IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2008 HCV 00303

BETWEEN	HUBERT EDWARDS	CLAIMANT
AND	MILTON IVANHOE KELLY	FIRST DEFENDANT
AND	WILHELMINA KELLY	SECOND DEFENDANT

IN CHAMBERS

Catherine Minto instructed by Nunes Scholefield Deleon and Company Lawrence Haynes for the defendants

August 7 and November 2, 2009

APPLICATION TO EXTEND TIME TO FILE DEFENCE - WHETHER DEFENCE HAS ANY REAL PROSPECT OF SUCCESS - EXTINCTION OF TITLE TO LAND - CIVIL PROCEDURE RULES - RULE 25.1 (b), (c), (i), 26.1 (2) (k), 26.8 - WHETHER RULE 26.8 APPLICABLE TO APPLICATION TO EXTEND TIME TO FILE DEFENCE

SYKES J.

1. There are two applications before the court. One is an application by Mr. Edwards, the claimant, for judgment against both defendants, Mr. and Mrs. Kelly, ("the Kellys"), and consequential orders. The other is an application by the Kellys for extension of time within which to file a defence. I heard the application for extension of time within which to file defence first.

The history before and after the filing of the claim

2. Much of what is stated is not in dispute and indeed the Kellys in their affidavit have provided much of the information that the claimant did not have.

3. Mr. Hubert Edwards, a retired cabinet maker, is the registered proprietor of lot 224 South Haven in the parish of St. Thomas, the home of National Hero, Paul Bogle. Mr. Edwards spent 47 long years in

England and purchased the disputed land in 1971. The land is registered at volume 999 folio 465 of the Register Book of Titles.

4. The Kellys, in March of 1972, became fee simple owners of the adjoining land, lot 223, registered at volume 999 folio 964 of the Register Book of Titles. They chose to make their retirement home there after many years of hard work and toil in England as a hospital porter and a hospital attendant respectively. The Kellys, like Mr. Edwards, are well on their way to becoming octogenarians.

5. When the Kellys purchased the land, they say that the boundaries were pointed out to them by the vendor's agent. Thereafter they gave instructions to a builder to erect a house on the land. This was done. The Kellys moved into their new abode in 1975 when the construction was completed.

6. Unknown to them, the builder had erected the house in such a manner that part of it was on the adjoining property owed by Mr. Edwards. It was in 2004, nineteen years later, that the error was discovered. The discovery came about because Mr. Edwards tried to sell the land and actually entered into a written agreement for sale with a third party. It was when the purchaser engaged the services of a surveyor that it was discovered that the Kellys's home had encroached on Mr. Edwards's land. The result was that the contract was cancelled because Mr. Edwards was not able to deliver a vacant lot as required by the sale agreement.

7. Mr. Edwards and the Kellys tried to resolve the matter without litigation but that has failed primarily because the Kellys have not been able to come up with the money to purchase the land on which they have encroached.

8. Mrs. Kathleen Betton-Small represented the Kellys. Mr. Edwards, at one point, was represented by the firm of Myers, Fletcher and Gordon and later by the firm of Nunes, Scholefield, Deleon and Company.

9. The correspondence indicates that the Kellys accepted that they had trespassed on Mr. Edwards' land. There is a letter dated March 29,

2005, from Mrs. Betton-Small to Mrs. Natalie Farrell-Ross of Myers, Fletcher and Gordon, asking, rather politely, whether Mr. Edwards "is willing to sell the land and the terms thereof" because the Kellys "would be willing to consider purchasing" the land. Mrs. Farrell-Ross responded by letter and facsimile dated April 5 and September 7, 2005, respectively. To these two communications, Mrs. Betton-Small stated that "our clients are interested in purchasing the land but have informed us that they are waiting on their son who has promised to assist them with the required funds."

10. On January 22, 2008, Mr. Edwards launched a claim against the Kellys in which he is asking for an order requiring the Kellys to pull down and remove that part of the concrete structure that has encroached on his land. He is also seeking an injunction restraining them from any further encroachment on the land. Finally, he is seeking damages for trespass, and interest.

11. The claim form and particulars of claim as well as the necessary accompanying documents, prescribed by the rules, were served on the Kellys on February 16, 2008.

12. The Kellys did not file a defence. Miss Minto writes to Mrs. Betton-Small indicating that her client would be prepared to sell the land for JA$1.9m. Mrs. Betton-Small responds by saying that her clients, the Kellys, were offering JA$1.1m for the land.

