THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2015/0014

BETWEEN:

[1] M. GROUP RESORTES, S.A.
[2] JALOUSIE PLANTATION DEVELOPMENT COMPANY (2005) LIMITED

Appellants

and

[1] PLACIDE LASCARIS
[2] PAUL JOSEPH
[3] ANDREW PILTIE
[4] JOHN JOSEPH
[5] OWEN PETER
[6] TERRY SOULAGE
[7] HUGH JOSEPH
[8] THOMAS FONTENELLE
[9] MARTINUS HIPPOLYTE

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On the written submissions:

Mr. Mark D. Maragh of Amicus Chambers for the Appellants
Ms. Edith Petra-Nelson of Greene, Nelson & Associates for the Respondents

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2016: August 29.

Civil Appeal – Interlocutory appeal – Judgment in default of defence – Claim for unpaid wages – Whether by filing a reply to the appellants' late defence the respondents waived their right to default judgment – Whether the learned master had any jurisdiction to make order entering judgment in default of defence in the absence of an application by the respondents under Civil Procedure Rules 2000 Parts 11 and 12 – Whether the effect of filing a reply, having regard to the pending application for default judgment, triggered Practice Direction No. 1 of 2012 which then required the master to exercise her case management powers and give directions for the future conduct of the matter

Held: dismissing the appeal and ordering costs to the respondents in the amount of $1,000.00 that:

1. The principle of waiver essentially states that if a party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, with the intention that the other party should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. In the case at bar, the appellants in filing an irregular defence on 19th February 2015 did not rely or act upon any conduct by the respondents. Furthermore, the action of the respondents in taking the procedural step available to them under the Civil Procedure Rules 2000 "CPR" 10.9 in filing a reply to the defence did not waive their right to the requested judgment in default of defence and no such waiver should be inferred from their conduct. In the circumstances, the respondents having satisfied the conditions in CPR 12.5 were entitled to the entry of judgment against the appellants as of the date of the filing of the request for judgment, notwithstanding the later filing of the appellants' defence. Therefore, the learned master did not err when she entered the judgment that the respondents had become entitled to since the filing of the second request for judgment on 4th February 2015.

   St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited SKNHCVAP2002/0006 (delivered 1st March 2003, unreported) applied; Mark Brantley v Hensley Daniel and Clement Liburd NEVHCV2013/0118 (delivered 12th March 2014, unreported) applied; W.J. Alan & Co. v El Nasr Export and Import Co. [1972] 2 QB 189, 213 applied.

2. The learned master found that the request complied with the provisions of Part 12 of the CPR and the court office was duty-bound upon receipt of the request to enter judgment in default against the appellants. The master was therefore correct to proceed on the respondents' extant request.

   Civil Procedure Rules 2000 Part 12 applied.

3. The appellants' reliance on Practice Direction 12 dealing with default judgments in misconceived. The relevant part of the Practice Direction applies when the time for filing an acknowledgment of service or the defence has expired and the claimant has not applied for judgment under CPR 12.4 or 12.5. In that situation, the court must fix a status hearing. In this case, there was a request for judgment under CPR 12.5 and so the Practice Direction does not apply.

JUDGMENT

[1] WEBSTER, JA [AG]: This is an interlocutory appeal against the order of the learned master made on 30th April 2015 by which she entered judgment in default of defence against the appellants in an amount to be determined by the court.

Background

[2] On 2nd December 2014, the respondents filed a claim against the appellants for unpaid wages. The appellants filed acknowledgments of service but did not file defences within the time prescribed by the Civil Procedure Rules 2000 ("CPR"). The respondents filed a request that judgment in default of defence be entered for the respondents. The request is not included in the record of appeal and there is no evidence supporting or opposing the request for judgment, nor the appeal itself. However, it appears from the skeleton arguments filed by the parties that it is undisputed that the respondents' request for judgment was filed on 7th January 2015 and refiled on 4th February 2015 at the request of the registrar. Up to the time of the case management conference, the registrar had not granted or denied the request for judgment.

[3] On 19th February 2015, the appellants filed a joint defence to the claim and on the same day the registry issued a notice of hearing of the case management conference on 30th March 2015. On 24th March 2015, the respondents filed a reply joining issue with the appellants on their defence.

[4] On 30th March 2015, the case management conference was adjourned to 30th April 2015 to allow new counsel for the appellants to review the file and regularise his status in the

matter. At the resumed case management conference, the master made the following findings:

> "AND UPON NOTING the request to judgment in default of defence filed by the claimants [respondents] having complied with the provisions of CPR 12.5
> AND upon counsel for the defendants [appellants] being of the view that the claimant having filed a reply to the defence has waived the request for judgment in default
> AND being of the contrary view that the court must enter a default judgment once a request was made prior to the filing of the defence unless the claimant withdraws the [sic] expressly withdraws the request for default judgment."

[5] The master then entered judgment in default of defence for the respondents based on the outstanding request for judgment filed by the respondents, which had not been withdrawn, and gave the appellants leave to appeal her decision ("the 30th April Order").[1]

Issues on the Appeal

[6] The appellants filed their notice of appeal on 22nd May 2015 setting out seven grounds of appeal. The issues that arise from the grounds of appeal, as set out in paragraph 6 of the appellant's skeleton arguments, are:

(a) whether by filing a reply to the late defence of the appellants the respondents waived their right to a default judgment;

(b) whether the learned master had any jurisdiction to make the 30th April Order in the absence of an application by the respondents under CPR 11 and 12; and

(c) whether the effect of filing a reply, having regard to the pending application for default judgment, triggered Practice Direction No. 1 of 2012 which then required the master to exercise her case management powers and give directions for the future conduct of the matter.

