[2010] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 53/2009

BETWEEN	**PHILIP HAMILTON (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate)**	**APPELLANT**
A N D	**FREDERICK FLEMMINGS**	**1ST RESPONDENT**
A N D	**GERTRUDE FLEMMINGS**	**2ND RESPONDENT**

Canute Brown instructed by Brown, Godfrey and Morgan for the appellant

Alexander Williams instructed by Usim, Williams and Company for the respondents

9 February and 18 May 2010

PROCEDURAL APPEAL

IN CHAMBERS

PHILLIPS, JA

[1] This is a procedural appeal from the decision of Master Lindo given on 22 April 2009, wherein she refused an application filed on behalf of the appellant on 17 March 2009, requesting that the time for the filing of his defence be extended and that the defence be filed and a copy served on the respondents within 14 days from the date of the order. Leave to appeal was granted.

[2] The grounds of the application before the Master were that the appellant had been unable to file his defence within the period required due to illness and inability to give full instructions to his attorney-at-law, and also that the appellant had a real prospect of successfully defending the claim.

[3] The notice and grounds of appeal were duly filed on 30 April 2009. The appellant challenged the exercise of the Master's discretion to refuse leave to file his defence, and relied on two grounds of appeal:

> "(a) That the learned Master erred in law in holding that:
>
> (i) The proposed Defence of hardship to a claim for a decree of specific performance was not available to the Appellant and/or is not known to law.
>
> (ii) The appellant failed to satisfy the Court that the Defence had a real prospect of success.
>
> (iii) The Appellant's delay in applying for the leave to file his Defence was inexcusable and therefore failed the test set out in Rule 13.1 of the Civil Procedure Rules 2002.
>
> b) The Learned Master in exercising her discretion whether to grant or refuse leave erred in law by failing to abide by the overriding objective in that she did not consider the effect of the refusal to grant leave to file the Defence would have on the Appellant and not balancing it with the prejudice, if any, the grant of the Application would cause to the Respondents."

The proceedings.

[4] This matter commenced by claim form and particulars of claim dated 30 July 2008. The cause of action and the remedy sought by the respondents were straightforward and succinct. The respondents claimed specific performance, damages in lieu of or in addition to specific performance, and all necessary enquiries and accounts, in respect of the appellant's breach of an agreement for sale made between the respondents and the appellant, for the sale of all that parcel of land which is contained in certificate of title registered at Volume 383 Folio 7 in the Register Book of Titles, which agreement the appellant had failed, neglected and/or refused to complete despite demand. Several documents relevant to the claim were annexed to the claim form, to wit, the agreement for sale, the certificate of title, copy grant of probate and other items of correspondence relating to the payment of the deposit of $900,000.00, and then later a further payment in the sum of $700,000.00 as requested, to "enable the estate to discharge its obligations to the Revenue and to secure the issue of the Form 8".

[5] In the particulars of claim, the respondents referred to the agreement for sale dated 21 December 2006, mentioned the sale price of $4,350,000.00, that it was a condition of the agreement that completion should have taken place on or before the expiration of 90 days, and that

they had made two payments toward the purchase price, the deposit and a further payment, although no further payments, subsequent to the deposit, were due under the agreement until completion.

[6] The respondents averred that they were ready willing and able at all times to complete the transaction, however the appellant in breach of his contractual obligations had failed, neglected and or refused to complete the same. In the particulars of claim the respondents reiterated their claim for specific performance of the agreement and damages in lieu thereof or in addition thereto.

[7] The acknowledgement of service of the claim form and the particulars of claim was filed on 17 September 2008, indicating service of the documents on 5 August 2008. The defence was not filed within the time required by the rules.

[8] On 17 March 2009, the application for extension of time set out in paragraph 1 herein, the outcome of which is the genesis of this appeal, was filed with affidavit in support, sworn to by Mr Philip Hamilton, the executor of the estate of Mr Arthur Roy Hutchinson, deceased.

