EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCM2018/ 0077

BETWEEN:

BANK OF SAINT LUCIA LIMITED

Claimant

And

1. **FRANCIS SAMUEL**
2. **JUSTINA SAMUEL**

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:

Ms Kristian Henry for the Claimant
Ms Alberta Richelieu for the First Defendant
Mr Leevie Herelle for the Second Defendant

2019: July 24
August 2
August 16 [Re-Issued]

DECISION

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The Bank of Saint Lucia Limited ("the Bank") filed a claim[1] for sums allegedly owed by the defendants. The claim is premised on a loan granted to the defendants by the Bank. The loan is secured by a hypothecary obligation registered at the Land Registry.

[1] On 27th August 2018

[2] Both defendants were served with the claim on 13th September 2018. The first defendant ("Mr. Samuel") filed an acknowledgement of service admitting the entire claim, together with an application to pay by installments[2], within the time stipulated for doing so. The second defendant ("Ms Samuel") failed to file acknowledgement of service or defence, within the stipulated time.

[3] On 19th July 2019, the Bank filed two requests for judgment pursuant to the Civil Procedure Rules 2000 ("the CPR") namely; judgment on admission (Form 8) against Mr. Samuel and judgment in default of acknowledgement of service (Form 7) against Ms. Samuel. At that time Ms Samuel had not filed an acknowledgement of service or defence and the time for doing so had expired. Four days later on 23rd July 2019 she filed a signed but undated defence. Then on 24th July 2019, she filed an application for extension of time to file her defence and for relief from sanctions. It was accompanied by an affidavit in support and draft defence which was duly signed and dated by her and her legal practitioner.

The Issues

[4] The issues which have arisen for consideration are:

1. Whether the Bank ought to have made its request for judgment in default of acknowledgement of service via notice of application with affidavit in support pursuant to CPR 12.9 and not by a request in Form 7, on the basis that the claim is against more than one defendant?

2. Whether judgment should be entered against both defendants on the premise that the Bank's requests for judgment were filed earlier in time or should the Court exercise its case management powers to deal with Ms Samuel's application ahead of the requests for judgment in default?

[2] On 26th September 2018

Law and Analysis

Issue 1 : Whether the Bank ought to have made its request for judgment in default of acknowledgement of service via notice of application with affidavit in support pursuant to CPR 12.9 and not by a request in Form 7, on the basis that the claim is against more than one defendant

[5] Ms Alberta Richelieu Counsel for Mr Samuel referred the court to the case of **Sherman v Glasgow and Campbell**[3] to support the contention that the Bank's request for judgment in default of acknowledgment of service was irregular, having been filed in Form 7 and not by way of notice of application with affidavit in support. The case considered the object and application of Rule 12.9. Mr Leevie Herelle Counsel for Ms Samuel concurred with the suggestion. Ms Kristian Henry Counsel for the Bank argued that the rule was not applicable as the Bank has requested judgment against both defendants.

[6] CPR 12.7 provides that *"a claimant applies for default judgment by filing a request in Form 7."*

[7] CPR 12.9 provides for default judgment in a claim where there is more than one defendant and states:

> *"(1)* ***A claimant may apply for default judgment on a claim for money*** *or a claim for delivery of goods* ***against one of two or more defendants and proceed with the claim against the other defendants.***
>
> *(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." [Emphasis added]*

[3] Claim No.: SVGHCV 259 of 2011 at paragraph 14

[8] The application of the rule has also been addressed in several other cases.[4] On examination of these authorities, it is apparent that the CPR 12.9 applies only where a claimant intends to obtain default judgment against certain defendants and continue with the claim against the other defendants. The rule requires that the court undertake an inquiry into whether the claim can be dealt with separately against the other defendants, before judgment can be entered. It has been said that the "Court" in such instance means a Judge of the High Court or a Master in Chambers but does not include the Registrar. On conclusion of the inquiry the court may either enter judgment and proceed with the claim against the other defendants, or refuse to enter judgment and deal with the request when it disposes of the claim against the other defendants.

