EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: BVIHCV2015/0313

BETWEEN:

OLGA NICHOLS

Claimant

and

EPICUREAN HOLDING LIMITED d.b.a. HARBOUR MARKET

First Defendant

ROADTOWN WHOLESALE TRADING LTD.

Second Defendant

Before:
Eddy Ventose — Master [AG.]

Appearances:

Ms. Stacy Abel for the Claimant
Mr. John Carrington Q.C. for the Defendants

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2016: November 9
2017: January 13

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JUDGMENT

1. VENTOSE, M. [AG.]: Before the court are three matters: first, a request by the Claimant for judgment in default of acknowledgment of service filed on 11 March 2016; second, an application by the First Defendant for an extension of time to file a defence filed with sworn affidavit on 15 March 2016; and, third, an application by each of the First and Second Defendants to strike out the amended claim form and amended statement of claim for not disclosing any reasonable grounds for bringing a claim in negligence against the First and Second Defendants as occupier and controller of the property in question filed on 18 October 2016.

2. At the hearing on 9 October 2016, the parties were asked to file submissions and authorities on the question: (a) whether the request for judgment in default of defence can be entered where the defendant has filed a defence (in compliance with CPR 12.5(c)(i)) but outside the 28 day period required by CPR 10.3.(1); and (b) if the answer to this question is yes, what is the consequence for the First and Second Defendants' applications to strike out the statement of claim and the application for extension of time for filing and serving a defence. The parties also asked to file submissions and authorities on the applications of the First and Second Defendants that the amended claim form filed on 1 February 2016 and amended statement of claim filed on 26 January 2016 should be struck out against the First and Second Defendants pursuant to CPR 26.3(1)(b) and (c).

## Background Facts

3. The background facts as outlined in the statement of case of the Parties are as follows. The Claimant originally claimed on 11 November 2015 against the Second Defendant, inter alia, general damages for pain and suffering and loss of amenities, special damages and aggravated damages as a result of the negligence of the Second Defendant.

4. The Claimant avers that on 16 October 2016 when she visited Harbour Market, a supermarket, to do some shopping she used the wooden staircase to access the building. She also avers that on the way up the stairs she used the handrail on the right side of the staircase. However, on her way down, she moved to the other side to allow another customer who was ascending the staircase to pass. The Claimant also avers that while descending the staircase she fell and injured her foot through no fault of her own. She claims that there was no handrail or other safety device on the left side of the staircase. The Claimant claims that the Second Defendant failed to: (1) take reasonable steps to ensure the safety of customers using the staircase; (2) provide adequate warning or any warning at all of the stairs as a hazard to customers; (3) implement proper safety measures to ensure the safety of the stairs; and (4) take reasonable care for the Claimant's safety whilst on the premises.

## Procedural History

5. As mentioned above, the claim was filed on 11 November 2015. The Second Defendant acknowledged service on 26 November 2015 and filed a defence on 14 December 2015. The essence of the defence of the Second Defendant is that it does not own or operate the supermarket known as Harbour Market or occupy the premises on which the supermarket operates. In light of this, it is understandable why the defence consists mainly of denials.

6. On 26 January 2016, the Claimant amended the statement of claim to add the First Defendant as a party. In the amended statement of claim, the Claimant avers that the First Defendant is physically located at Soper's Hole West End, Tortola, where the alleged incident occurred. The Second Defendant, the Claimant further avers, owns and operates a chain of supermarkets, one of which is operated by the First Defendant and is marketed and advertised as a branch of the Second Defendant under the name "Harbour Market". The claim form was amended on 1 February 2016.

7. The First Defendant filed an acknowledgment of service on 10 February 2016, stating that the claim form was received on 5 February 2016. On 11 March 2016, the

Claimant filed a request for judgment in default of defence against the First Defendant. The First Defendant, on 15 March 2015, filed an application with sworn affidavit for an extension of time to file a defence. The grounds of the application were that: (1) the delay was not intentional and arose because of the absence of counsel for the First Defendant from the jurisdiction for the period within which the defence was to be filed; (2) the defence was only three (3) clear days out of time; (3) the proposed defence has a realistic prospect of success; and (4) the Claimant would not suffer any prejudice from the late filing and service of the defence.

