



[2024] JMSC Civ. 165

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV00349

| | | |
|----------------|---------------------------------|---------------------------------|
| BETWEEN | DENTON HUNTER | 1ST CLAIMANT |
| AND | ARDENE CANNON | 2ND CLAIMANT |
| AND | ODAIN REID | 1ST DEFENDANT |
| AND | OWEN REID | 2ND DEFENDANT |
| AND | CHRISTOPHER REID | 3RD DEFENDANT |
| AND | LOYATA ANNIKAY PETERS | 4TH DEFENDANT |
| AND | WESTON CHRISTOPHER JONES | 5TH DEFENDANT |

IN CHAMBERS

Ms Judith Clarke and Ms Jamila Thomas instructed by Judith Clarke and Co for the Claimants

Mr Keith Bishop instructed by Bishop and Partners for the 1st to 3rd Defendants

4th and 5th Defendants absent and unrepresented

Heard: October 2nd, 2024, and November 29th, 2024

Application to enter judgment — Application for defence to stand — Application for extension of time — Relevant considerations – Indefeasibility of a registered title –

– Possessory title — Operation of the Limitation of Actions Act — Effect of a possessory title on successors in title to include a bona fide purchaser for value

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] On the 2nd of October 2024, two (2) applications were heard by the Court. At the hearing, only Counsel for the Claimant and 1st to 3rd Defendants were in attendance. The Court was informed by Mr Bishop that he had been advised that Counsel for the 4th and 5th Defendants might have a challenge attending, but that was the extent of the information he could provide.

[2] The opportunity was provided for contact to be made with Mr Jody White, this however proved unsuccessful. Mr White did not appear neither did he ask anyone to hold on his behalf. A review of the record revealed that Counsel had been present on the 12th of June 2024, when these matters were scheduled for hearing, accordingly, the decision was taken to proceed in order not to waste judicial time.

The Claimants' Notice of Application

[3] The Claimants' Application was filed on the 12th of January 2023. It was supported by an Affidavit of Melissa Allen and the following orders are sought therein:

1. A Declaration that the Claimants have acquired an absolute possessory title over all that parcel of land located at 65 Shenstone Drive, Kingston 6 in the parish of Saint Andrew comprised in the Certificate of Title registered at Volume 1034 Folio 544 of the Registered Book of Titles by virtue of the Limitation of Actions Act.
2. A declaration that any rights and title of the defendants to the subject property have been extinguished having regards to the provisions of the Limitation of Actions Act.

3. A declaration that the 1st, 2nd and 3rd defendants have acquired title to the subject property by fraud.
4. An order that the transfers to the 1st, 2nd and 3rd defendants in the first instance and the 4th and 5th defendants in the second instance be cancelled and a new certificate of title issued in the names of the claimants and/or their nominees.
5. In the event that the signatures and/or cooperation of the Defendants are required to give effect to the Orders herein and the said Defendants are unwilling, unable or neglect to sign any required documents and/or to cooperate, then the Registrar of the Supreme Court of Judicature of Jamaica is hereby empowered to sign said documents on behalf of the Defendants herein.
6. An Order that the Defendants by themselves or their servants and/or agents and/or anyone for them or claiming through them be restrained from entering on the said land, entering into contract for sale hereof charging or otherwise dealing with the said land prior to the cancellation thereof of the Title in the name of the Defendants thereof by the Registrar of Titles.
7. Costs to the claimants to be taxed if not agreed.
8. Liberty to apply.
9. Such further and/or other relief as deemed fit by this Honorable (sic) Court.

[4] The ground upon which the Applicants are seeking the Orders is as follows:

- The right to enter judgment has arisen because the defendants have not filed and/or served Acknowledgment of Service and/or Defence in keeping with the requirements of the Civil Procedure Rules.

1st to 3rd Defendants' Application

[5] The 1st to 3rd Defendants' Application was filed on the 31st of January 2024 and seeks the following orders:

1. That the service of the Defence of the 1st, 2nd and 3rd defendants on January 3, 2023, be taken as service of the said defence on the Claimant;
2. Any other order deems (sic) necessary by the court; and
3. Costs

[6] The grounds on which the order is being sought is as follows:

- i. Part 1
- ii. Part 11, Civil Procedure Rules, 2002 [CPR, 2002];
- iii. Part 17, CPR, 2002;
- iv. The claimants' Attorney-at-Law deliberately refused to accept the service of court a document from the defendants.