[1] The 30th April Order was not included in the record of appeal and the court had to work with an unsealed copy provided by the Registry.

The Effect of the Reply

[7] The respondents' request for judgment was filed under CPR Part 12.5 which states that "*The court office at the request of the claimant must enter judgment for failure to defend if…*" the conditions set out in the rule are satisfied. The rule is mandatory and once the conditions have been satisfied the court office must enter judgment for the applicant. The wording of the 30th April Order confirms that the respondents had satisfied the conditions in Part 12.5.[2]

[8] The respondents having satisfied the conditions in Part 12.5 they were entitled to the entry of judgment against the appellants as of the date of the filing of the request for judgment, notwithstanding the later filing of the appellants' defence. In support of this obvious proposition, counsel for the respondents relied on St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited[3] which involved an application by the defendant, prior to filing his defence, to strike out a claim, followed by a request by the claimant for judgment in default of defence. The claimant's request for default judgment was entered by the court office. The defendant applied to set aside the default judgment but the trial judge found that the time for filing the defence had expired and that the judgment was regularly entered. On appeal the Court of Appeal reversed the judge's decision finding that the filing of the strike out application by the defendant stopped time from running for the filing of the defence and that the court office was obliged to set a date for the hearing of the strike out application before dealing with the defendant's request for default judgment. On the issue of how the court office should deal with sequential applications filed by the parties to a claim, Saunders, JA said at paragraph 17 –

> "Before examining the judge's reasons it is important to re-emphasise an important philosophical change that has been brought about by the new CPR. It is that fundamentally, responsibility for the active management of cases now resides squarely with the court."

[2] See paragraph 4 above.
[3] SKNHCVAP2002/0006 (delivered 1st March 2003, unreported).

And at paragraph 18 –

> "The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first in time. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the court office to ensure that sequence resulted in a denial of justice to the bank."

[9] The respondents also relied on the case of Mark Brantley v Hensley Daniel and Clement Liburd[4] for the proposition that a defence filed out of time after a request for judgment has been filed is not properly before the court.

[10] Relying on the principles from the cases, I find that the respondents were entitled to judgment against the appellants on the filing of the request for judgment on 4th February 2015 and it was unnecessary for them to file and serve a reply to the defence that the appellants had filed without authority on 19th February 2015.

[11] The filing and service of a reply is a procedural step contemplated by CPR 10.9 which provides that a claimant may file and serve a reply to a defence 14 days after service of the defence. If the claimant does not file a reply, there is an implied joinder of issue on the defendant's defence. The reply was filed at a time when the respondents were still awaiting a decision from the court office regarding their request for judgment. At that stage, the respondents would have been better off writing to the court office enquiring about the status of their request for judgment, but the course that they adopted does not, in my opinion, mean that they waived their right to the judgment that they requested, and, as it turned out, to which they were entitled.

[12] The test for waiver has been described in various judgments of the courts. Lord Denning M.R. in W.J. Alan & Co. v El Nasr Export and Import Co.[5] described it as:

> "The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the

[4] NEVHCV2013/0118 (delivered 12th March 2014, unreported).
[5] [1972] 2 QB 189, 213.

> first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa per Azioni v. Davidsons (Manchester) Ltd*. [1952] 1 Lloyd's Rep. 527, 539."

[13] In the case at bar, the appellants did not rely or act upon any conduct by the respondents. They filed an irregular defence on 19th February 2015. Instead of returning the defence to the appellants, the court office accepted it and immediately issued a notice of hearing for the case management conference. The respondents then exercised the option available to them under CPR 10.9 and filed a reply to the defence. This, as I said above, was an optional step that was unnecessary on the facts of this case.

[14] The only step that was taken in the proceedings after the filing of the reply was the attendance at the case management conference by both parties. This was done in compliance with the case management notice issued by the court office on 19 February 2015, and not because the respondents had filed a reply to the defence on 24th March 2015. There is no evidence that the appellants took any step as a result of the filing of the reply, or that the respondents had abandoned their request for a default judgment. In my opinion, the learned master did not err when she entered the judgment that the respondents had become entitled to since the filing of the second request for judgment on 4th February 2015.

[15] In the circumstances, I find that the respondents did not waive their right to the requested judgment in default of defence and no such waiver should be inferred from their conduct in taking the procedural step of filing a reply to the defence filed by the appellants.

Master's jurisdiction to make the 30th April Order

[16] The issue of the learned master's jurisdiction to make the 30th April Order can be disposed of swiftly. The learned master found that the request "complied with the provisions of CPR 12" and, as stated above, the court office was duty-bound upon receipt of the request to enter judgment in default against the appellants. Why they did not do this is not apparent from the record. A fresh application under CPR 11 or 12 was

completely unnecessary. The master was correct to proceed on the respondents' extant request.

Practice Direction 12

[17] The appellants' reliance on Practice Direction 12 dealing with default judgments in misconceived. The relevant part of the Practice Direction applies when the time for filing an acknowledgment of service or the defence has expired and the claimant has not applied for judgment under CPR 12.4 or 12.5. In that situation, the court must fix a status hearing. In this case, there was a request for judgment under CPR 12.5 and so the Practice Direction does not apply.

Miscellaneous

[18] There are two other matters to be disposed of:

(a) The appellants requested an oral hearing of the appeal in their notice of appeal. We do not think an oral hearing is necessary to dispose of this appeal.

(b) The appellants reserved the right in their skeleton argument to make further submissions when they receive the learned master's reasons for her decision. There is nothing in the record of appeal showing that they requested the reasons and in any event the reasons set out in the 30th April Order are sufficient to show why the master came to the decision that she did.

Order

[19] In the circumstances, I would dismiss the appeal with costs of $1,000.00 to the respondents.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur

Mario Michel
Justice of Appeal