heavy weather in his submissions regarding the Defendant not filing an affidavit in support of the application. Whilst the general rule is that applications are to be made in writing and supported by evidence it must always be remembered that the Court is not a slave to the rules. The Court's function is to ensure fairness.

[7] I have noted that the Defendant has filed an affidavit setting out the reason for the first extension sought. In summary due to certain statutory instruments offices were

mandated to close as it relates to the Defendant. As it related to Counsel, working remotely as far as practicable was recommenced.

[8] The Claimant submits that the Defendant ought to put on affidavit the reason why it was not possible for its staff to work remotely and comply with the directions. I find this submission to be unfortunate. Whilst the Court exercises its discretion on evidence, in this case Counsel sets out in his application every single statutory instrument which prevented his client from opening. The Court cannot ignore the fact that the Federation was at that time battling the ravaging effects of the pandemic. Not only were offices closed, Court sittings were also affected.

[9] The Court can and ought properly in my view to take judicial notice of any Statutory Instrument issued by the Government. More so, when the Instruments also speak to the operations of the Court.

[10] The Claimant referred to the case of **BBL Limited et al v Canouan Resorts Development Limited et al, SVGHVAP2019/0006**. In this case the Honourable Chief Justice set out what the Court must consider in determining an application for extension.

[11] One of the factors is whether the applicant's pleaded case is, in any event, hopeless. The Claimant has made substantial submissions on the merits of the defence and counterclaim.

[12] I do not understand the guidance in **BBL Limited** to suggest that there is to be some type of trial on paper. I part company with Counsel for the Claimant in the written submissions where substantial submissions are made on matters supposedly on the assumption that certain facts are established. Counsel for the Claimant has hinged submissions on the merits of the defendant's case on an assessment of the witness statement of the Defendant. That in my view is dangerous. A witness statement is

not evidence unless it is accepted by the witness as his evidence in chief at the trial. Further, a witness statement is always subject to evidential objections and application being made to amplify. More importantly, a witness's evidence may change complexion after cross examination.

[13] The Defendant's defence filed is not hopeless. It raises live issues to be determined at trial. I am unable to agree with Counsel for the Defendant that the defence is hopeless or very weak.

[14] Even without the affidavit being filed by the Defendant, I would have granted the application sought.

[15] For these reasons both the applications of June 18, 2021 and July 13, 2021 are granted.

[16] Before I leave this application, the Court must express the respectful view that the Claimant's objection to the application for an extension was both unreasonable to take and to pursue.

[17] The Claimant must therefore pay the Defendant's costs of the objection to be assessed by this Court in default of agreement.

APPLICATION TO APPOINT AN EXPERT.

[18] The Claimant also objects to the Defendant's application filed on September 24, 2021. The first line of attack is that the application was not filed in compliance with the Court's order made on June 01, 2021.

[19] In the Court's order of June 01, 2021, it was ordered that all interlocutory applications are to be filed at least 3 days before the next hearing. The order says nothing about

service. This is purposely so. In this Court's case management, it is usually directed that all interlocutory applications be filed after witness statements and before the final case management conference. This does not affect the requirement of 7 days' notice before the application is determined.

[20] It follows therefore that in any event, the case management conference held on September 29, 2021 would have had to be adjourned to allow the Claimant the requisite notice unless he waived notice, which he did not.

[21] For these reasons, the application for costs of the hearing on September 29, 2021 is refused and the application is treated as properly filed.

[22] The Claimant objects to the application on the basis that the proposed evidence of the expert is not reasonably required.

[23] The Defendant proposes to call Marcella Lanns – Monish to give evidence of her opinion from her audit of the Defendant:

a. regarding sums the Claimant allegedly received between 2007 to 2014 in lieu of vacation even though he used his allotted 27 days of vacation; and

b. whether the Claimant was paid a stipend for being a member of the Audit Committee of the Board of Directors of the Defendant between 2010 and 2015.

[24] I find it difficult to follow the objection of the Claimant since the proposed evidence are material to the facts pleaded at paragraphs 5 to 10 of the Counterclaim.

[25] I find that the proposed evidence of Marcella Lanns – Monish is relevant and will assist the Court in determining the issues in this claim and in particular the counterclaim.

[26] The Claimant also takes objection to the appointment of Douglas Gillanders as an expert. This proposed witness is a Quantity Surveyor and Land Appraiser. One of the issues raised in the counterclaim is an undervaluing of the land. This is set out at paragraphs 16 to 22 of the counterclaim.