[7] In oral submissions, Mr Bishop asked the Court to interpret paragraph 2 as being broad enough to include an order for an extension of time to file Defence, as that order had not been specifically requested in the Application.

Chronology of Events

[8] In order for the issues to be properly identified and ventilated, the Court finds it useful to outline the sequence of events which have led the parties to this stage.

1. On the 29th of January 2018, the Claimants filed a Fixed Date Claim Form and Affidavit. In these documents, they sought declarations and other orders in respect of their alleged ownership of the disputed property at Lot 65 Shenstone Drive, Kingston 6 registered at Volume 1034 Folio 544 of the Register Book of Titles.

2. These documents were served on the 1st to 3rd Defendants, along with other Defendants named therein, against whom the matter has since been discontinued. On the 5th of October 2018, the 1st to 3rd Defendants filed a Joint Affidavit in response and on the 9th of October 2018, an Acknowledgment of Service was filed.
3. An Application for extension of time to file the Defendant's Application was filed on the 23rd of October 2018. A change of Attorneys subsequently occurred and on the 9th of September 2019, the 1st to 3rd Defendants, who were now represented by Mr Bishop, filed a Notice of Application which sought a number of orders. These included an order to have the Affidavit filed in October 2018 stand as filed in time and an order to have the Claim struck out on the basis that the action, which included allegations of fraud, had been commenced by the wrong originating process.
4. On the 26th of November 2019, the 1st to 3rd Defendants' Application was heard by Rattray J who ordered that a Claim Form and Particulars of Claim be filed and served by the 11th of December 2019. On the 9th of December 2019, the Claimants filed an Application seeking an extension of time but this Application does not appear to have been assigned a date for hearing.
5. On the 29th of April 2020, the 1st to 3rd Defendants filed an Application for the Claimant's statement of case to be struck out for failure to comply with the order of Rattray J. An updated version of this Application was filed on the 10th of August 2020.
6. On the 18th of September 2020, the Claimants filed an Amended Notice of Application for extension of time. Both the Claimants' and 1st to 3rd Defendants' Application were heard by Carr J and on the 2nd of October 2020, she extended time for compliance by the Claimant to the 9th of October 2020. The 1st to 3rd Defendants' Application was refused.

7. On the 7th of October 2020, the Claim Form and Particulars of Claim were filed and served. On the 17th of November 2020, the Defence of the 1st , and 3rd Defendants was filed but the question of its service is mired in dispute.
8. The Claimants sought an injunction against the 1st to 3rd Defendants to prevent any dealings with the Title for the property, which had been acquired by the latter. The hearing for the injunction commenced on the 8th of April 2021 and was part heard to the 1st of June 2021 when it was granted. On the 8th of April 2021, in addition to the order reserving the date for decision, the Court also ordered that the status quo was to remain until the matter had been determined. It should be noted that a similar order had previously been made on the 16th of February 2021.
9. On the 5th of November 2021, the Claimants filed an Amended Claim Form and Particulars of Claim adding the 4th and 5th Defendants to whom the 1st to 3rd Defendants had transferred the property, while the ruling on the injunction was pending. An injunction was also sought against the 4th and 5th Defendants and on the 26th of September 2022, the interim injunction granted against them in November 2021 was extended until the determination of this matter.
10. Pursuant to the order of the Court, the 4th and 5th Defendants were served with the Amended Claim Form and Particulars of Claim by publication of two (2) Notice of Proceedings on the 11th and 18th day of April 2022 respectively. An Affidavit of Service with tear sheets attached was filed on the 22nd of April 2022. No Acknowledgment of Service or Defence has been filed by them. On the 12th of January 2023, the Claimant filed this Application for Judgment in the absence of a Defence by the named Defendants.
11. On the 8th of February 2023, the 1st to 3rd Defendants filed an Application for the Acknowledgment of Service which had been filed on the 9th of October 2018 to stand as filed in respect of the Claim Form. This

Application does not appear to have been given a date. On the 14th of June 2023, the Claimant's Application for Judgment was adjourned to October 25th, 2023 for the 1st to 3rd Defendants to provide proof of service of their Defence and for the Claimants to serve the Defendants with the Application. The Claimant's Application for Judgment was subsequently served on the 1st to 3rd Defendants on the 9th of November 2023. The records reveal that neither the Defendants nor their Attorneys were in attendance that day.