[9] Mr Hamilton stated that he was a retired teacher, that he had received the claim form and particulars of claim in August 2008, and that early in September he had informed his attorneys about the development

in a transaction they had been handling on behalf of the estate. He further deponed to the fact that he had had discussions with Ms. Elma Wilson who was residing in the house on the property, the subject of sale to the respondents. Ms Wilson was also the beneficiary under the will of Mr Hutchinson, and had previously intended to vacate the home and, to migrate to the United States of America. This plan however had fallen through, and she was then experiencing serious difficulties in obtaining alternate accommodation. In fact she had endeavoured to persuade the respondents to withdraw their interest in the premises as her health had deteriorated considerably and she was no longer able to climb steps. Unfortunately, this attempt did not bear fruit.

[10] Mr Hamilton further stated that shortly thereafter he fell ill. He suffered a stroke, was hospitalized and was unable to speak to give his attorneys any instructions with regard to the claim which had been instituted against him.

[11] By January 2009, he had been advised that the time for filing the defence had passed, but that he could apply for an extension of time to file the same. He indicated that he remained concerned about the welfare of Ms Wilson, and although informed that hardship as a defence was difficult to prove, nonetheless he was of the view that when all the circumstances were put before the court, the court would find that he

had a real chance of success. A copy of the proposed defence was attached to the affidavit.

[12] The proposed defence admitted that the parties had duly entered into the said agreement for sale, (in respect of premises registered at Volume 383 Folio 7 and located at 5 Lucas Road, Kingston) its conditions and the payments made thereunder, but added that the second further payment was also made in relation to a mortgage on the property, which the parties were unaware of at the time of execution of the agreement for sale. The appellant averred in paragraph 4 of the proposed defence that he was "ready, willing and able to account for all sums paid by the Claimant to the Appellant pursuant to and incidental to the Agreement for Sale". Additionally, he stated that he was unable to complete the transaction due to the 'exceptional hardship' being experienced by a third party, who was Ms Wilson the beneficiary of the estate. He indicated her original intention to migrate and reside with her daughter in the United States, but now pleaded that she had been denied a visa to enter that country. In paragraph 9 of the proposed defence he stated that Ms Wilson was "upwards of 65 years old and is cared for by persons who live near to her".

[13] In the premises, the appellant prayed that the court would deny the respondents specific performance of the agreement for sale due to the

hardship it would cause, which the appellant could not have foreseen, and asked that if the court saw it fit to award damages to the respondents, that those damages be in lieu of specific performance and not in addition to the same.

Master Lindo's Judgment.

[14] Master Lindo heard this application on 1 April 2009. She reviewed the history of the matter through the courts, as well as the statements of case, which I have already set out herein. There was no affidavit in response to that of Mr Hamilton. However the Master referred to counsel's submissions on behalf of the respondents, wherein he stated that there was no credible explanation for the failure to file the defence within the time specified by the rules. In fact counsel said that there had been no request not to enter judgment, none to consent to file the defence out of time, there was no defence disclosed by the appellant and his actions had shown a disregard of the rules.

[15] The Master appeared impressed with these submissions. She stated that even though the delay in filing the defence may have been due to the illness of the appellant, there was not sufficient evidence placed before the court in this regard, for instance there were no specific dates, "as to the onset of his illness and his recovery". The learned Master also

found that the explanation for the delay in filing the application for extension of time to file the defence, six months after the filing of the acknowledgement of service was not satisfactory and even if the alleged illness of the appellant could be considered a reasonable explanation for the delay, this was outweighed by the lack of a defence with a realistic prospect of success.

[16] The learned Master had earlier in her decision referred to the averment in the proposed defence, that, 'the appellant pleads that he is unable to complete the contract because of exceptional hardship being experienced by a third party…..' and stated: "I am not satisfied that this is a defence with a realistic prospect of success". She therefore concluded:

> "In giving effect to the overriding objective of the CPR of enabling the court to deal with cases fairly and expeditiously, in saving expense and ensuring that the resources of the court are not used up on cases which have no merit, and in view of all the circumstances, I am satisfied that this is a fit case for me to exercise my discretion in refusing the appellant's application."