13. Miss Minto wrote again on August 27, 2008. Mrs. Betton-Small revealed, in a letter dated September 2, 2008, that she has been unable to get instructions from her client. This information then moved Mr. Edwards to seek final judgment since there was no prospect of settling the matter.

14. By notice of application for court orders, filed on December 19, 2008, Mrs. Betton-Small applied to have her name removed from the record on the grounds that (a) the Kellys have ceased communicating with her and (b) she could not continue to represent the Kellys without instructions.

15. The Kellys are now represented by Mr. Haynes. On June 1, 2009, he filed an application to extend time within which to file a defence. The grounds of this application are (a) the Kellys were relying on their former attorneys to indicate to when the defence should be filed and (b) they have a real prospect of successfully defending the claim.

16. Mrs. Wilhelmina Kelly swore an affidavit in support of the application. The fact of the encroachment is not in issue. She admits that she was told about the encroachment in 2004. She also agrees that there were discussions between the parties. Mrs. Kelly confirms that her children (not just a son) promised to help but to date, "nothing is forthcoming from them" (see para. 8 of affidavit dated May 27, 2009).

17. Crucially, she says in paragraph 9, that "throughout the time we were waiting to hear from our children we did not think about filing a defence nor were we aware that we had a Defence (sic) to this action."

The proposed defence

18. It goes without saying that unless there is a real prospect of success then the extension of time within which to file a defence should not be granted because it would a waste of the court's resources to entertain a hopeless case.

19. Miss Minto has sought to resist the application by submitting that the law does not indicate that the Kellys have any prospect let alone a real prospect of successfully defending the claim. I wish to say that, in my view, Miss Minto's propositions on the law, have not truly embraced the significant change in the law of Jamaica that has occurred since the Privy Council decision of ***Wills v Wills*** (2003) 64 W.I.R. 176. The Board applied the House of Lords case of ***Pye (J.A.) Oxford Ltd v Graham*** [2003] A.C. 419 and approved the English Court of Appeal's decision of ***Buckinghamshire County Council v Moran*** [1990] Ch 623. Miss Minto seems horrified by the possibility that the holder of the legal title ("the paper owner") may have his title extinguished by his inactivity. Counsel still seems to think that some kind of forceful exclusionary act is required from the trespasser before the paper

owner can be held to be excluded from his property. As Lord Browne-Wilkinson puts it in ***Pye***, any notion that there has to be some kind of "confrontation" between the squatter and the paper owner is wrong (see para. 38).

20. It cannot be overstated that any case that has a contrary statement of law to that found in ***Wills v Wills*** must now be accepted as incorrect as far as Jamaica is concerned. This applies to the Jamaican Court of Appeal's decision in ***Archer v Georgianna Holdings Ltd.*** (1974) 21 W.I.R. 431.

21. Lord Walker in ***Wills v Wills*** pointed out, after tracing the legislative history relevant to this area of law, that the Jamaican Limitation Act of 1881 closely followed the English Limitation Act of 1833, as amended by the Real Property Limitations Act of 1874. The effect of the English Act and the Jamaican legislation was to abolish the "highly technical doctrine of adverse possession (and the converse notion of non-adverse possession)" (see para. 14).

22. His Lordship indicated that despite the abolition of the technical doctrine, the expression "adverse possession" continued to be used by lawyers but the meaning had changed. What it now means is that "sort of possession which can with the passage of years mature into a valid title, that is possession which is not by licence and is not referable to some other title or right" (see para. 17)

23. Lord Walker noted that despite the legislation, English and Jamaican courts were stubbornly resistant to the new idea introduced by the legislature. Both courts sought "to give the expression a more technical meaning and to require proof that the squatter used the land in a manner inconsistent with the owner's intentions" (see para. 18).

24. Lord Walker concluded at paragraph 19, in relation to all the important decisions of the English and Jamaican Courts of Appeal, including ***Archer's case***:

> *All those decisions may have been correct on their special facts. All of them rightly stressed the importance, in cases of this sort, of the Court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also rightly stated that the Court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is not invariably either necessary or sufficient as evidence of possession. Nevertheless, the decisions must now be read in the light of the important decision of the Court of Appeal in Buckinghamshire County Council v Moran [1990] Ch 623 and the even more important decision of the House of Lords in Pye.*