12. On the 3rd of January 2024, an attempt was made to serve the 1st to 3rd Defendants' Defence on the Chambers of Ms Clarke. This service was refused. On the 31st of January 2024, the same date to which the Claimant's application was adjourned, the 1st to 3rd Defendants filed an Application seeking an Extension of time for the Defence filed on the 17th of November 2020 to stand. No Application or Affidavit has been filed by the 4th and 5th Defendant but on the 24th of March 2024, submissions opposing the injunction were filed on their behalf. In these submissions, they asserted the indefeasibility of the Title and their position as bona fide purchasers for value without notice.

ISSUES

[9] The issues for the Court's determination are as follows:

1. Should the Claimants' Application for Judgment be granted?
2. Should the Court permit the Defence filed on the 17th of November 2020 to stand?
3. Alternatively, should an extension of time be granted to the Defendant to serve the aforementioned defence?
4. Can the orders sought by the Claimants be granted against the 4th and 5th Defendants?

Summary of Claimant's Submission

- [10] In submissions on behalf of the Claimant, Ms Thomas referred to the power of the court which is governed by Part 12 of the Civil Procedure Rules ("CPR").

Counsel highlighted Rule 12.1 which states —

"(1) This part contains provisions under which a Claimant may obtain judgment without trial where a defendant —

- a) Has failed to file an acknowledgement of service giving notice of intention to defend in accordance with Part 9; or*
- b) Has failed to file a defence in accordance with Part 10.*

- [11] Ms Thomas asked the Court to note that an Acknowledgement of Service was filed on behalf of the 1st, 2nd & 3rd Defendants on October 9, 2018, wherein they indicated that they were served with the claim on March 28, 2018; this meant that the Acknowledgment of Service was filed out of time. Their Application for Extension of Time was filed even later on October 23, 2018.

- [12] Counsel referred to the opportunity provided to these Defendants to prove service at the hearing scheduled for October 25th, 2023, when there was no appearance by or on behalf of the Defendants. Ms Thomas argued that it was not until January 3rd, 2024, almost one full year after the filing of the Claimants' Application for Judgment, that the Attorneys for the 1st to 3rd Defendants purported to serve the Defence filed on November 17th, 2020.

- [13] Ms Thomas submitted that this action by the Defendants' Attorneys belied all the prior assertions that the Defence had been served and rendered entirely unnecessary the prior adjournment. She argued that inasmuch as the 1st to 3rd Defendants' Defence may have been filed in time, the Claimants are entitled to have Judgment entered against them as it is clear that the Defence has not been served. The decision of **Peter Kavanaugh v. The Attorney General et al** [2012] JMSC Civ 154 was cited by her in support of this position.

- [14] Ms Thomas submitted that in that decision, the Court considered how to treat with a Defence which, though filed in time, was not served in time and expressed in clear terms that the time limited for service is to be contemporaneous with the time allowed for filing the Defence. She argued that in the case at bar, it has been over three (3) years since the filing of the Defence.
- [15] In respect of the 4th and 5th Defendants, Ms Thomas submitted that the Claimants have filed an Affidavit of Service of the Claim on the 4th and 5th Defendants. No Acknowledgement of Service or Defence has been filed on behalf of these Defendants. On more than one occasion, Attorney-at-Law Jody White appeared in these proceedings and indicated that he was instructed by the 4th and 5th Defendants, but never formalized his representation..
- [16] Ms Thomas contended that as all the Defendants are in default, the Claimants are entitled as of right to a Judgment in Default against them. The terms of the Judgment entered should be in such form as the Court considers the Claimants are entitled to on the Amended Claim.
- [17] Ms Thomas commended the Court of Appeal decisions of **Sterling (Eileen Beverley) v Frank Arthur Sterling** [2009] JMCA Civ. 107 and **Glen Cobourne v Marlene Cobourne** [2021] JMCA Civ. 24 as providing useful guidance on the sufficiency of the Claimants' evidence for the orders to be made.
- [18] She submitted that the reasoning of Smith JA at paragraphs 17 and 18 of **Sterling (Eileen Beverley) v Frank Arthur Sterling** (*supra*), should be adopted. In that matter the Learned examined the approach of the Court and Parties on an Application for Default Judgment which does not involve a specified or unspecified sum or delivery of goods. Ms Thomas further submitted that the case of **Glen Cobourne v Marlene Cobourne** (*supra*) makes it clear that the affidavit evidence in support of the Application for a Default Judgment only needs to establish that the conditions of Rule 12.4 or Rule 12.5 have been satisfied. Once this is established, the Court is obliged to determine the terms of the Default Judgment

based on the facts averred to in the Particulars of Claim. Specific reference was made to the remarks of McDonald-Bishop JA (as she then was) where she stated:

[27] However, the rule is clear that the entitlement to the default judgment was to be informed by and adjudged on the facts averred in the particulars of claim and nowhere else. Thus, there is no requirement for evidence verifying the contents of the particulars of claim before a default judgment may be entered. There is also no requirement for an affidavit of merit containing a rehearsal of the particulars of claim. In the absence of any provision for affidavit evidence in proof of an assertion contained in the statement of case, the certificate of truth was sufficient to give the particulars of claim the force of law for the purposes of an application for a default judgment. The judgment should have been entered on what was disclosed in the particulars of claim, which would have been what was served on the respondent and to which no intention to defend had been indicated.

[28] The rationale for the default judgment to be entered, based on what was disclosed on the particulars of claim, is obvious. This is because the case that would have been served on the respondent for a response to be filed by her, in accordance with the rules of court, would have been comprised within the four walls of the particulars of claim (along with any document on which the claimant seeks to rely, which is annexed to it). So the court would be acting on the premise, until the contrary is proved, that the respondent, having seen that case set out in the particulars of claim (with supporting documents, if any), does not intend to challenge or resist it. The failure of the respondent to respond to the particulars of claim upon service of it is tantamount to an acceptance or admission of the facts pleaded in it until the contrary is shown.

[19] Ms Thomas emphasised what she contended were the material facts outlined by the Claimants in their Amended Particulars of Claim as follows:

- a) They have been in exclusive, continuous possession and occupation of property at 65 Shenstone Drive, Kingston 6 from as about the year 1999 or 2000. They have pleaded that the title of Lloyd Hibbert, the person registered as owner prior to its purported transfer in 2017, would therefore have been extinguished under the provisions of the Limitation of Actions Act by the time of the purported transfer to the 1st, 2nd and 3rd Defendants (paragraphs 3-12).

- b) In any event, further or alternatively, the transfer to the 1st, 2nd and 3rd Defendants in the year 2017 would have been secured by fraud on the part of these Defendants as the said Lloyd Hibbert died in or about 2012. The particulars of the fraud of these Defendants are outlined at paragraph 21 of the Amended Particulars of Claim.
- c) As the 1st, 2nd and 3rd Defendants have no lawful title to the property, they could not lawfully pass title to the 4th and 5th Defendants when the transfer to them was registered on the subject title on January 28, 2021 (paragraphs 24 -27).

[20] Ms Thomas argued that based on the facts pleaded, the Claimants have established that they have been in open, undisturbed, continuous possession and occupation of the subject property from the year 1999 or 2000 up to 2017 when the 1st, 2nd and 3rd Defendants were registered as proprietors on the title to the property. Their period of possession would satisfy the provisions of the Limitations of Actions Act and they would have acquired a possessory title to the property by 2012. The interest of Lloyd Hibbert was extinguished and no title could have lawfully passed to the 1st, 2nd and 3rd Defendants.

[21] Ms Thomas contended that as no title could have lawfully passed to the 1st, 2nd and 3rd Defendants, they could not have lawfully passed title to the 4th and 5th Defendants, the current registered proprietors. This would be the case whether or not the 4th and 5th Defendants are bona fide purchasers. Counsel cited the Privy Council decision of **Recreational Holdings (Jamaica) Limited v. Lazarus**. Privy Council Appeal No. 0085 of 2015, decided July 27, 2016, as providing support for this assertion.

[22] In respect of the alternative claim of fraud against the 1st, 2nd and 3rd Defendants, Ms Thomas argued that the allegations of fraud pleaded are sufficient to establish such a claim.