[27] Again, the Claimant's objection is simply that this witness's evidence is not necessary. I disagree.

[28] This witness can provide relevant evidence which can assist the Court in resolving the issues in this case.

[29] For these reasons the Defendant's application filed on September 24, 2021 will be granted.

[30] In relation to costs, I find that the objection and pursuing of same to this application was also unreasonable. There was no real basis for the objection set out in the Claimant's submissions. The Claimant must therefore pay the Defendant's costs of the objection to be assessed by this Court in default of agreement.

[31] In the circumstances, it is hereby ordered that:

a. Time is extended for the Defendant to make standard disclosure to July 30, 2021 and the list filed on that day is deemed properly filed;

b. Time is extended for the Claimant to file and serve an agreed statement of facts and issues for determination at the trial of this claim, such list is to be countersigned by Counsel for the Defendant, until November 30, 2021;

c. Marcella Lanns- Monish and Douglas Gillanders are both appointed as experts pursuant to Part 32CPR;

d. Permission is granted to the Defendant to lead expert evidence of Marcella Lanns- Monish and Douglas Gillanders at the trial of this claim;

e. The Defendant shall file and serve a report in compliance with Part 32 CPR on behalf of each expert on or before January 11, 2022;

f. Permission is granted to the Claimant to put any questions in writing to the experts on or before January 31, 2022;

g. The Defendant shall file and serve any responses to the questions put to the experts on or before February 28, 2022;

h. The Claimant shall pay the Defendant's costs of the applications filed on June 18,2021, July 14, 2021 and September 24, 2021 to be assessed by this Court in default of agreement;

i. This matter is adjourned to March 15, 2022 for a further case management conference; and

j. Permission is granted to the Claimant to appeal this order.

Alvin Shiva Pariagsingh
Master (Ag.)

By the Court,

Registrar

IT IS HEREBY ORDERED THAT:

The matter is adjourned to Tuesday 22nd March 2022 at 9:00am.

Reason:

Mr. Caines, counsel for the appellant, informed the Court that Senior Counsel, Mr. John Jeremie was not in a position to argue before the Court due to a scheduling conflict. Counsel intimated that Senior Counsel was of the belief that the appeal was set for hearing on Tuesday 22nd March 2022 and it would be difficult for Senior Counsel to be present to prosecute the appeal a day earlier on Monday 21st March 2022. Counsel, as such, asked the Court for its indulgence to have the matter adjourned to Tuesday 22nd March 2022 instead.

The Court upon hearing the request and the reply of counsel for the respondent to the adjournment application, acceded to Mr. Caines' request.

Case Name:

Rudolph Morton
v
Frigate Bay Development Corporation

[SKBHCVAP2021/0018]
(Saint Christopher and Nevis)

Date:

Monday, 21st March 2022

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]

Appearances:

Appellant:	**Ms. Keisha A. Spence and Mr. Jason Hamilton**
Respondent:	**Mr. Garth Wilkin**
Issues:	**Interlocutory appeal - Extension of time - Variation of case management orders - Relying on expert witnesses - Exercise of the master's discretion - Whether the learned master erred in law and fact when he held that reference to statutory rules regarding the management of the Covid 19 pandemic provided sufficient explanation for the failure of the respondent to provide evidence to support the applications for an extension of time to file a list of documents having regard to the provisions in the said statutory rules and Practice Direction 1 of 2021 - Whether the learned master erred in law and fact when he failed to appreciate the provisions under the statutory rules in that the rules did not mandate a 'blanket' lockdown and in fact mandated statutory bodies to work remotely from the office and private offices to work virtually from home - Whether the learned master erred in law when he ruled that the list of documents filed on behalf of the respondent was properly filed despite that the said document did not comply with rule 28.7(6) of the Civil Procedure Rules 2000 - Whether the learned master erred in law and fact when he held that the defence filed on behalf of the respondent was not hopeless - Whether the learned master misdirected himself in law regarding the appellant's submissions in relation to the defence and counterclaim filed by the respondent and the use of the witness statement to assess the defence - Whether the learned master misdirected**