[9] In the present case the Bank has requested that judgment be entered against both defendants and has no intention of continuing the claim further, against either one of them. In these circumstances CPR 12.9 would not be applicable. That is so, even where the Bank is seeking to have judgment entered against the defendants, under different rules. In the relation to Mr Samuel the request is made pursuant to CPR 14.6 based on his admission of the whole debt and in the relation of Ms Samuel the request is for judgment in default of acknowledgment of service pursuant to CPR 12.4. Judgment has been requested against both defendants, which if granted brings an end to the claim, save for enforcement.

[10] In the circumstances, I conclude that the request made in Form 7 in relation to Ms Samuel and in Form 8 in relation to Mr Samuel are the appropriate methods for seeking judgment against the respective defendants.

Issue 2 : Should judgment be entered against both defendants on the premise that the Bank's requests for judgment were filed earlier in time or should the Court exercise its case management powers to deal with Ms Samuel's application ahead of the request for entry of judgment in default?

[4] Olga Nichols v Epicurean Holding Limited d.b.a. Harbour Market and Roadtown Wholesale Trading Limited Claim No.: BVIHCV2015/0313; Development Bank of St. Kitts-Nevis v Greame Huggins et al Claim No: SKBHCV2009/0119 at paragraph 7; Mohammad Sadik Atassi and Chirin Atasi v Raghed Murtada and LIVENEVIS Develpments Limtied Claim No.: SKBHCV2015/0283 at paragraph 15.

[11] Mr Herelle argued on behalf of Ms. Samuel that it is not the case that once a request for judgment is filed, the court office must simply proceed to enter judgment. The court is empowered under rule 25.1 (f) of the CPR to determine the order in which applications are to be heard and that power is discretionary. He submitted that Ms. Samuel's defence has merit and is a complete answer to the claim. In the circumstances, she should not be denied the opportunity to defend the claim, where the court is empowered to do justice between the parties by determining the order in which the applications should be heard. He relied on the case of **Olga Nichols v Epicurean Holdings Limited d.b.a. Harbour Market and Roadtown Wholesale Trading Limited**[5] where a Master held that the court had discretion to determine the order in which applications are heard, and exercised such discretion to hear and determine an application to strike out a claim, before considering a request for default judgment which was filed earlier in time.

[12] On behalf of the Bank Ms Henry submitted that CPR 12.4 mandates that judgment be entered upon the request of the claimant where the defendant has not filed an acknowledgment of service within the stipulated time and leaves no room for the exercise of discretion. She argued that the correct approach is that the application filed first in time should be heard first and relied on the case of **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**[6]. She submitted that the Court of Appeal accepted as the general position that applications should be addressed according to the first in time rule, even if a court has the power under CPR 25.1 (f) and (j) to decide the order in which issues are to be resolved, or to set timetables and otherwise control the progress of cases. Ms Henry submitted further that the Bank would be denied justice if judgment was not entered, as it has complied with the rules and worked with both defendants to arrive at a consent position and it is Ms Samuel who has abused the process by failing to comply with the rules.

[13] I have given due consideration to the relevant rules, the cases cited by respective Counsels, amongst others and the contending positions put forward by either side.

[5] Claim No.: BVIHCV2015/0313

[6] Civil Appeal No.6 of 2002 (Saint Christopher and Nevis, delivered 31st March 2003)

[14] CPR 12.4 provides as follows:

> ***"The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –***
> ***(a) the claimant proves service of the claim form and statement of claim;***
> ***(b) the defendant has not filed –***
> ***(i) an acknowledgment of service****; or*
> *(ii) a defence to the claim or any part of it;*
> *(c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;*
> *(d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*
> ***(e) the period for filing an acknowledgment of service under rule 9.3 has expire****d; and*
> *(f) (if necessary) the claimant has the permission of the court to enter judgment."*
> *[Emphasis added]*

[15] CPR 25.1 provides:

> *"The court must further the overriding objective by actively managing cases. This may include –*
> *…*
> *(f) deciding the order in which issues are to be resolved;*
> *…*
> *(j) fixing timetables or otherwise controlling the progress of the case;"*
> *…*

[16] CPR 26.1(2) states:

> *"Except where these rules provide otherwise, the court may –*
> *…*
> *(d) decide the order in which issues are to be tried;*
> *…*
> *(w) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective."*

[17] In the **Olga Nichols case**, the claim was for negligence against the defendants as occupier of certain property and the alleged failure to ensure safety of the premises for customers. The defendants applied to strike out the claimant's statement of case on the basis that the claimant had not pleaded that either defendant was the occupier of the premises, who owed her a duty of care and the nature of any such duty or the statutory provision from which a duty arose.There were three applications before the court filed in the following order:- (1) a request by the claimant for judgment in default of

acknowledgement of service, (2) an application by the first defendant for extension of time to file a defence, and (3) an application by each of the defendants to strike out the amended claim form and statement of claim for not disclosing reasonable grounds for bringing the claim.

[18] The Master accepted the general position that in the normal course, applications are heard on a first in time basis and that the court office must enter judgment for failure to defend once the prescribed conditions are satisfied.[7]" However the Master went on to say that in the circumstances of that case, in order to give effect to the overriding objective for dealing with cases justly, the court is empowered under CPR 26.1(2)(d) to decide the order in which issues are to be tried and correspondingly to determine the order in which applications are to be heard. The Master applied dicta from **Caribbean 6/49** where Barrow JA had said *"…… the overriding objective of the CPR 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."*[8] Barrow JA doubted that the process under CPR 12.5 was purely mechanical, because the Registry was at least required to ensure that the claim was properly made and that the documents tendered were in order. He opined that 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 a claim. Against this backdrop, the Master concluded that although the request for default judgment was filed earlier in time, the application to strike out should be heard first, in order to do justice between the parties.

[19] The chronology of filings in the **Caribbean 6/49 case** were however different to the **Olga Nichols case**. In the former the defendant did not file a defence and instead filed an application to strike out the claimant's statement of claim within the period for filing a defence. The strike out application was not served on the claimant. The period for filing the defence having expired and the claimant being unaware of the application to strike out

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[7] At paragraph 10

[8] At paragraph 12

made a request to the Registrar for judgment in default. Judgment was entered and the defendant applied to set it aside.

[20] The Court of Appeal determined that the defendant was entitled to have the application to strike out heard before the requirement to file a defence arose. It was in these circumstances that Barrow JA opined that the process under CPR12.5 was not purely mechanical and the court ought to have refused to enter judgment where the application to strike out was properly filed prior to the request for default judgment.

[21] In the **Caribbean 6/49 case** Saunders JA held:

> *It is that fundamentally, responsibility for the active management of cases now resides squarely with the court.* ***Here we had a situation where an application was filed and was awaiting the fixing of a hearing so that a Judge in Chambers could decide whether or not the statement of claim should be struck out as being an abuse of the court's process. This application was followed by a later application or request to the Registrar to enter a judgment in default of Defence.*** *If the earlier application to strike out the Claim had been heard first and decided in the bank's favour then there would have been no claim for which to enter default judgment. The suit would have been put to an end. That possible outcome was sufficient in itself to have dictated that the striking out application should have been heard first. Because the later application/request was first entertained, the result was to conclusively deny the bank of its right to a hearing of what was a serious application and one that could have resulted in the dismissal of Caribbean's entire claim.*[9]
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> ***... 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.*[10]

[22] The majority also concluded that the application to strike out was in substance a Part 9.7 application, which if made within the period for filing a defence, operated as a stay of the proceedings until the application is heard and determined and would have taken precedence over any other application or request since its determination in favour of the appellant/ defendant would have resulted in the matter being brought to an end.[11]