- [23]** In addressing, the Defendants' application, Ms Thomas submitted that this application was filed more than one year after the Claimants' Application for Default Judgment against all the Defendants on January 12, 2023. Counsel argued that apart from being dubious and vexatious in its substance, the 1st to 3rd Defendants' approach to the court is an abuse of the process of the court; particularly in circumstances where an adjournment was granted to the Defendants on the original date set for the hearing of the Claimants' Application on the basis that they could prove service. However, on the next court date, the Defendants and their Counsel were absent.
- [24]** Ms Thomas urged the Court to reject the Defendants' position that the refusal of the Claimants' Attorney to accept service constituted a proper ground on which the orders sought could be granted as this was over three (3) years after service should have been effected.
- [25]** Counsel raised questions as to the merit of the Affidavit of the 1st Defendant in support of the Application, specifically where it was stated that the Defence filed November 17, 2020 was "thereafter" emailed to the Claimants' previous attorneys, but no proof of this service was provided.
- [26]** In respect of the authorities relied on by the 1st to 3rd Defendants, Ms Thomas submitted that while they touched and concerned various aspects of the law as to extension of time, unless orders, relief from sanctions, applications for summary judgment, striking out, it is not clear whether these authorities are being relied on in response to the Claimants' Application for Judgment and/or the Defendants' Application for Court Orders filed January 31st, 2024.
- [27]** Ms Thomas questioned whether the 1st to 3rd Defendants have in fact admitted that the Defence was not served in keeping with the rules and now seek an extension to the 3rd of January 2024. Counsel argued that if this is the case, the evidence required to ground a successful application is non-existent as service would still be out of time and cannot be validated except through consent or an order from the court for which compelling evidence would be required.

Summary of 1st to 3rd Defendants' Submissions

- [28] In submissions in support of the 1st to 3rd Defendants' application, Mr Bishop asked the Court to note that on the 3rd of January 2024, the Defence was sent to the Claimant's Attorney who refused to accept service. He submitted that commensurate on that refusal, the Defendants' filed their Application for an extension of time.
- [29] Mr Bishop contended that the 1st to 3rd Defendants' request for these orders has been made relatively early in the proceedings as there has been no Case Management Conference in the matter and the 4th and 5th Defendants have not yet filed their Defence.
- [30] Counsel further contended that the grant of these orders would occasion no prejudice to the Claimants. Mr Bishop asked the Court to note that even though the 1st to 3rd Defendants' Application has been opposed, there has been no mention of any prejudice to them. Counsel cited and relied on the decision of **Peter Haddad v Donald Silvera** SCCA No. 31 /2003, where the Court of Appeal held that in exercising its discretion for extension of time, a court should consider the following factors:
- a. The length of and the reasons for the delay; and
 - b. The degree of prejudice, among other things.
- [31] Mr Bishop asserted that the Claimants had presented no evidence that the delay was intentional. He relied on the decisions of **Dorothy Vendryes v Richard and Karene Keane** [2010] JMCA App 12 and **United Arab Emirates & Finnegan v Parkside Health Authority** [1998] 1 All ER 595 as authority for the point that delay is just one of many factors to be considered. Counsel asked the Court to consider the other factors which include prejudice, saving expenses, dealing fairly with the parties, and ensuring that the cases are dealt with expeditiously.

- [32] Mr Bishop argued that the complaint as to service can easily be cured by extending the time and allowing the Claimants the usual time to file a reply. Counsel asked the Court to consider that the period involved spanned the outbreak of COVID-19 in Jamaica and in the best tradition of the bar, the Claimants could have written to Counsel to make inquiries about the service of the Defence and this could have been rectified many years ago, rather than waiting for a convenient time to surprise the Defendants with their Application.
- [33] Mr Bishop submitted that the chronology of the history of the case is important as there were numerous applications, particularly by the Claimants, for injunctive and other reliefs. He asked the Court to note the delay to the proceedings which was occasioned by the fact that the Claimants commenced the claim by a Fixed Date Claim Form, which was wrong in law. Counsel argued that additional delay was occasioned by the fact that the Claimants took a year to obey the order to file and serve the Claim Form and Particulars of Claim.
- [34] Mr Bishop further submitted that the court has the discretion and power to extend time in circumstances where the history of the matter shows that the Claimants have disobeyed the rules and orders of the court and, as such, do not have a perfect record in the proceedings. He argued that there was sufficient basis for the orders sought by the 1st, 2nd and 3rd Defendants to be granted and the service on the 3rd of January 2024 be deemed as good service or in the alternative, that time for service be extended to that date.