25. Now, what did ***Pye*** decide? The facts of ***Pye*** are instructive. On February 1, 1983 J.A. Pye Limited ("Pye") had a written grazing agreement with Mr. Graham to use 25 hectares of land. Mr. Graham would have use of the land. The agreement ended December 31, 1983. When the agreement ended in December 1983, Mr. Graham wanted to renew the agreement but Pye refused, and in fact required Mr. Graham to give up possession of the land. Mr. Graham continued using the land. He took hay from the land in August 1984 and was permitted to do so on payment of a sum of money. In 1984 and 1985, Pye refused his request to renew any agreement and take further cuts of hay. He nonetheless occupied the land and treated it as part of his own lands which were adjoining. By June 1997, he claimed that he had obtained title by adverse possession. Mr. Graham died in 1998 but his widow and personal representatives continued the claim to the land. In January 1999, Pye sought an order for possession against the widow and personal representatives. They resisted on the ground that they had acquired title by possession because they had possession of the land since the end of the grazing agreement. Pye, on the other hand, contended that Mr. Graham, before his death, had acknowledged that the land was not his and was even prepared to enter into a new agreement regarding the land if Pye was so interested.

26. The evidence unambiguously established that the Grahams made extensive use of the land in the full knowledge that it was not theirs but were prepared to take that risk. The evidence also showed that apart from engaging in some paper transactions regarding the land, Pye did no act that could be regarded as possession of the land.

27. At first instance the trial judge upheld the claim to title by possession but was reversed by the Court of Appeal.

28. It is important to note that at the time of ***Pye***, the legislature in England had intended to address the risk of property owners losing their property by inaction but despite this legislative intention, the law as it stood at the time of ***Pye*** permitted extinction of title by inactivity of the registered owner.

29. A few passages from the judgment of their Lordships in ***Pye*** will make illustrate the important change in the law brought about by the legislation. Lord Bingham said at paragraph 2:

> *The Grahams have acted honourably throughout. They sought rights to graze or cut grass on the land after the summer of 1984, and were quite prepared to pay. When Pye failed to respond they did what any other farmer in their position would have done: they continued to farm the land. They were not at fault. But the result of Pye's inaction was that they enjoyed the full use of the land without payment for 12 years. As if that were not gain enough, they are then rewarded by obtaining title to this considerable area of valuable land without any obligation to compensate the former owner in any way at all. In the case of unregistered land, and in the days before registration became the norm, such a result could no doubt be justified as avoiding protracted uncertainty where the title to land lay. But where land is registered it is difficult to see any*

> *justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it. It is reassuring to learn that the Land Registration Act 2002 has addressed the risk that a registered owner may lose his title through inadvertence. But the main provisions of that Act have not yet been brought into effect, and even if they had it would not assist Pye, whose title had been lost before the passing of the Act. While I am satisfied that the appeal must be allowed for the reasons given by my noble and learned friend, this is a conclusion which I (like the judge, at p 709F) "arrive at with no enthusiasm".*

30. It is clear that Lord Bingham was no great advocate of the legal position in ***Pye*** but nonetheless his Lordship saw no other possible outcome on the facts and law as they stood at the time.

31. Lord Browne-Wilkinson delivered the leading judgment in ***Pye***. It deserves careful study. His Lordship accepted that for the purpose of the relevant statutes, possession, meant what Slade J. had stated in ***Powell v McFarlane*** (1977) 38 P & CR 452, 469:

> *Possession of land, however, is a concept which has long been familiar and of importance to English lawyers, because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession. In the absence of authority, therefore, I would for my own part have regarded the word 'possession' in the 1939 Act as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus*

possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land.

32. The implication from this passage alone is that the intention of the holder of the legal title is irrelevant. This passage focuses solely on the intention of the person in possession who would be the "squatter".

33. In paragraphs 33 - 38, Lord Browne-Wilkinson successfully interned the idea that the squatter must necessarily commit an act of "ouster" in the sense of a confrontation with the paper owner. His Lordship observed that taking of, and continuing possession with the ***permission*** of the paper owner does not make the squatter in possession for the purpose of acquiring title by extinction of the paper owner's title.

34. Lord Browne-Wilkinson also scotched the notion that the squatter has to use the land in a manner that is inconsistent with the paper owners present or future intended use. He said that none of this is necessary.

35. His Lordship continued his powerful analysis by pointing out that possession has two elements: (i) factual possession, that is a sufficient degree of physical custody and control; and (ii) an intention to exercise such control for one's benefit or on one's behalf. Lord Browne-Wilkinson stated that the common law has always required an intention to possess coupled with "objective acts of physical possession" (see para. 40). The intention, he added, is often times inferred from the physical acts but that does not mean that there are not two separate and distinct requirements of the intention and the physical acts.