[9] At paragraph 17
[10] At paragraph 18
[11] At paragraph 5, per Georges JA

[23] Barrow JA concurred that the strike out application should have been heard before the court office processed the subsequent request for default judgment. He concluded that:

> *"……the court office would have been not only enabled and entitled, in the performance of its duty to decide the order for resolving issues and control the progress of the case, but obliged to refuse to enter the default judgment that had been requested after the defendant had earlier applied to strike out the claimant's entire case. Until the strike out application had been heard it was wrong to enter default judgment which had the ineluctable effect of denying the Bank of its right to a hearing of its application.[12]"*

[24] Barrow JA accepted that under the new rules in particular Part 25 the court must actively manage the conduct of litigation[13] and 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.[14] In so doing he did not disrupt the general rule that the application filed first in time ought to be determined first; neither did the court make any pronouncement which created an exception to the general rule. The strike out application was in fact the earlier one and by its very nature, ought to have been determined first. The **Olga Nichols case** understandably turned on the nature of the contending applications which were before the Master. The particular application having been deemed to operate as a stay of proceedings until it was heard and determined should have been disposed of first, to enable the court to establish whether there was any basis at all for a judgment. That reasoning does not assist Ms Samuel in the present case.

[25] I found the case of **Glenford Rolle v Stephen Lander[15]** to be more analogous to the present case. There the appellant/defendant was served with a claim form and statement of claim and having failed to file acknowledgement of service or defence within the specified time, the respondent/claimant filed a request for judgment in default. A few days later, the appellant filed a defence, and subsequently an acknowledgment of service. When the matter came up for status hearing a Master determined that the respondent was entitled to have judgment and remitted the matter to the Registrar for entry of judgment, provided that the conditions of CPR 12.4 were satisfied. The appellant appealed, on the

[12] At paragraph 29
[13] At paragraph 28
[14] At paragraph 37-39
[15] DOMHCVAP2013/0025A

basis that default judgment could not be entered when the defence had been filed and served before the Master had made the order.

[26] The Court of Appeal held that in relation to CPR 12.5, the critical question is whether at the time the request for judgment in default was made, a defence had been filed. It was said that the filing of a defence subsequent to the filing of a claimant's request for default judgment will not avail a defendant, as upon receipt of the claimant's request, the court must enter judgment for failure to defend, once the conditions set out in CPR 12.5 are satisfied.

[27] The following extract from the judgment of Baptiste JA is instructive:

> *"[13] The trigger for resorting to rule 12.5 is the failure to file a defence within the period for filing a defence and in the case of rule 12.4 it would be the failure to file an acknowledgement of service within the period prescribed by the rules.* ***If the period for filing a defence has passed and a claimant utilises rule 12.5, as he is entitled to do, it certainly would be at variance with logic and contrary to the plain meaning of CPR 12.5 to then complain that the rule cannot be invoked because a defence has been filed. The same would also apply to the non-filing of an acknowledgement of service.*** *In relation to rule 12.5, the critical question has to be whether at the time the request for judgment in default was made, a defence had been filed.* ***Under rule 12.4 the critical question would also be whether at the time when the request for default judgment was made, an acknowledgement of service had been filed. Any other interpretation would deprive the Rules of efficacy…***[16] *[Emphasis added]*
>
> *[14] I now consider the […] effect of the defence being filed after the request for entry of judgment was filed and before the master made her order. In* ***The Attorney General v Keron Matthews****, the Board pointed out that there is no rule which states that if a defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits.* ***The rules, however, makes provision for what the parties may do if the defendant fails to file a defence within the prescribed period. In the present matter, the claim, not being a fixed date claim, the defendant faced the risk of a request by the claimant that judgment in default should be entered in his favour. That risk materialised when the claimant made the request. Upon receipt of such a request the court office must enter judgment for failure to defend if the conditions set out in rule 12.5 are satisfied. Accordingly, the filing of a defence or amended defence, after the filing of a request by the claimant for***

[16] At paragraph 13

judgment to be entered for failure to defend will not avail a defendant…[17]***"*** *[Emphasis added]*