DISCUSSION/ANALYSIS

Should the Claimants' Application for Judgment be granted? Should the Court permit the Defence filed on the 17th of November 2020 to stand? Alternatively, should an extension of time be granted to the 1st to 3rd Defendants to serve the aforementioned Defence?

- [35] Although issues 1, 2 and 3 were extracted and individually stated above, it is readily apparent that though they can properly stand as distinct issues, they are so

interconnected that the Court's determination of any of these questions would result in a full determination of both Applications. While I do not propose to dissect and discuss in full all the authorities cited by the Parties, they have been carefully considered by the Court for the purpose of this ruling.

- [36] It is established practice that Part 12 of the CPR regulate the circumstances in which Judgment can be entered in default of a Defence. These provisions were the subject of judicial discourse in **Sterling (Eileen Beverley) v Frank Arthur Sterling** (supra) where Smith JA stated:

[17] Rule 12.1 defines a default judgment and sets out the general circumstances under which it may be obtained. It clearly confers on a claimant the right to obtain a default judgment. Rule 12.2 indicates that this right is circumscribed by the cases or circumstances slated in that rule. In such circumstances, default judgment may not be entered even where no acknowledgement of service or defence has been filed. Rule 12.3 imposes on the registrar a duty that is the corollary of the right created by Rule 12.1. Save and except for the circumstances enumerated in Rule 12.2, the claimant has an entitlement to default judgment provided that the prerequisites have been satisfied. Thus, if a claim does not fall within Rule 12.2 and the conditions outlined in 12.4 and 12.5 are satisfied, a claimant is entitled to have default judgment entered in his/her favour.

- [37] Having made these pronouncements, the Learned Judge then considered the approach which would be followed depending on the nature of the claim and stated as follows:

[18] It is clear that the form of the default judgment differs according to the remedy sought. Where the claim is for a specified sum of money, the registrar must enter default judgment for that specified sum. Where the claim is for an unspecified sum, judgment is to be entered for a sum to be determined by the court and where the claim is for goods, judgment should be for their delivery or for the payment of their value. Where the claim is for a remedy other than the foregoing, judgment is for a remedy to be determined by the court. The claimant must file an application for court orders supported by affidavit evidence and the court shall enter judgment in the form it considers appropriate based on the particulars. In my judgment then, the judge is under an obligation to determine the form of the default judgment. Anv discretion that the judge has is limited to determining the form the default judgment should take, provided that the particulars or

claim discloses a justiciable claim. I agree with counsel for the appellant that the learned judge was obliged to determine the terms of the default judgment once she was satisfied that the prerequisites stipulated by the Rules had been fulfilled and she had jurisdiction " (emphasis added)

- [38] It is the Claimants'/Applicants' position that they have done enough to move the Court to enter Judgment as although they were late in complying with the orders made by Rattray J, an extension was subsequently obtained and they complied with these orders. My review of the record, as outlined in the chronology above, confirms that this is indeed the case. It is on this basis that they have prayed in aid the provisions at Part 12 of the rules as well as the guidance in **Peter Kavanaugh v The Attorney General** (*supra*). In my analysis of this decision, it was apparent that although the Court ruled in favour of the Defendant and granted an extension of time to have their Defence stand, the issue turned on the evidence. Specifically, the evidence in support of attempts to serve the Defence and the time within which it was served.
- [39] In this matter, although the 1st Defendant stated that the Defence was served on the previous Attorney, the Court was not provided with any evidence in support of this assertion. What was indicated instead was the reason for the absence of this evidence, specifically, the departure from Defence Attorney's firm of the individual who would have emailed same.
- [40] The Court was also asked to infer that the Claimants were in some way at fault for failing to make an enquiry of the Defence given the challenges of the Covid 19 period. Perhaps in recognition of the fact that the rules and authorities on the point require proof of service or at the very least, an attempt to serve within the prescribed time (or swift compliance thereafter) the Court was also invited to deem the attempt on the 3rd of January 2024 as good service or to extend time for service to that date.
- [41] In considering whether the 1st to 3rd Defendants have provided a sufficient basis to grant the orders sought by them and move the Court to deny the orders sought by the Claimant, the dicta of the Court in **Peter Haddad v Donald Silvera** (*supra*)

proved instructive. At page 9 of the Judgment, which considered whether an extension of time ought to be granted to the Applicant, Smith JA stated:

.... The cases also established that notwithstanding the absence of a good reason for delay the Court was not bound to reject an application for an extension of time as the overriding principle was that justice had to be done. See Leymon Strachan v Gleaner Co. Ltd. et al (supra) at p. 20...