The submissions

[17] Counsel for the appellant informed the court that the application to extend time to file the defence, which was filed on 17 March 2009 was served on the respondents on 19 March 2009. At that time no application had been filed to enter judgment. Indeed counsel indicated that

although such an application had been filed by the respondents on 31 March 2009, that application had not been served on him, and so up to the time when he was being informed by the Master that the appellant's application had been refused, he had no inclination that such an application was before the court, or that an order had been made thereon. This I must say, if accurate, is quite extraordinary. Counsel for the respondents did not deny this statement but indicated that the application was made under rule12.10 (4) & (5) of the CPR which state as follows:

> "(4) Default judgment where the claim is for some other remedy, shall be in such form as the court considers the claimant to be entitled to on the particulars of claim.
>
> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply."

[18] That rule however does not direct non service of the application and one would not have expected the respondents to have adopted that course, particularly when the parties were before the court on another application which had been served some time previously. However, I have had no feedback from the Master on this, and the written judgment out of the court does not support this allegation. The

judgment indicates that two applications were before her, but there does not seem to have been any arguments presented on the application to enter judgment. Further, on the basis of what is set out below, it would appear, in any event, that that application would have been heard in the absence of the attorney for the appellant.

[19] Counsel for the appellant indicated that the matter commenced on 1 April 2009. After submissions from counsel for the respondents, that the defence of hardship did not amount to a defence in law, and moreso in relation to a third party, and the appellant had responded to state that hardship was a defence to a claim for the equitable remedy of specific performance, and that there were authorities that could be provided in support of that proposition, the Master adjourned the matter for the authorities to be supplied. However, on the adjourned date, due to a misunderstanding by counsel for the appellant in respect of the time fixed for the hearing, that is 9.30 a.m. as opposed to 10.00 a.m., the matter had been disposed of when counsel for the appellant arrived at the Masters chambers at 9.50 a.m. This also seems somewhat unusual, as counsel indicated to me that there had been a message to the registry when he discovered the mistake of the time scheduled for the hearing. Thus, dealing with the matter in his absence, without more, when it was in essence partheard and without any indication of recalcitrance or otherwise dilatory behaviour on his part, is rather unsettling.

[20] Counsel in dealing with the grounds of the appeal submitted that the court has an unfettered discretion to enlarge time, save that the court should exercise its powers in furtherance of the overriding objective. He relied on the case of **Premium Investment Limited v Jamaica Redevelopment Foundation Inc.** HCV3632 of 2007, (unreported) delivered 11 June 2008, where Sykes J ruled that the applicable rules with regard to the extension of time were 10.3(9) and 26.1(2) (c) of the CPR, although he stated that these rules do not set out any criteria that govern the exercise of the power to enlarge time, but accepted that in the end, it is the overriding objective which must guide the exercise of the discretion.

[21] He also relied on **Finnegan v Parkside Health Authority** (1998) 1 W.L.R. 411, where it was stated inter alia, that, "save in special cases or exceptional circumstances, it can rarely be appropriate, an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the appellant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Order 3 or 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed".

[22] Counsel submitted that there was information before the court which was unchallenged with regard to the delay. And there had not been any request for the affiant to attend court to be tested under cross-examination on the credibility of his explanation. But even if the explanation for the non compliance was 'inadequate or unconvincing' counsel stated that the extension should have been granted in keeping with the overriding objective to do justice in the case.

[23] Counsel then submitted that although it ought not to be necessary to show merits on an application for extension of time, **ex abuntanti cautela**, he would nonetheless endeavour to do so.

He relied on the following facts that :

(a) The executor had entered into a valid and enforceable contract with the respondents.

(b) The premises is occupied by a third party who has joint beneficial interest in the premises along with her daughter and is in possession.

(c) The interest of the third party is recognizable and can be protected in law.

(d) The third party was experiencing difficulties securing alternative accommodation; difficulties of which the purchasers are not unaware. She is an elderly woman over sixty- five years and of deteriorating health.

(e) To remove the third party from the premises, if self help methods fail, would require the institution of legal proceedings at the instance of the Appellant/Applicant he having warranted to the

> Respondents vacant possession on completion of the contract.