36. In this exposition of possession, it is to be noted again, that there is no reference to the intention of the paper owner. It is the intention of the "squatter" coupled with factual possession that determines possession of land for the purpose of determining when the paper owner's title is extinguished.

37. Factual possession means, according to Lord Browne-Wilkinson, that the occupier or "squatter" must have such a degree of control that it

can be said that he has behaved as if he were the paper owner and that no one else has in fact behaved in the same way in respect of the land, during the relevant time. This explains why there cannot be possession by the paper owner co-existing with possession by another person who is there without the owner's consent. If the squatter is there by the paper owner's consent then he does not have possession which would enable him to acquire title by extinction of the paper owner's title. Possession in these circumstances would be in the paper owner alone. If he is there without the paper owner's consent and he behaves in the manner required with the requisite intention he is in possession. His title does not arise until the requisite time has passed. More accurately, the paper owner's title is not extinguished until the requisite time has passed.

38. Finally, Lord Browne-Wilkinson stated that it is not necessary for the "squatter" to have an intention to own. All he needs to have is an intention to possess.

39. If there were any remaining doubts, Lord Browne-Wilkinson has incinerated them with this passage at paragraph 45:

> *The real difficulty has arisen from the judgment of Bramwell LJ. He said, at p 273:*
>
> *"I do not think that there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it ..."*
>
> ***The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical***

> ***and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user.*** *Bramwell LJ's heresy led directly to the heresy in the Wallis's Cayton Bay line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell LJ survived this statutory reversal but in the Moran case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong.* (my emphasis)

40. Note that the intention of the paper owner is irrelevant. On the point of whether an offer to pay is inconsistent with possession sufficient to extinguish a paper owner's title, Lord Browne-Wilkinson held at paragraph 46:

> *Once it is accepted that the necessary intent is an intent to possess not to own and an intention to exclude the paper owner only so far as is reasonably possible, there is no inconsistency between a squatter being willing to pay the paper owner if asked and his being in the meantime in possession.* ***An admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime.*** (my emphasis)

41. Thus the point being made by Miss Minto that the Kellys acknowledged that Mr. Edwards owned the land and extended an offer to purchase the land is beside the point. This does not prevent the Kellys being in possession. From the judgment of Lord Browne-Wilkinson and ***Wills v Wills***, it is incontestable, that the expression "adverse possession" ought not be used any more, but for those who find it difficult to avoid the expression, "adverse possession" simply means that "sort of possession which can with the passage of years mature into a valid title, that is possession which is not by licence and is not referable to some other title or right." We should now refer to

title acquired by these means as "title acquired by extinction of the paper owner's title."

42. On this exposition by Lord Browne-Wilkinson, it is clear that the only question capable of being tried on the part of the Kellys is, with what intention did they possess Mr. Edwards' land? In the words of Lord Browne-Wilkinson, did the Kellys have "(1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")" (see para. 40 of ***Pye***). There is nothing in the evidence so far to suggest that the Kellys's possession referable to the permission of MR. Edwards or that they are claiming under some other title. It seems that the first question has already been answered. The Kellys were in undisturbed possession without permission, or other legal title, for 19 years.

43. Lord Hope came to the same conclusion. I will cite a passage from him in which his Lordship is referring to the word "adverse" in section 15 of the Limitation Act 1980. However, reading the judgment of Lord Hope as a whole as well as the judgment of Lord Browne-Wilkinson, it will be obvious that the exposition on section 15 of the English Limitation Act of 1980, does not alter the position as far as Jamaica is concerned (see para. 33 - 35 in particular of Lord Browne-Wilkinson's judgment in ***Pye***). Lord Hope said at paragraph 69:

> *At first sight, it might be thought that the word "adverse" describes the nature of the possession that the squatter needs to demonstrate. It suggests that an element of aggression, hostility or subterfuge is required. But an examination of the context makes it clear that this is not so. It is used as a convenient label only, in recognition simply of the fact that the possession is adverse to the interests of the paper owner or, in the case of registered land, of the registered proprietor. The context is that of a person bringing an action to recover land who has been in possession of land but has been dispossessed or has discontinued his*

possession: paragraph 8 of Schedule 1 to the 1980 Act. His right of action is treated as accruing as soon as the land is in the possession of some other person in whose favour the limitation period can run. In that sense, and for that purpose, the other person's possession is adverse to his. But the question whether that other person is in fact in possession of the land is a separate question on which the word "adverse" casts no light.