[42] The Learned Judge then provided additional guidance on the relevant considerations for the Court at pages 11 to 12 where he stated:

It was also the view of that Court that "whereas under the previous law, a plaintiff who was unable to show a good reason for not serving in time failed at the threshold, under the CPR a more calibrated approach is to be adopted. If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted... The weaker the reason, the more likely the court will be to refuse to grant the extension."

It was emphasized that "one of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good reason for a departure." The Court quoted Lord Woolf in Biguzzi v Rank Leisure plc [1999] 1 W.L.R. 1 926 at p. 1 933D:

"If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant."

In my view the above excerpts from the judgment are instructive. It is beyond debate that "one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with the proper expedition."

The overriding objective principle of Part 1 of the Civil Procedure Rules (CPR) applies to rules of this Court — see Rule 1.1 (10) (a) of the Rules.

Generally speaking the rules of the Court must be obeyed. The authorities show that in order to justify a Court in extending time in order to carry out a procedural step, there must be some material on which the Court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules.

- [43]** The Learned Judge's statement of the applicable legal principles makes it clear that while the absence of a good reason would not necessarily mean that the extension would not be granted, great significance is placed on the strength of the reason provided, given the importance of compliance with established timelines and the effective enforcement of same.
- [44]** It is my considered view that the explanation provided was grossly inadequate as there were no specifics provided as to the alleged initial date of service. Neither were details available as to whom it was sent or by whom. While it was averred that the Paralegal had left the firm, there was no evidence of attempts to confirm receipt with the Claimants' previous Attorney to support this assertion.
- [45]** In addressing the request that the attempted service in 2024 be accepted as good service or time extended, the Court was left to do so without the benefit of an explanation as to what had happened in the intervening years. This question took on greater significance in light of the Claimants' unchallenged evidence that subsequent to the filing of their Application, the 1st to 3rd Defendants had informed the Court that the Defence had been served yet failed to attend Court on the date scheduled for them to prove service.
- [46]** Although the 1st to 3rd Defendants took umbrage to the fact that the service in 2024 was not accepted, the Claimants were within their right to refuse same. The time for service had long passed and no application for an extension of time had been filed by the Defendant up to this point. The Claimants were under no obligation to follow up with the Defendants to remind them of the need to comply with the rules, neither were they under any duty to assist in the Defendants' request that the protracted delay be remedied by service being accepted.
- [47]** In arriving at a decision on this issue, Rule 1.1 which speaks to the overriding objectives was also considered. The Court is cognizant of the requirement that the matter should be dealt with justly between the parties. It has also been noted that the grant or refusal of these applications would have significant outcomes for either side. In respect of the 1st to 3rd Defendants, this would mean declarations adverse

to their legal ownership of the disputed property and their ability to pass title to the 4th and 5th Defendants.

[48] In my consideration of this factor and the question of prejudice to either Party if their applications were refused, the actions of the Parties were carefully scrutinised. Although the 1st to 3rd Defendants had failed to serve their Defence in the prescribed time or file an Application for an extension of time, it is the unchallenged evidence of the Claimant that they took actions to part with possession of the disputed property with the specific intention of defeating the Claimants' interest in same.

[49] This is noted in the fact that following the Claimants Application for an injunction on the 23rd of December 2020, which was scheduled for hearing on the 30th of December 2020, the 1st to 3rd Defendants lodged the transfer to the 4th and 5th Defendants on the 28th of January 2021. Despite the fact that the hearing of the application was pending, correspondence was sent the Registrar of Tiles on the 1st to 3rd Defendants behalf requesting that the Claimant's caveat be warned and the transfer be effected. As stated in the chronology an order for the status quo to remain was made on the 25th of February 2021. Following the making of this order, the Claimant's caveat lapsed on the 10th of March 2021. The 1st to 3rd Defendants had participated in the injunction hearing and would have been aware of the orders made. But, in the period following the lapse of the caveat and overlapping with the hearing in April 2021, the transfer to the 4th and 5th Defendants was effected.