[24] He finally submitted that the learned Master erred when she indicated that she was not satisfied that the defence of hardship was one with a realistic prospect of success. He relied on the cases of **Thomas v Dering** (1837) 1 Keen 729, **Wedgwood v Adams** (1843) English Report Vol. XLIX 958, and more recently, **Wroth & Another v Tyler** [1974]1Ch 30; [1973] 2 WLR 405; [1973] 1 All ER 897 for the general principle that:

> "…the court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract."

In the latter case the decree was not granted as it would have required the husband to take out proceedings against his wife to obtain possession of a dwelling house which he had contracted to sell.

[25] In reply, counsel for the respondents relied on and reminded the court of the principles enunciated in the leading cases on the subject, to wit **Hardy v Focus Insurance Company Limited** [1995] 47 WIR 116,121 and **Hadmor Productions Limited et al v Hamilton et al** [1983] 1 AC 191, 200, which set out the bases on which a court of appeal will interfere with and or set aside the exercise of a judge's discretion. He stated that the limited circumstances are those in which the exercise of the discretion is based on a misunderstanding of the law , or of the evidence before him, or upon

an inference that particular facts existed which did not exist. He submitted that this was not a case in which the learned Master fell into error, and as such, the order made by her refusing to enlarge the time to file the defence should stand.

[26] Counsel, in his submissions accepted that, 'in certain circumstances hardship to particular third parties to a contract for a sale of land may be grounds for refusal of an order for specific performance'. However, he maintained that the learned Master had not stated that that particular defence did not exist, but that it did not have a realistic prospect of success, which he says must mean based on the facts which were before her.

[27] Counsel therefore challenged the information which was before the Master. In fact, he pointed out that there was no affidavit deponed by the beneficiary herself explaining the hardship, and he submitted that there was evidence by way of correspondence that the appellant had still been pursuing the completion of the contract, in spite of the difficulties being experienced with regard to the delivery of vacant possession. He also challenged whether the alleged difficulties, which related to finding alternate accommodation could amount to 'hardship' as a plea in equity.

[28] Counsel relied on the cases of **Walters & Others v Roberts** (1981) P&CR 210, 216 to 220, and particularly on **Hexter v Pearce**, [1900] 1 Ch 341 and submitted thus:

> "The whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted, and is not bound to take damages instead."

[29] Counsel finally submitted that the learned Master had dealt with all the matters before her, had examined the potential prejudice to both parties, the explanations for the delay, applied the law to the facts of the case before her and concluded in compliance with the overriding objective, that the application to enlarge time should be refused, and in the exercise of that discretion, he said, she could not be faulted and the court should so find.

[30] In response counsel for the appellant indicated that in the correspondence it was clear that the attorneys on behalf of the executor were endeavouring to fulfill their obligations under the contract to give vacant possession and to complete the contract. It was not a situation of attempting to renege on their contractual arrangements. There were on-going discussions but these were later stymied by the situation which developed on the part of the beneficiary, who, he submitted, was neither, as had been suggested by counsel for the respondents, a trespasser or a

licensee. He distinguished the cases relied on by counsel for the respondents, to say that in the case of **Walters and Others v Roberts,** the party in possession had taken under a subcontract, which made it clear that its occupation of the land was never intended to survive the extinction of the contract, and the Agricultural Holdings Act 1948, did not give any protection in those circumstances, so specific performance would readily be granted. In the case of **Hexter v Pearce** although there was argument that the appellant could experience great difficulties in working the mining lease, and the court made it clear that 'whether the contract is a convenient or an inconvenient one is for the parties to consider when they enter into it', the court found that if the appellant did not act unreasonably there would be no difficulty in working the lease and therefore granted specific performance. The important point to note however, is that those cases went to trial, for the court to decide whether the order of specific performance ought to have been granted in the particular circumstances of each case.

[31] Counsel also brought to the attention of the court, rule 12.5 (e) of the CPR which states :

> "12.5 The registry must enter judgment at the request of the claimant against a appellant for failure to defend if -
>
> (a)…
> (b)…
> (c)…

(d)…
(e) there is no pending application for an extension of time to file the defence."