8. Subsequently, on 18 October 2016, both the First and Second Defendants filed an application under CPR 26.3(1)(b) and (d) to strike out the amended claim form and amended statement of claim for not disclosing any reasonable ground for bring a claim in negligence against the First and Second Defendants as occupier and controller of the property in question.

## The Three Applications

9. As mentioned earlier the court has to consider three matters, namely: (1) a request for judgment in default of acknowledgment of service filed on 11 March 2016; (2) an application filed on 15 March 2016 by the First Defendant for extension of time to file a defence filed; and, (3) an application by each of the First and Second Defendants to strike out the amended claim form and amended statement of claim for not disclosing any reasonable grounds for bringing a claim in negligence against the First and Second Defendants as occupier and controller of the property in question filed on 18 October 2016.

10. In the normal course, applications are heard on a first in time basis. This would suggest that the request for judgment in default of acknowledgment of service should be heard first because it was filed first on 11 March 2016. CPR 12.5 makes it clear that the court office at the request of the claimant must enter judgment for failure to defend if the conditions are satisfied. This aspect will be explored fully later. However, during the hearing, Counsel for the First Defendant argued that the court has no

jurisdiction to enter judgment in default because the CPR 12.5 states that it is for the court office to enter judgment at the request of the claimant. It would be surprising indeed if the court cannot enter judgment in default under either CPR 12.4 or CPR 12.5 at the request of a claimant if all the conditions are satisfied and the matter is properly before the court. The rules are worded in this manner to ensure greater efficiency since entry of judgments in the circumstances outlined in CPR 12.4 and CPR 12.5 would involve no judicial discretion and are purely administrative in nature.

11. If the request for judgment in default of defence is dealt with first and is successful it would effectively put an end to the application for an extension of time to file the defence and the application to strike out the amended statement of claim. In such circumstances, in order to give effect to the overriding objective to deal with cases justly, the court is granted the power under CPR 26.1(2)(d) to decide the order in which issues are to be tried which by parity of reasoning would also include the power to determine the order in which applications are to be heard to do substantive justice between the parties. In addition, CPR 26.2(w) gives the court the power to take any step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective. This general power is sufficient to permit the court to decide the order in which applications are heard to better manage the case and to further the overriding objective.

12. In *St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited* (Civil Appeal No.6 OF 2002 dated 31 March 2003), Barrow JA [A.G.] stated (at [39]) that:

> The overriding objective of CPR 2000, to enable the court to deal with cases justly, dictates that the effect of filing an application to strike out a claim as an abuse of the court's process *is to oblige the court office to refuse to enter default judgment*. (emphasis added)

13. In that decision, the Court of Appeal had to consider a case where the defendant did not file a defence because it had previously applied to strike out the claimant's

statement of claim. While the application was awaiting a hearing, the claimant made a request for the Registrar to enter judgment in default of defence. The issue for the Court of Appeal was whether the mere fact of the filing of that application to strike out stopped time from running in relation to the period within which a defence should have been filed. The timing in *Caribbean 6/49 Limited* is different from the case at bar because in that case the request for judgment in default of defence was made after the application to strike out had been filed. A critical factor in that case was that the request complied with CPR 12.5 so the court office was obliged to enter default judgment. In the case at bar, the request for judgment in default of defence was made earlier in time to the application to strike out the amended statement of claim. This matters little for reasons that will become clear later. In *Caribbean 6/49 Limited* Saunders JA (Ag.) emphasised (at [18]) that:

> 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.