[50] This Court finds that in circumstances where the 1st to 3rd Defendants had been under Court orders in respect of the disputed property, the transfer to the 4th and 5th Defendant was consistent with a pattern of not only flouting the rules as to complying with timelines, but also a deliberate disregard of the orders of the Court. As such, any decision to allow the extension sought would '*seriously defeat the overriding objectives of the rules*' and reward the 1st to 3rd Defendants undeservingly.

[51] It is for the foregoing reasons that the Court finds that there is merit in the Claimant's position. The 1st to 3rd Defendants in contrast have failed to provide a basis on which their application should be granted.

Can the orders sought by the Claimants be granted against the 4th and 5th Defendants?

[52] The Court having found merit in the Claimants' request for Judgment against the 1st to 3rd Defendants, consideration was given to whether the order sought at paragraph 4 of their Notice of Application should be granted as well. In examining this issue, the Court took note of the fact that the 4th and 5th Defendants did not attend or participate in the hearing in spite of having notice of same. While submissions had been filed in respect of the injunction against them, there was no response whether by Application or Affidavit to the Claimants' Application.

[53] In the submissions filed in response to the grant of an injunction against them, it was stated that the 4th and 5th Defendants were bona fide purchasers for value who responded to an advertisement for sale of the property and made their purchase in good faith. Reliance was also placed on the indefeasibility of the Registered Title. While these indications may have had some relevance to the Court's consideration of the matter, they were never encapsulated in evidence and cannot properly be considered in the determination of this matter.

Request for Entry of Judgment

[54] In respect of all the Defendants, this Court adopts the ratio of the Court in the **Recreational Holdings** case which upheld the decision in **Chisholm v Hall** [1959] AC 719. In that matter, the Court found that by virtue of **section 70 of the Registration of Titles Act**, the interest of every successor in title, to include a bona fide purchaser for value interest was subject to any possessory rights acquired by the individual by virtue of the operation of the Limitations of Actions Act. These findings were succinctly stated at paragraph 34 of the judgment as follows;

[34] So the Board rejects each of the company's contentions. It concludes as follows:

(a) the Board's Opinion in the Chisholm case was correct;

(b) the proviso to section 70 of the Act explicitly subordinates the title of the registered proprietor to such unregistered rights under the Limitation Act as have begun to accrue since the first registration under the Act; and no exception is made, as it is elsewhere in the Act, for the registered proprietor who can claim to have been a bona fide purchaser for value;

(c) section 68 of the Act does not (to borrow the word from Mr Knox) trump the proviso to section 70 because, as was held in the Chisholm case, the word "subsequent" in section 68 means "subsequent to the first registration", with the result that section 68 is complementary to the proviso;

(d) notwithstanding the near paramountcy under it of the registered title and the often favoured status under it of the bona fide purchaser for value, the Act does nothing to disturb this obvious conclusion: that, if the vendor's title has been "extinguished" under section 30 of the Limitation Act, there remains no title for the vendor to pass...and none for his purchaser to receive; and

(e) the decision of the Court of Appeal, explained in a judgment of Morrison JA to the clarity of which the Board pays respectful tribute, was correct.

[55] The Court is satisfied that the evidence outlined in the pleadings proves on a balance of probabilities that the Claimants had acquired possessory title against Lloyd Hibbert and this title would be good against his successors in title including the 1st to 3rd Defendants.

[56] In light of the Court's findings that the Claimant's possessory title was good against the 1st to 3rd Defendants, it stands to reason that it would also defeat the interest of their successors in title.

[57] Accordingly, the order sought against the Defendants can properly be granted.

Conclusion

[58] In conclusion, this Court finds that the Claimants have met the required threshold for their Application to be granted and the following orders are made:

1. Order made in terms of paragraphs 1, 2, 4, 5, 6, 7 and 8 of the Claimants' Notice of Application filed on the 12th of January 2023.
2. The 1st to 3rd Defendants' Application for the Defence to stand and/or for an Extension of Time is refused.
3. The 1st to 3rd Defendants' Application for Leave to Appeal is granted. A stay of the enforcement of Orders 4 and 5 is granted for fourteen (14) days.
4. The 4th and 5th Defendants' Oral Application for Leave is refused as they have no evidence before the Court and did not participate in the proceeding. A written application supported by affidavit evidence is to be filed.
5. Costs awarded to the Claimants against the 1st to 3rd Defendants to be taxed if not agreed.
6. Claimants' Attorneys to prepare, file and serve the Formal Order herein.