[32] Counsel therefore submitted that any application to enter judgment which had been filed subsequent to the filing of the application to enlarge time to file the defence out of time would be irregular and ought not to have been pursued, let alone for an order to have been made on the same in his absence.

Analysis.

[33] In this matter, as stated previously, the learned Master had before her an application to enlarge time to file a defence, as the time within which the appellant ought to have done so had expired. She exercised her discretion and decided to refuse the application. The issue on this appeal therefore is: was she wrong in doing so? I accept the principles set out in **Hadmor Productions Limited et al v Hamilton et al** (supra) and I am guided by them. In his speech, Lord Diplock reminded their Lordships of "the limited function" of an appellate court, in an appeal from the exercise of a discretion by a single judge, in refusing to grant injunctive relief. He said at page 220-B of his judgment:

> "Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his

> discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is mainly one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of theses reasons, that it becomes entitled to exercise an original discretion of its own."

[34] On the bases of these principles therefore, (although the application before me is not one for injunctive relief, the principles are nonetheless applicable) it is incumbent on me, by way of review, to examine the Master's decision to ascertain if there are any grounds for interfering with the same.

Ground of appeal a) iii)

[35] The applicable rules of the CPR are 10.2 (1) and 10.3(1) which state that a appellant who wishes to defend all or part of a claim must file a defence, and the general rule is that the defence must be filed within 42 days of service of the claim. Rule 10.3(9), permits a appellant to apply to the court for an order extending the time for filing a defence, and rule 26.1 (2)(c) under the court's general powers of management states that the court may extend the time for compliance with any rule, practice direction, order or direction of the court, even if the application for an extension is made after the time for compliance has passed.

[36] It is clear that neither rule 10.3(9) or 26.1(2)(c) contain the criteria that ought to be utilized in the exercise of the power to enlarge time. The principle governing the court's approach in determining whether to grant or refuse an application for extension of time was summarized by Lightman, J in an application for extension of time to appeal in the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** [2001] EWHC Ch 456, which has been endorsed by this court in **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 at [15]. In the latter case, the issue related to the filing of a defence out of time. In her judgment Harris J.A. referred to the dictum of Lightman J which set out the principles, thus;

> "In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice.
>
> Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."

[37] The questions therefore are - was there sufficient material before the learned Master which could provide a good reason for the delay in failing to comply with rule10.3 (1) of the CPR and also, was there any information before her to satisfy her that there was merit in the case.?

[38] In the instant case, the claim form and the particulars were served on the appellant on 5 August 2008. Pursuant to rule10.3(1), the defence would have been due within 42 days of the service of the same. However, pursuant to rule 3.5(1) during the long vacation, the time prescribed by these rules for filing and serving any statement of case does not run. The long vacation in the rules is the vacation beginning on the 1st of August in each year, (rule 3.4(1)). The Michaelmas Term commences on the 16th September (rule 3.3). The acknowledgement of service

would have been due on the 20 August 2008, but was filed on 17 September 2008. The defence would have been due on 29 October 2008. It was not filed. The application to enlarge time to file the defence was filed on 17 March 2009. By that time the defence was overdue about 4½ months.

[39] The explanation given for this delay was that having given instructions to the attorneys in September 2009 the situation of the residential arrangements of the beneficiary changed and negotiations to accommodate the changed situation failed. The executor then fell ill, suffered a stroke and could not speak , was unable to give his attorneys instructions, was advised of the expiry date for filing the defence in January 2009 and proceeded to endeavor to obtain the assistance of the court by March 2009.

[40] The learned Master was of the view that even if the delay was due to the illness of the appellant, there was not sufficient information before her as to the dates of the onset of his illness and of his recovery. She went on to say that filing the application for extension of time six months after the filing of the acknowledgment of service was not satisfactory.