44. Lord Hope is saying that Mr. Edwards' cause of action accrued from the moment the Kellys had possession because they were persons in whose favour the limitation period can run.

45. In the same vane is Lord Hutton at paragraph 76:

I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion. Where the evidence establishes that the person claiming title under the [Limitation of Actions Act of Jamaica] has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded.

46. On the evidence adduced so far, there is nothing to suggest that the Kellys's possession was equivocal or open to more than one interpretation.

47. From all these passages, the traffic is all one way on this point. It is therefore true to say that in Jamaica, the paper title holder can lose his property by inactivity provided the squatter has met the two ingredients identified by their Lordships in ***Pye***.

48. In effect, all the legal points raised by Miss Minto have been answered in a comprehensive manner by ***Pye*** which, as stated already, was approved and applied by the Privy Council in ***Wills***.

49. The Kellys have trespassed on the land. They did not have the permission of Mr. Edwards to encroach on the property. Neither are they claiming that they were there initially by some licence or under some title.

50. The affidavit evidence from Mrs. Kelly shows that they intended to occupy the land of Mr. Edwards as if were they own albeit they thought they were on their own land.

51. The facts as deposed by all the parties seem to point to the prima conclusion, at least at this stage, that the Kellys have possession coupled with the requisite passage of time, which, appear to meet the legal requirements for extinction of Mr. Edwards' title. England has now redressed this "injustice", by legislation, that Mr. Edwards may suffer. We have not.

52. It appears that the proposed defence of the Kellys is far from fanciful.

Relief from sanctions

53. Miss Minto submitted that an extension of time for filing defence ought not to be granted because the defendants have not met the requirements of rule 26.8 of the Civil Procedure Rules ("CPR"). She submitted that the defendants having filed an acknowledgment of

service they failed to file a defence. Also, she said, that there is no written application for relief from sanctions and so in the circumstances of the case, the application to extend time to file defence ought to fail.

54. What Miss Minto is saying in relation to the sanctions point is this. The rules clearly say that a defendant has a specific time to file the acknowledgement of service (14 days), and a further time to file the defence (42 days) (see rules 9.2 (6), 9.3 (1), and 10). Should the defendant fail to act within the required time and he does not secure agreement from the claimant to file the defence out of time, the defendant is barred from filing a defence unless he has permission of the court. In short, the CPR polices this aspect by imposing a sanction on the defendant and the only way forward is by curial remedy.

55. Miss Minto cited a previous decision of mine, ***Carr v Burgess*** C.L. 1997/C 130 (delivered April 19, 2006). In that case, I held that in considering an application for extension of time, the court should have regard to rule 26.8, where the application is made after the time for doing the act has passed. I also referred to the general power of the court to extend time for complying with a rule or doing some act required by the rule or a court order (see rule 26.1 (2) (c)). I had held that where an application for extension of time had been made before the time has expired for doing the act, then rule 26.8 does not arise for consideration.

56. I have decided to examine the law afresh to see if there is any basis for me to come to a different conclusion on the law. I now embark upon that examine.

57. There are three cases to be examined. The first is from the Court of Appeal of the Organisation of Eastern Caribbean States. The second is other from the Court of Appeal of England and Wales. The third is from the Supreme Court of Jamaica.

58. The first case is that of ***Pendragon International Ltd v Bacardi International Ltd*** (Anguilla Civil Appeal No. 3 of 2007) (November 23,

2007) decided by the Court of Appeal of the Organisation of Eastern Caribbean States on appeal from Anguilla.

59. In that case, it was an application to extend time within which to file an appeal. The applicant was out of time by four days. The time for filing the application expired on July 5, 2007 but the application was filed on July 9, 2007.

60. The application was refused. Rawlins J.A. held that the provisions of rule 26.8 (2) and (3) (which are identical to rule 26.8 (2) and (3) of the CPR of Jamaica), apply to applications for extension of time. The Court went further and held that the court may extend time only if all the criteria in rule 26.8 (2) are met and on this being established, then the court was to consider the factors set out at rule 26.8 (3) (see also ***Frederick v Joseph*** (St. Lucia Civil Appeal No. 32 of 2005) (delivered October 16, 2006)).

61. In the case of ***Sayers v Walker*** [2002] C.P. Rep. 61, the issue was whether the court should extend time within which to file an appeal against judgment. The lawyer in that case, unwisely, relied on advice he had been given by a clerk at the Registry Office. He alleged that he was told that time for appeal began when the order was perfected and not when the decision was made. This proved to be erroneous with the consequence that he was out of time. The appellant then sought the leave of the Court of Appeal to appeal out of time.

