THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

SKBHCVAP2012/0028

BETWEEN:

ADAM BILZERIAN

Appellant

and

[1] GERALD LOU WEINER
[2] KATHLEEN ANN WEINER

Respondents

Before:
The Hon. Dame Janice M. Pereira — Chief Justice

Appearances (on written submissions only):
Mr. John Tyme for the Appellant
Mr. Jean M. Dyer for the Respondents

2013: May 24.

Interlocutory appeal – Whether judge erred in refusing to set aside judgment entered in default – Whether another acknowledgment of service is required after an amended claim is filed – Whether an amended claim constitutes a fresh action and/or supersedes the original claim – Civil Procedure Rules 2000 Parts 9, 10 and 13

The respondent filed and served a claim form and statement of claim ("the Original Claim") on the appellant. The appellant filed an acknowledgement of service within the prescribed time under the Civil Procedure Rules 2000 ("CPR"). The respondent then filed and served an amended claim form and statement of claim ("the Amended Claim"). The appellant did not file another acknowledgment of service. The respondent entered a request for judgment in default of acknowledgment of service. The appellant filed and served a defence to the amended claim within the 28 day time limit prescribed by CPR. The appellant subsequently filed another acknowledgement of service. The Registrar entered the default judgment. The appellant applied to have it set aside on the ground that

it was wrongly entered as he had filed an acknowledgment of service to the Original Claim and as such there was no failure to file an acknowledgment of service. The application was dismissed by the judge. The appellant has appealed.

Held: allowing the appeal, setting aside the default judgment, remitting the matter to the High Court for case management and awarding costs to the appellant, that:

1. The learned trial judge was required as a matter of law to set aside the default judgment entered 'in default of acknowledgment of service' as having been wrongly entered pursuant to CPR 13.2(1) as there was an effective 'acknowledgment of service' filed to the Original Claim. It did not matter that the Original Claim was subsequently amended. The acknowledgement of service remained valid and effective in respect of the Amended Claim.

2. The judge erred in accepting the respondents' argument that the Amended Claim constituted a fresh action, as the Original Claim did not die and remained the claim even though amended.

JUDGMENT

[1] PEREIRA CJ: This interlocutory appeal arises from the refusal of the trial judge on 9th November 2012, to set aside a judgment entered in default against the appellant on 4th September 2012, the terms of which were fixed on 20th November 2012. It raises the sole question as to whether a party is required, where he/she has filed an acknowledgement of service to an original claim form, on the filing of an amended claim form, to file a further or another acknowledgement of service.

[2] The procedural chronology so far as is relevant to this appeal is as follows:

(a) On 20th April 2012, the respondents issued a claim form together with a statement of claim against the appellant ("the Original Claim");

(b) On 22nd May, 2012, the appellant was served with the Original Claim.[1]

(c) On 29th May, 2012 the appellant filed an acknowledgment of service. This acknowledgment of service was timely having been filed within fourteen days after service of the Original Claim as prescribed by rule 9.3(1) of the Civil Procedure Rules 2000 ("CPR 2000").

[1] Other documents in respect of interim injunctive relief obtained on 24th April 2012 were also served on the appellant.

(d) On 21st and 22nd June 2012, the respondents filed and served respectively on the appellant an amended claim form and statement of claim ("the Amended Claim").

(e) No further or additional acknowledgment of service was filed and served by the appellant to the Amended Claim.

(f) On 17th July 2012, the respondents issued a request for entry of default judgment "in default of – Acknowledgment of service".

(g) On 19th July 2012, the appellant had filed a defence in the proceedings. It is noteworthy that the appellant's defence, in so far as the Amended Claim was concerned, would have been duly filed within the 28 day time limit prescribed by CPR 10.3(1) for service of a defence after service of the Amended Claim.

(h) The appellant filed another acknowledgement of service on 31st August 2012.

(i) On 4th September 2012, the Registrar entered the default judgment.

(j) On 12th September 2012 the appellant applied to set aside the default judgment on the ground that it was wrongly entered as he had filed an acknowledgment of service to the Original Claim and as such there was no failure to file an acknowledgment of service.