[41] However, in my view, in examining the conduct of a litigant in respect of delay, for the purpose of deciding whether to exercise a discretion in his/her favour, the relevant starting time for consideration, is

when the litigant is in breach of the rules, in that, the time has expired, and the matter cannot proceed without reference to the courts. In this case it would have been 4 ½ months and the matters outlined in paragraph 39 above, could readily have consumed that period, and provided the good reason for the delay. A stroke is a serious condition, and the appellant said that he had been hospitalized and if accompanied by any sort of paralysis, as in this case, could provide a distraction from the focus of an action in the court, where the party is sued in the capacity of an executor, bearing in mind, also, that all this information was not challenged. There was no affidavit in opposition refuting this, and or claiming that any prejudice had been suffered as a result of the delay. In any event, the delay was not inordinate. Additionally I accept the views stated in the **Finnegan v Parkside Health Authority** case, that a procedural default even if unjustifiable, and particularly where no prejudice has been deponed to or claimed, the litigant ought not to be denied access to justice.

[42] In my opinion the learned Master fell into error in her approach to this aspect of the matter.

Ground of appeal a) i) and ii)

[43] However, even if there was no good reason for the delay, in the interest of justice the proposed defence would have to be examined in order to ascertain if there is any merit in the same.

[44] Essentially, the appellant pleaded and admitted the agreement for sale, but indicated that he was unable to complete the contract because of "exceptional hardship" which related to the beneficiary, a third party, who resided on the premises, who was elderly, whose health had significantly deteriorated, so much so that she was no longer able to climb steps, could not find alternate accommodation, and who was being cared for by persons who resided near to her.

[45] The learned Master merely stated that, 'I am not satisfied that this is a defence with a realistic prospect of success'. There was no basis given for this conclusion. It is not surprising therefore that counsel for the appellant understood that to mean that, in her view, the defence of hardship to an equitable claim for specific performance did not exist, and for counsel for the respondents to understand the statement to mean that the defence was not available to the appellant on the facts before her, and therefore the defence in this case would not succeed.

[46] The difficulty that exists is based on the events which transpired at the hearing in April 2009. It would appear that the learned Master did not have an opportunity to hear submissions on the law in respect of this

aspect of the case, and therefore was at a disadvantage. In fact counsel for the respondents conceded before me, as stated earlier, that hardship in respect of particular third parties can in certain circumstances be grounds for a refusal of an order for specific performance. In **Thomas v Dering,** it was held that the court will not execute a contract, the performance of which is unreasonable and or would be prejudicial to persons interested in the property but not parties to the contract. In **Wroth and Another v Tyler** the law was clearly stated in the judgment of Megarry,J endorsing the dicta of Plumer V.C. in **Howell v George** (1815) 1 Madd 1,11 which passage the learned Vice Chancellor cited, he said with approval:

> "A vendor must do his best to obtain any necessary consent to the sale; if he has sold with vacant possession he must, if necessary, take proceedings to obtain possession from any person in possession who has no right to be there or whose right is determinable by the vendor, at all events if the vendor's right to possession is reasonably clear; but I do not think that the vendor will usually be required to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession. Where the outcome of any litigation depends upon disputed facts, difficult questions of law, or the exercise of a discretionary jurisdiction, then I think the court would be slow to make a decree of specific performance against the vendor which would require him to undertake such litigation."

[47] In the instant case, the defence is clearly arguable. It is not one that ought to be decided on affidavit evidence, as counsel for the respondents appeared to be attempting to do before me, and surely not one to be shut out of the trial process entirely.

[48] In my opinion, the learned Master erred in this regard also.

Ground of appeal (b)

[49] In my view, in finding as she did, the learned Master, did not properly apply the overriding objective as in the circumstances of this case, it is only just and fair that the time for the filing of the defence herein ought to have been enlarged.

[50] As a comment, I feel impelled to state that the parties should proceed to have the judgment entered in default of defence, in the absence of the appellant, without notice, and in circumstances where an application to file defence out of time was not only on file, but in train , as before the court, and being heard, set aside **ex debito justitiae.**

Conclusion

[51] In light of all that I have said, the appeal is allowed. The order of the Master is set aside and the time for filing the defence is extended to 28 days from the date of this order. Costs to the appellant to be taxed, if not agreed.