62. Brooke L.J., correctly, took account of the similar English provision in order to decide whether the court should exercise its discretion in favour of the appellant (rule 3.9 which is similar to rule 26.8 of Jamaica and the Organisation of Eastern Caribbean States). His Lordship noted that the factors listed in rule 3.9 while specifically made applicable by rule 3.8 to an application for relief from sanctions, were relevant to an application for extension of time. His Lordship indicated that they should be taken into account because it would be undesirable to develop a judge-made check list when rule 3.9 provided an acceptable guide in cases of complexity (see para. 21). According to his Lordship, cases of greater complexity required a more sophisticated approach, hence the reference to rule 3.9

63. In other kinds of cases, that is non-complex cases, Brooke L.J. indicated that in less complex cases, the matters set out in Practice Direction 52 at paragraph 5.2 would be sufficient to deal with those cases.

64. Included in the matters for consideration under rule 3.9 is whether the application was made promptly. Rule 26.8 (1) has a similar requirement but says that any application for relief from sanctions must be made promptly.

65. I do not necessarily agree with the distinction made between complex and non-complex cases but nonetheless I agree with Brook L.J. that the matters set out in the rule dealing with relief from sanctions provide a good guide that can be used in considering when considering an application for extension of time to do any act required by the rules or a court order or practice direction.

66. I also agree with the underlying reason advanced by Brooke L.J. which is that if the extension of time is not granted then the judgment of the lower court would stand and therefore would be the "sanction" suffered by the person who wishes to appeal. Thus the effect of denying the application is in effect the imposition of a "sanction" (see para. 21).

67. It is to be noted that the Eastern Caribbean Court of Appeal has taken a very strict approach to time tables laid down by the rules. It is clear that despite the absence of clear wording in the CPR making this the case, the Court has decided that the criteria of rule 26.8 (2) and (3) are strictly applicable when considering extension of time within which to file an appeal. This is by way of contrast to the English approach which merely suggests that the criteria for relief from sanctions are taken into account when considering a similar application. There is clearly a differing philosophical approach to the issue of tardy litigants. The Eastern Caribbean Court of Appeal has a strict black letter approach whereas the English Court of Appeal provides more "wriggle room."

68. Having reviewed the two cases, it is my view that rule 26.8 should be taken into account when considering an application for extension of time to file a defence. It is true that the two cases which I have examined involved applications for extension of time to file appeals but that is an accident of history rather than a sufficient ground to say that criteria for granting relief from sanctions should not be used in cases such as the one before me.

69. I would not adopt the strict black letter approach indicated by ***Pendragon*** for these reasons. The general rule in the Jamaican CPR which deals with extension of time, rule 26.1 (2) (c), does not state what the criterion or criteria are for extension of time applications. To that extent, there is no firm basis for treating rule 26.8 as providing the mandatory standard. That does not and cannot mean that there are no criteria. Rule 26.8, along with the overriding objective, should guide the exercise of the discretion under extension of time applications because using the criteria is readily accessible and they do contain what a judge would consider in any event. Also the use of these criteria removes the need for the judiciary to create its own checklist. It is my view that the matters stated in rule 26.8 are matters that a court would have to take into account when called upon to exercise its discretion on extension of time application even if rule 26.8 did not exist.

70. Surely, the promptness of the application must be material. So too must the explanation for failing to file a defence in the required time. The conduct of the applicant in the matter to date must be important. It may be that his lateness is a demonstration of his general tardiness and persistent breach of rules, practice directions and court orders. The consequence of the breach and the effect on the other party, if relief is granted, as well as the effect on other litigants must be considered.

71. The third case is that of ***Adeite v The Attorney General of Jamaica*** (HCV00429/2006) (delivered June 18, 2007). In this case McDonald J. (Ag) (as she then was) held that rule 26.8 does not apply when there is an application for an extension of time and ought not to be considered at all. According to her Ladyship, rule 26.8 only applies

where an order, rule or direction expressly states what the sanction is. Thus the inability to file a defence without judicial approval is not a sanction.

72. In granting the application to file a defence out of time, it appears that her Ladyship had regard to (a) the real prospect of the defence succeeding; (b) the explanation for the failure to file a defence within the time; (c) prejudice to either party; and (d) whether the claimant could be adequately compensated in costs and (e) the overriding objective.