(k) The application to set aside came on for hearing before the trial judge on 9th November 2012 and that application was dismissed. The appellant has accordingly appealed with the leave of the court.

[3] No written reasons were given by the learned trial judge for refusing to set aside the default judgment. Further, it appears that no formal order of refusal has been filed (as the record discloses none) and no copy of the order was attached to the notice of appeal as required by CPR 62.4(2). A timely reminder to the Registrars of the court offices in the jurisdiction as to the requirement contained in CPR 42.5(1) would, I hope, be of some use. It says in part, subject to certain exceptions, that "Every … order must be drawn by the court, unless …" (my emphasis). Notwithstanding these failures, it appears to be common ground

between the parties that the learned trial judge refused to set aside the default judgment because he was of the view that:

(i) the Amended Claim was a new claim; and

(ii) it was not open to the appellant to acknowledge service of the Amended Claim after the Request for Entry of Default Judgment had been received by the Court Office.

Accordingly, he held that the default judgment had been properly entered.

[4] It does not appear that the learned trial judge considered the merits of the defence and counterclaim which was timely filed to the Amended Claim notwithstanding that the appellant, in his application to set aside, relied not only on CPR 13.2(1)(a) (which deals with a situation where the court must set aside a default judgment which was wrongly entered), but also on CPR 13.3(1) which gives the court a discretion as to whether or not to set aside a default judgment. In the exercise of that discretion the court must have regard to the timeliness of the application, the reason for the failure to file an acknowledgment of service or defence as the case may be, and the realistic prospects of defending the claim. On this application, launching a two-pronged attack on the default judgment, it was, in my judgment, incumbent on the trial judge, having found that the default judgment was regular and thus falling outside CPR 13.3(1), to have gone on to consider whether he ought to have exercised his discretion under CPR 13.3(1). The record does not disclose that the learned trial judge adverted his mind to CPR 13.3(1) at all and it is my considered view that he did not. I am fortified in this view having regard to Ms. Dyer's skeleton arguments which fail to mention that the learned trial judge engaged in any such consideration. I have no doubt that had the learned trial judge done so, counsel would have so stated and indeed relied upon it. For this reason alone, the appeal ought to be allowed and the matter remitted to the learned trial judge to consider the application under CPR 13.3(1). However, this approach would not address the more fundamental issue of the default judgment entered 'in default of Acknowledgement of service' on the basis that notwithstanding an acknowledgment of service was timely filed in respect of the

Original Claim, that another 'acknowledgement of service' was required once the Amended Claim had been subsequently filed. I now turn to consider this question.

Is another 'acknowledgement of service' required in respect of an amended claim where an 'acknowledgment of service' had already been timeously filed in respect of the original claim?

[5] Ms Dyer, counsel for the respondents readily accepts that since the advent of CPR 2000, it does not appear that the situation as here, has been tested and that no authority has been found on the point. She refers to the pre-CPR era and the UK Supreme Court Practice (White Book) 1993 20/1/7 which in essence stated 'where the amendment is made after acknowledgement of service, the Court will generally dispense with service of the amended writ[2] and will generally order service and acknowledgement of service to stand although such order is not strictly necessary, since the original acknowledgment of service stands good to the amended writ'. She continued, in reliance on the White Book, that this was so because the amendment to the writ took effect not as from the date of the amendment but rather took effect retrospectively to the date of original issue of the writ.[3] The Rules of Court 1970, ("the Old Rules") generally followed the approach in the White Book.[4]

[6] Counsel then posits that the Old Rules are at odds with CPR 2000 because:

(i) CPR 20.3 expressly provides that a party must serve a copy of the amended statement of case on every other party;

(ii) CPR 2000 does not enact an equivalent of the Old Rules Order 20/3/2/b for the management of proceedings after amendment. Given CPR's silence thereon it must be inferred that timelines were all then meant to run afresh; and

(ii) unlike the Old Rules, a claimant can amend his claim to add a cause of action which accrued to him since the issue of the claim form which is

[2] The "Writ" is now called the "Claim Form" under CPR 2000.
[3] See the White Book 1993 at 20/5-8/2.
[4] See generally, Order 20 of the Old Rules.

what the respondents did here, by adding a claim for monies due under a promissory note which became due on 14th May 2012.