14. However, one must be cautious with the use of the words "must" in CPR 12.5. It would suggest that once the conditions are satisfied there is no discretion, and that judgment in default must be entered. However, Barrow JA (Ag.] (at [27]) stated that:

> It has been said that this process involves no judicial decision or discretion, that it does not even require approval, and that the entry of default judgment is rather more in the nature of an administrative act than of a judicial character, see 14 Atkin's Court Forms 2nd edition, 1996 issue, at 323. Even under the former Rules of the Supreme Court I doubt that the process was always purely mechanical because the Registry was required at least to ensure that the claim was properly made and that the documents tendered were in order. It is known registry practice,

in some jurisdictions, for the Registrar to refuse to enter a default judgment when the defendant has applied to strike out the suit.

15. The Court of Appeal is making reference to known registry practice to refuse to enter a default judgment when the defendant has applied to strike out the claim. There is no reference to whether chronologically the application to strike out was first in time or filed after the request for default judgment. As Barrow JA [Ag.] stated:

> The overriding objective of CPR 2000, to enable the court to deal with cases justly, dictates that the effect of filing an application to strike out a claim as an abuse of the court's process is to oblige the court office to refuse to enter default judgment. Because the default judgment ought never to have been entered in these circumstances the learned judge ought to have set aside the default judgment.

16. This principle is of general application and applies to a genuine application to strike out a claim – one that goes to the heart of the claim rather than some procedural default, which may be cured under the court's case management powers. Consequently, notwithstanding the First and Second Defendant's applications to strike out were the third of the three matters before the court, I will proceed to hear them first. If successful, it would render moot the other two applications for there would be no claim for which judgment in default must be entered and no defence would therefore be needed.

## The Application to Strike Out

17. The First and Second Defendants apply pursuant to CPR 26.3(1)(b) to strike out the amended claim form and amended statement of claim for not disclosing any reasonable grounds for bringing a claim in negligence against the First and Second Defendants as occupier or controller of the property in question. The First Defendant avers that the claim was originally filed against the Second Defendant but it was subsequently amended to add the First Defendant as a party. The defence of the First Defendant was filed on 15 March 2016.

18. In that defence, the First Defendant admits that it owns a chain of supermarkets but states that: (1) it does not own or operate the supermarket known as Harbour Market; that the staircase is well constructed and it poses no concealed danger to any user; and (2) the Claimant's fall was caused by her own failure to pay proper attention to her decent of the staircase and to use the stair rail on the steps or otherwise to take proper care to prevent injury to herself.

19. The court has the undoubted power to strike out a claim but that power must be exercised in exceptional circumstances. In *Real Time Systems Ltd v Renraw Investments Ltd* [2014] UKPC 6, the Judicial Committee of the Privy Council stated that:

> 17. In that connection, the court has an express discretion under rule 26.2 whether to strike out (it "may strike out"). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to "give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which is to deal with cases justly. As the editors of The Caribbean Civil Court Practice (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period.

20. The power to prevent a party from pursuing or defending a claim should be reserved for rare cases. The court should, in furthering the overriding objective of dealing with cases justly, if appropriate find other reasonable alternatives available to it under its

wide case management powers under CPR 26. That does not mean however that the court could not in a deserving case use its power to strike out when faced with a claim or defence that has absolutely no merit.

21. CPR 8.7(1) and (2) provides as follows:

> (1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.
> (2)The statement must be as short as practicable.

22. The purpose of these two rules is to allow the defendant to know with clarity the case that it has to answer. The claim form and the statement of claim must contain facts that establish the cause of action for which the claim is brought. A failure to establish a cause of action against the defendant may make the claim liable to be struck out under CPR 26.3(1)(b) which provides that:

> 26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

23. Counsel for the Defendants submits that the Claimant alleges that the Defendants were negligent and that her injury was caused by the "negligence and/or breach of statutory duty in common law as the occupiers of the premises". Counsel also submits that the amended claim form and amended statement of claim are incurably bad because: (a) the Claimant does not plead that either Defendant is the occupier of the premises on which she was allegedly injured; (b) the Claimant does not plead that either of the Defendants owes her a duty of care or allege the nature of the duty of care owed to her by the Defendants; and (c) in relation to the allegation of breach of statutory duty, the statute giving rise to the duty has not been pleaded.