	himself as to the provisions under rule 29.9 of the Civil Procedure Rules 2000 - Whether the learned master erred when he held that rule 3.2 was not applicable to the computation of time with respect to the time for filing any interlocutory applications - Whether the learned master erred in law and misdirected himself that the appellant's oppositions to the respondents applications were unreasonable - Whether the learned master erred in law when he awarded the respondent costs on each application, which said applications were in breach of Part 65 of the Civil Procedure Rules 2000 - Whether the learned master erred in fact when he held that the sole basis for the appellant's opposition to the respondent's application under Part 32 of the Civil Procedure Rules 2000 was that the evidence was not reasonably required - Whether the learned master erred in law and in fact when he reasoned that the experts had useful evidence which could assist the court
Type of Order:	**Oral Judgment**
Result / Order:	**IT IS HEREBY ORDERED THAT:** **1. The appeal is dismissed in respect of the applications to extend time and the order appointing the experts and the master's orders in that respect are affirmed.** **2. The orders for costs are set aside.** **3. No order as to costs on appeal.**
Reason:	**This was an appeal against the case management orders of a master and the exercise of the master's discretion with respect to cost. The master had three applications before him, two which dealt**

with the extension of time and the other dealt with application to appoint two experts. He made orders granting the applications. This led to 12 grounds of appeal filed by the appellant alleging various errors of law and misdirection on the part of the master.

Being essentially an appeal against case management decisions, the Court found it useful to set out the law pertaining to appellate interference with case management decisions. It has always been the case that a case management decision is peculiarly that of the first instance judge and the appeal court will be slow to interfere with such a determination. The appeal court will interfere when it is proper to do so. However, it must be understood that in cases of appeals from case management decisions, the instances in which the appeal court can interfere are limited. A judge making a case management decision has a very wide discretion and anyone seeking to appeal such a decision has an uphill task. The Court can interfere if the case management judge is plainly wrong, otherwise the whole purpose of case management which is to move cases forward as quickly as possible would be frustrated because the cases are likely to be derailed into interlocutory appeals. As Lady Arden said in Royal & Sun Alliance plc v T & N Limited [2002] EWCA Civ 1964:

"I accept without reservation that this court should not interfere with case management decisions made by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant unless satisfied that the decision is so plainly wrong that it must be regarded as outside of the generous ambit of the discretion entrusted to the judge."

The principle that an appellate court should only interfere with the matters of case management where a judge has gone plainly wrong are established and has been emphasised many times. Case management should not be interrupted by interim appeals as this would lead to satellite litigation and delays in the litigation process. Moreover, the judge dealing with case management is often better equipped to deal with case management issues. The judge may well be acquainted with the proceedings as he may have had to deal with several interim applications before the applications which are the subject of the appeal.

Case management decisions are discretionary decisions. They often involve an attempt to find these least worst solutions where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge and the appeal court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by the first instance judge where he has misdirected himself in law, failed to take relevant factors into account, has taken into account irrelevant matters or come to a decision that is plainly wrong in the sense of being outside of the generous ambit where reasonable decision makers may disagree. So then, the question is not whether the appeal court would have made the same decision as the master, the question is whether the master was wrong in the sense explained.

The Court listened to the submissions of both counsel on this appeal in regard to the master's findings and the appeal grounds. Having regard to the principles which pertain to appellate intervention, the Court was not satisfied that in respect of the applications to extend time and the appointment of the expert witnesses that the

master was plainly wrong. The Court did not discern any error on the part of the master in principle or otherwise which would engage appellate interference. The Court heard the submissions of the appellant in the context of the evidential affidavit evidence in support of the applications, and the response from the respondent. In the circumstances, the Court did not find that the decision of the master was one which was plainly wrong. In respect of the expert evidence also, the Court did not find any basis for appellate interference. The Court noted the submissions of the appellant in the context of whether there was any expert evidence needed to resolve the crux of the claim. However, the Court, having considered the matter, did not see that the judge was plainly wrong in his decision to appoint the experts.

With respect to the appeal against the order on costs, the Court was of the view that the master was plainly wrong in this regard. The Court noted that the orders arose in case management and in the context of rule 65.11(1) of the Civil Procedure Rules 2000. The Court was also of the view that the opposition to the applications was not unreasonable. Accordingly, the Court set aside the order of the master in respect of costs.

For the reasons advanced the Court ordered that the appeal was dismissed in respect of the application to extend time and the order appointing the experts and the orders of the master were affirmed in this respect. The order for costs was set aside for the reasons indicated. As both parties had achieved some measure of success on appeal, there was no order made as to costs on appeal.

Case Name: **[1] Renika Daniel**