Accordingly, counsel says, that this leads to the conclusion that an amended claim constitutes a fresh action with fresh particulars and that it is logical that the timelines would run afresh since the amended claim supersedes the original claim.

Analysis

[7] It is true that CPR 2000, which allows a party to amend a statement of case,[5] is silent as to the specific consequential steps to be taken thereafter. It does not say for example:

(a) that where a party files and serves an amended statement of case on a defendant, that the defendant is allowed 28 days as set out in CPR 10.3(1) for the filing of an amended defence; or

(b) that where a defendant has filed an 'acknowledgment of service' to the original claim, once the original claim is amended and served on him, he/she must (notwithstanding having already given notice of intention to defend) file another or second acknowledgment of service in respect of the amended claim within the time allowed under CPR 9.3(1) for the filing of an acknowledgment of service to the original claim.

Indeed, no provision is made for amending an acknowledgement of service (unlike Order 20 Rule 2 of the Old Rules).

[8] This begs the question as to what is the true purport of the provisions of CPR 2000 in the face of these omissions in relation to amendments to a statement of case. Were they deliberate? Should CPR import such provisions or read them as having been so imported to give effect to the provisions of CPR dealing with amendments to a statement of case? Or, put another way, is it necessary for giving effect to the provisions dealing with amended statements of case that such provisions be read

[5] Once without permission at any time prior to the date fixed for the first case management conference and thereafter with permission of the court.

into or imported into CPR 2000 where it is silent? The answer to this question lies in my view on an analysis of the provisions of CPR 2000, which would have a bearing on an amendment to a statement of case. In carrying out this analysis I bear in mind the fact that the drafters of CPR 2000 would have been quite familiar and versed in the Old Rules which were abolished only when CPR 2000 came into force.

[9] An appropriate starting point in my judgment is with the definition of a 'statement of case' in CPR 2000. CPR 2.4 says that a 'statement of case' means:

> "(a) a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
> (b) any further information given in relation to any statement of case under Part 34 …"[6]

We are here not concerned with subparagraph (b) of this rule, but rather with subparagraph (a). Importantly, an 'acknowledgment of service' is not caught within the definition of 'statement of case' and thus cannot be treated as or in the same way as a statement of case. This in my view is for good reason, having regard to the object and purpose of an 'acknowledgment of service'. It is a document which serves a number of purposes:– It may give notice of an intention to defend the claim, or it may admit the whole or part of a claim with an intention to defend other parts of the claim, or, it may be a necessary precursor to disputing the court's jurisdiction. An acknowledgement of service need not be filed at all if the defendant files a defence within the time that he should have filed such acknowledgement.[7] The mere filing of the defence within the time limited for acknowledging service serves as sufficient notice of the defendant's intention to defend the claim. It is to me pellucid that the object and purpose of the acknowledgment of service is to put the claimant on notice as to the stance taken by the defendant in relation to the claim. It pleads nothing one way or the other.

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[6] Part 34 deals with Requests for Information.
[7] See CPR 9.1(2)(b) and 9.2(4).

[10] CPR 9.3(1) states that the general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form. This is clearly a reference to the original claim form. CPR 9.3(4) also states that '[a] defendant may file an acknowledgment of service at any time before a request for default judgment is received at the court office out of which the claim form was issued.' This reference also appears to be a reference to the original claim form. Similarly, CPR 10.3(1) states as the general rule that '… the period for filing a defence is the period of 28 days after the date of service of the claim form.' This also appears to be a reference to an original claim form.

[11] CPR Part 20 deals with amendments to 'statements of case'. It tells you when and the basis on which a statement of case may be amended. It does not deal with or impose timelines for filing an amended statement of case – whether by way of claim form, statement of claim, defence, counterclaim or reply. More importantly, it does not state that where a statement of case is amended it gives rise to or constitutes 'a fresh action' or that the amended claim 'supersedes' the original claim as contended by counsel for the respondent if what is meant by those phrases is that the action will have commenced only as from the date of filing the amended claim and that the Original Claim has simply died as from the date of filing the amended claim. This was not the case pre-CPR and the language of CPR does not call for such a construction now. To my mind, to speak of an 'amended statement of case' or a statement of case being amended means exactly what it says – that the statement of case albeit amended, remains the 'statement of case.'