24. Counsel for the Claimant submits that the First Defendant, having filed a defence, should not be permitted now to argue that the claim discloses no reasonable ground for bringing the claim against either Defendant. Counsel also submits that the striking out of a statement of case or defence is a draconian step which a court should only take in exceptional circumstances.

25. I agree with Counsel for the Defendants that the amended claim form and the amended statement of claim do not comply with CPR 8.7(1) and (2). However, bearing in mind the nature of an application to strike out which would effectively shut the door to the Claimant, it should only be granted in clear and deserving cases. Striking out is not the first and primary response of the court and pursuant to CPR 26.1(1)(w) the court may "give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which is to deal with cases justly. The court may give an "unless order" directing the Claimant to amend within a specified time period the claim form and statement of claim to comply with CPR 8.7(1) and (2) failing which the matter will be struck out.

The Request for Judgment in Default

26. The request for judgment in default of defence against the First Defendant was filed on 11 March 2016. However, the Claimant did not pursue this and the matter was sent to mediation on 15 March 2016. The mediation was unsuccessful and the matter was listed for case management and on 27 May 2016 the Claimant was directed to file and serve a response to the application for an extension of time to file a defence that was filed by the First Defendant on 15 March 2016.

27. Barrow JA (Ag.] in *Caribbean 6/49 Limited* doubted that the process of entering judgment in default was always purely mechanical because the Registry was required at least to ensure that the claim was properly made and that the documents tendered were in order. In the case at bar, the request for entry of judgment in default of defence contained both specified and unspecified sums. A claimant who applies for default judgment must file a request in Form 7 as required by CPR 12.7. Form 7 can

only be used where the claim is for judgment for a specified sum. If the judgment is for an unspecified sum, the Claimant is mandated to use Form 32 pursuant to CPR 12.10(1)(b). The request for judgment in default contains both specified and unspecified sums. This is not necessarily fatal as the Claimant pursuant to CPR 12.8(3) may abandon the claim for the unspecified sum and permit the court office to enter default judgment for the specified sum, or if the Claimant does not wish to abandon the unspecified sum, judgment may be entered for an amount to be decided by the court.

28. If that were the only issue with the request for entry of judgment in default of defence then matters could be put right. However, the request also contains other errors, as noted by the Defendants, such as: (1) including a claim for loss of income as "special damages" which is prohibited by CPR 2.4 for not indicating whether the Claimant was in a position to prove damages or give an estimate of time the Claimant requires to deal with the assessment as required by CPR 16.2 and (2) the costs claimed were incorrect as fixed costs cannot be claimed in relation to a claim for an unspecified sum of money pursuant to CPR 65, Appendix A, Table 1. In such circumstances, it is unlikely the court office or the court would enter judgment in default of defence as requested by the Claimant.

29. Moreover, the Claimant made a request for entry of judgment in default of defence against the First Defendant in a claim where there are two defendants. This means that CPR 12.9 is engaged and the Claimant should have made an application to the court with supporting affidavit. CPR 12.9 states that:

> (2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –
> (a) can be dealt with separately from the claim against the other defendants –
> (i) the court may enter judgment against that defendant; and
> (ii) the claimant may continue the proceedings against the other defendants;

(b) cannot be dealt with separately from the claim against the other defendants, the court –

(i) may not enter judgment against that defendant; and

(ii) must deal with the application at the same time as it disposes

of the claim against the other defendants.

30. For the above reasons, the request for default judgment is defective and judgment in default of defence cannot be entered against the First Defendant. In light of this, it is not strictly necessary to answer the two questions posed to the Parties at [2] above.