73. So there is now a judicially-created checklist. However, there is no guarantee that another judge of the Supreme Court will adhere to this checklist. Whatever the virtues of the checklist, rule 26.8, while not exhaustive, provides a ready guide that is accessible to litigants and their legal advisers. The difficulty with judicially-created lists is that there is the potential for it to be always a work in progress and one never knows when some factor that was not articulated before will make its sudden and perhaps determinative appearance on stage. Under rule 26.8, one may argue about the weight to be given to the various factors listed in any given case which is one thing, but with judicially-created lists, the debate may be even about what should be on the list which is quite another thing. These are additional reasons why I suggest, humbly, that rule 26.8 is of value in considering applications for extensions of time.

The analysis

74. It is now appropriate to examine the evidence before me against rule 26.8 and the overriding objective to see if the Kellys have made case for the exercise of the discretion in their favour.

75. I have already indicated that the proposed defence might very well prove to be conclusive of the issue in the Kellys's favour, if allowed in and is established.

76. Let me say at the outset that when examining the factors listed in rule 26.8 I shall be doing so in a systematic way. This is to make sure that I have considered all the relevant factors listed and then I shall

look to see if there are any other factors that should be taken into account even though they are not listed in rule 26.8. I take this approach because rule 26.8 is not exhaustive.

77. The application for extension of time was filed on June 1, 2009, more than a year after the defence should have been filed. This could hardly be described as prompt.

78. The explanation for failing to file a defence comes from Mrs. Kelly. Mrs. Kelly stated in her grounds that her attorney did not advise her of the time period within which to file a defence. However, the grounds are at odds with affidavit which states that neither she nor her husband considered filing a defence. In effect, they decided not engage the litigation process that had commenced.

79. They tried to go the route of purchasing the property. She state in her affidavit that there were extensive discussions between her children, husband and the claimant with a view to resolving the matter. A number of her children promised to help her buy the land on which the encroachment occurred but nothing has been forthcoming. She also said, that during the time she did not hear from the children she did not think of filing a defence and neither was she aware that she had a defence to the action.

80. It appears that the Kellys had access to legal advice when the claim was served and even after the time when the defence should have been filed. The proof of this is the following letters.

81. There are the letters of March 10, 17, May 7 and June 16, all of 2008. The letters of March 10 and 17 2008 have not been exhibited but they have been referred to by a letter of May 7, 2008, to the Kelly's lawyer from Miss Catherine Minto.

82. The letter of May 7, 2008, indicated that Mr. Edwards would be prepared to sell his lot for JA$1.9m. Mrs. Betton-Small, counsel for the Kellys, wrote back to say that she was instructed to offer JA$1.1m. These letters were written after the time Mr. Edwards was entitled to apply for judgment.

83. There is no doubt that the Kellys had access to counsel. The relationship between Mrs. Betton-Small and the Kellys came to an end, it appears, in late 2008. The notice of application by Mrs. Betton-Small to remove her name from the record, states as the ground that the Kellys ceased communicating with her and she had no instructions. There is a letter dated September 2, 2008, by Mrs. Betton-Small to Miss Minto in which she says that "despite numerous attempts we have been unable to get any instructions from our clients." This application by Mrs. Betton-Small speaks volumes.

84. There is no evidence to suggest that Mrs. Betton-Small is at fault. As stated earlier, the Kelly's did not entertain the thought of filing a defence. Thus the ground that counsel failed to advise her has not been established.

85. There is now a draft defence therefore the omission to file a defence can be remedied within a reasonable time.

86. No trial date has been set and a likely trial date is now possible within the next twelve months. I say that the trail date is possible within the next twelve months because there is no denying that the time between filing claim and trial has reduced considerably over the last twelve to eighteen months. Also having regard to what I regard as the real issues in dispute between the parties there is no need for full examination of all the issues. Some of these issues have already been admitted in the affidavits and so there is no need to call evidence of them.

87. The real issues are the intention of the Kellys's when they occupied Mr. Edwards' land. Mr. Edwards may have evidence to indicate that the Kellys did not have the intention to possess his land.

88. No adverse impact on Mr. Edwards has been identified but there is at least one that will occur if the defence is allowed in at this stage. It is that Mr. Edwards would be faced with additional costs of pursuing his claim.

89. The interest of the administration of justice is multifaceted. It is always in the interests of justice that litigation is pursued within the rules and within the intended time frame. It is also in the interest of the administration of justice that so far as possible, matters be disposed of on the merits. The interests of the administration of justice also suggests that litigants who proceed with alacrity and do what is require of them should reap the reward of their efforts.