[12] In my view the references to the 'claim form' (in CPR 9.3(1), 9.3(4) and 10.3(1)) are wide enough and would sensibly incorporate an 'amended claim form'. It would be absurd to think that where a claim form was amended before service on a defendant and a defendant filed an acknowledgment of service that it needed to be specified or stated that he was acknowledging service of the 'amended claim form'. Similarly, where a defendant was served with a 'claim form' but prior to the 14 day period limited for acknowledging service he was again served with an

'amended claim form', it would be quite odd to require the defendant to specify that he was acknowledging service of the 'amended claim form' or, worse yet require that the defendant proceed to file two 'acknowledgments of service' – one in relation to the original claim and one in relation to the amended claim. Yet, by analogy, this is precisely what the respondents argue should be the case here. The defendant had filed an acknowledgement of service to the Original Claim form before being served again with the Amended Claim. Counsel for the respondents urged and the learned trial judge accepted (in my view, wrongly), that the Amended Claim constituted a fresh action. With the utmost respect to counsel and the learned trial judge this is simply not the case. The Original Claim (even as here where a new cause of action was added by amendment), did not die. It remained the claim albeit amended. As such, it does not constitute a 'fresh action' but continues as the action in its amended form. For similar reasons it is incorrect to speak of the Amended Claim as having 'superseded' the Original Claim.

[13] In short, the claim form, albeit amended, is still, to all intents and purposes, the claim form. To my mind it would be more apt to view the Amended Claim as being subsumed in the Original Claim with effect from the date when the amendment became so subsumed. Once it is understood in this way, the time lines as set out in CPR Parts 9 and 10 are easily and properly applied without the need to resort to importation or seeking the aid of pre-CPR provisions to give effect to what is, to my mind, the plain and obvious construction of the word "amend" as understood in its natural context. Accordingly, whether the defendant filed an acknowledgement of service to the Original Claim before service on him of the Amended Claim matters not. The fact that an Amended Claim has been filed and served on the defendant subsequently, does not affect the legal efficacy of the 'acknowledgement of service' filed in respect of the Original claim or the Amended Claim. It holds good for both as the Amended Claim is, as a matter of law, no more than the Original Claim in amended form. Similarly, a defence filed in respect of the Original Claim would be efficacious in respect of the Amended Claim although a defendant may, if desirable, file an amended defence, which to all intents and purposes would be 'the defence' to be filed in accordance with the

timeline set out in CPR 10.3(1). Mr. Tyme, counsel for the appellant is quite right in his contention that 'the amended claim was served on the appellant on 22nd June 2012. In keeping with Rule 10.3(1) of the Civil Procedure Rules the appellant had 28 days in which to file his Defence; that by filing his Defence on 19th July, 2012 the Appellant was within the time specified for him to do so…'. In my judgment, the drafters of CPR 2000 must have considered the matter and concluded that it was not necessary to state that which (on applying the natural meaning of words within their context) is plain and obvious.

Conclusion

[14] Based on the foregoing, it follows that the learned trial judge was quite wrong not to set aside the default judgment 'in default of acknowledgment of service' pursuant to CPR 13.2(1) when there was an effective 'acknowledgment of service' filed on 29th May 2012 to the Original Claim. CPR 13.2(1) does not admit of a discretion. The learned trial judge was required as a matter of law to set aside the default judgment entered 'in default of acknowledgment of service' as having been wrongly entered. I accordingly allow the appeal and make the following orders:

1. The order of the trial judge made on 9th November 2012 refusing to set aside the default judgment entered on 4th September 2012, is hereby set aside.
2. The default judgment entered on 4th September 2012, the terms of which were fixed on 20th November 2012, is hereby set aside pursuant to CPR 13.2(1) as having been wrongfully entered.
3. The substantive matter shall be set down by the Registrar of the Court on a date to be fixed for the conduct of a first case management conference pursuant to CPR 27.3.
4. The respondents shall bear the costs of this appeal fixed in the sum of $2,500.00.

[15] Finally, I am grateful to counsel on both sides for their well-written submissions.

Dame Janice M. Pereira
Chief Justice