Application for Extension of Time to File a Defence

31. The First Defendant applied on 15 March 2016 for an extension of time for filing a defence. If judgment in default of defence was granted by the court or the court office, this application would of necessity lapse. Counsel for the Defendants argues that the filing of a defence interrupts any entry of judgment under CPR 12.5(c). This is now a moot in light of the finding that the request was irregular and could not have been entered in favour of the Claimant by the court office or the court. I have serious doubts as to whether the mere fact of filing a defence out of time prevents the entry by the court office of a proper request for judgment in default of defence. In this regard, the Court of Appeal decision in *Rolle v Lander* (COMHCVAP 2013/0025 dated 20 October 2014) supports this view (see [11]-[14]). Nothing in the decision of the Judicial Committee of the Privy Council in *Attorney General v Keron Matthews* [2011] UKPC 38 undermines the clear logic of the Court of Appeal in *Rolle v Lander*.

32. CPR 10.3(9) states that a defendant may apply for an order extending the time for filing a defence. The CPR provides no guidance as to how the court is to exercise its discretion whether to grant leave to the defendant to file a defence out of time. However, Chief Justice Dennis Byron provided some guidance in *Rose v Rose* (Civil Appeal No. 19 of 2003 dated 22 September 2003) as follows:

Granting the extension of time is a discretionary power of the Court, which will be exercised in favour of the applicant for good and substantial reasons. The matters which the Court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the Respondent if the Application is granted.

Length of the Delay

33. The defence of the First Defendant was due on 4 March 2016, the claim form having been received on 5 February 2015. The defence was filed on 15 March 2016. The delay of eleven (11) days cannot be regarded as inordinate.

The Reason for the Delay

34. The First Defendant avers that the reason for the delay was that Counsel for the First Defendant was out of the jurisdiction attending trials in Dominica and Antigua and then seeking urgent medical attention. Consequently, the First Defendant was not able to take instructions in a timely manner to file the defence. No evidence was submitted to substantiate any of the reasons proffered. In relation to the first reason, the Court of Appeal in *Rose v Rose* has stated (at [4]) that:

> [The Court of Appeal] have expressed the view on many occasions that the lack of diligence of an attorney is not a good reason for delay, whether it is explained in terms of the volume of work the attorney is maintaining, or as in this case the difficulties experienced in communications.

35. Since the delay was not inordinate there is no need for any detailed examination of the reasons for the delay. The reasons do however seem tenable in the circumstances.

The Chance of Success

36. The First Defendant states that the defence has a good prospect of success in that it pleads that the First Defendant was not negligent in that the staircase was well constructed and well-lit and was provided with a stair rail which the Claimant was at fault in failing to use or otherwise the Claimant failed to pay proper attention while descending the staircase.

### The degree of prejudice

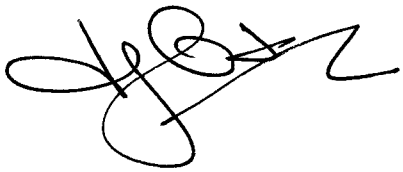
37. In addition, the First Defendant also states that the Claimant has suffered no prejudice in that the matter has proceeded through case management and mediation without any delay in the proceedings since the defence was served.

### Conclusion

38. Having considered the facts and authorities it is ordered as follows:

    (1) The Claimant's request for judgment in default of defence is refused.
    (2) The First and Second Defendants' applications to strike out the amended claim form and amended statement of claim are refused.
    (3) Leave is granted to the Claimant to further amend the claim form and statement of claim to comply with CPR 8.7(1) and (2) within 28 days of today's date. A failure to comply shall result in the statement of case being struck off.
    (4) Leave is granted to the First Defendant to file and serve a defence and the defence filed on the 15 March 2016 to be deemed properly filed.
    (5) The matter shall proceed in accordance with the CPR.
    (6) No order as to costs.

39. I wish to thank both Counsel for their submissions and authorities.



Eddy Ventose

Master [AG.]