90. I now go on to consider other factors. As stated before, if the defence is allowed, Mr. Edwards would be put through the expense of retaining counsel for a further period of time. However, in this case, this can be addressed with an appropriate costs order at this stage and also at the trial. Part 64.6 gives the court the power to make appropriate costs orders having regard to the conduct of the parties.

Disposition

91. Taking into account all the factors, including the overriding objective, I have formed the view that the application for extension of time to file defence succeeds. The consequential orders that I have made I believe are sufficient to achieve justice between the parties. They are designed to ensure that the Kellys have the opportunity to put forward their defence while compensating the claimant for his "loss" of opportunity to secure judgment now. Further, the orders ensure that the Kellys are constantly under pressure to act in a timely way and should they fail to pay the costs in the manner ordered, they are placed at risk of having their statement of case struck out.

92. On the question of costs, I have taken into account that the defendants have been exceptionally tardy and the court cannot countenance this kind of lethargy.

93. The orders are:

    a. Application for permission to file defence out of time granted.

    b. Defence to be filed within 7 days of this order granting extension of time within which to file a defence.

c. The defendants are to pay the costs of the claimant incurred between the last date when the defence should have been file to the date of the granting of the application.

94. In order that the defendants are not encouraged in their slothful ways I also order that the costs of the application to extend time within which to file a defence are to be agreed or taxed. These are the further orders on costs on the application. It is further ordered that:

a. Costs are to be agreed within ten days of the date of this order, and if agreed, to be paid in full within 20 days of the date of agreement.

b. If costs are not agreed then the Registrar must tax these costs within 30 days of the date of this order.

c. If costs are taxed and not appealed the costs must be paid in full within 20 days from the last day on which an appeal against the taxation can be filed.

95. It follows from what I have said that Mr. Edwards' application for judgment is not granted and is dismissed. Had the Kellys had greater regard for the time lines in the CPR, Mr. Edwards would not have been driven to make this application. All that has happened here is the creation of the Kellys.

96. It is further ordered in respect of Mr. Edwards' application that:

a. The costs of Mr. Edwards' application to be agreed or taxed.

b. The costs orders made in respect of the costs of the application to extend time within which to file a defence apply, mutatis mutandis, to this application as well.

c. If the agreed costs, or the taxed costs, if not appealed, in respect of both applications are not paid in accordance with the

terms of this order then the defendants' statement of case is struck out without further order or application.

97. In light of how I have interpreted the law relating to extinction of title of the paper owner, it would seem to be that in this particular case, the matter should be managed in order to get at the real issues.

98. In light of the affidavit evidence filed by the parties it is clear that some issues do not need full ventilation at trial. The following orders on case management reflect this conclusion. Under the case management regime, there is no need to look under every rock to see if there is anything of interest. That approach to litigation should now be confined to the dustbin of litigation history. Rule 25.1 states that the court "must further the overriding objective by actively (not the adverb) managing cases. The court does this by "identifying the issues at an early stage" and then "deciding promptly (note the adverb) which issues need full investigation and trial and accordingly disposing summarily of the others" (see rule 25.1 (b), (c)). The court is also mandated to deal "with as many aspects of the case as is practicable on the same occasion" (see rule 25.1 (i)). These objectives are supported by rule 26.1 (2) (k) which authorises the court to "exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no worthwhile purpose."

99. Having regard to the all the affidavit evidence the following matters need not be proved at the pending trial:

a. Mr. Edwards is the registered proprietor of land registered at volume 999 folio 465 of the Register Book of Titles (lot 224).

b. Mr. and Mrs. Kelly are the registered proprietors of land registered at volume 999 folio 964 of the Register Book of Titles (lot 223).

c. Both lots are adjoining lots.

d. Mr. and Mrs. Kelly erected a house which has encroached on Mr. Edwards' land;

e. Mr. and Mrs. Kelly accepted that their house encroached on Mr. Edwards's land and expressed a desire to purchase the land.

f. Mr. and Mrs. Kelly have agreed that they have encroached on Mr. Edwards' property from at least 1975.

100. Among the issues to be tried issues are (a) the intention of Mr. and Mrs. Kelly when they encroached on the land; (b) whether Mr. Edwards can adduce evidence showing that the Kellys did not have the intention to possess or that he dealt with the land as if he were the owner of the land during the relevant period; and (c) length of time of encroachment. What is clear from ***Pye*** is that paper transactions with the land is not likely to be sufficient to constitute possession by the paper owner.

Note

101. The court then proceeded to case management and case management orders were made in addition to the orders mentioned in the judgment.