[28] In **The Attorney General v Keron Matthews**[18], the sequence of the filings was the same as in the present case. Gobin J heard both the claimant's application for permission to enter judgment in default of defence and the defendant's application for an extension of time and dismissed the claimant's application, while granting the defendant an extension of time to file and serve the defence. The claimant appealed the decision. The Court of Appeal allowed the appeal and gave the claimant permission to enter judgment in default of defence. The defendant appealed to the Privy Council and there Lord Dyson stated that the rules make provision for what the parties may do if the defendant fails to act within the prescribed period and that if such period has expired the court must enter judgment, if requested to do so by the claimant. It follows therefore that if a defendant fails to file an acknowledgment of service or defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered.[19] That is precisely what has happened to Ms Samuel in the present case. Having failed to file acknowledgment of service or defence and the time for doing so having expired, the Bank has requested that default judgment be entered in its favour.

[29] Applying these principles to the present case I am of the firm view that the Bank's position should prevail. Both **Rolle v Lander** and **AG v Keron Matthews** lend unequivocal support to a conclusion that the Bank is entitled to have judgment entered in its favour. In both cases the defences and application for extension of time were filed out of time and after requests for judgment in default were already properly filed. Both appellate courts came to the same conclusion, without reference or allusion to any discretion to do otherwise and determined that once the request complied with the relevant rule, the court office was obliged to enter judgment for the claimant and that the claimant was entitled to have such judgment.

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[17] At paragraph 14
[18] [2011] UKPC 38
[19] At paragraph 16

[30] In my opinion this Court has no discretion to do otherwise and may not at this stage consider an application by Ms. Samuel to extend the time to file her defence. **Rolle v Lander** emphasizes that what is relevant is the moment at which the request is made. If no defence or application for extension of time to file defence has been filed when a request for default judgment is duly filed, judgment must be entered. Ms. Samuel must resort to CPR 13.3 and apply to have the judgment set aside, if she believes that she has a realistic prospect of successfully defending the claim and is able to surmount the other requirements of that rule.

[31] Even if the court is empowered to depart from the general first in time rule, there must be some compelling reason or circumstance to do so, as seem in case the **Olga Nichols case**. An application for extension of time is nothing akin to an application to strike out which, as has been said, goes to the core of a case. Counsel has argued that Ms Samuel's defence has merit and fully answers the claim. I have perused the draft defence exhibited to Ms. Samuel's application. It speaks of a lack of proper or detailed pleadings by the claimant and the absence of exhibits to support the allegations made. She says that without these exhibits the Bank is unable to prove that she was a party to and signed the loan agreement and hypothecary obligation. I am of the view that these are matters which could easily have been cured through the use of Part 34 to request further and better particulars. These are certainly not matters which would warrant the claim being struck out if such an application was made. Ms. Samuel has knowledge of whether she was party to and signed the loan agreement and hypothecary obligation. She does not deny doing so and tacitly concedes that she did by attempting to mount a plea of undue influence. I have found nothing compelling in her defence and do not believe that these are circumstances which warrant a departure from the general rule.

[32] The CPR provides timelines within which acknowledgement of service and defence must be filed and the consequences if a defendant fails to do so. When Ms. Samuel failed to file acknowledgement of service or defence within the stipulated time she placed herself at risk of having default judgment entered against her. That risk crystalized when the bank filed its

request and complied fully with the requirements of CPR 12.4. At that moment the bank became entitled to have judgment entered against Ms Samuel.

[33] The courts have ruled time and again that litigants are not at liberty to disregard the timelines set by the rules, with impunity. As Counsel for the Bank rightly points out, the Bank duly filed its request for entry of judgment in default first in time and is therefore entitled to have judgment entered in its favour. To do otherwise would amount to a denial of the Bank's right to the fair, economical and timely dispensation of justice ascribed by the rules. The rules are clear as to the options available to Ms Samuel at this time.

[34] Based on the foregoing, I conclude that judgment should be entered for the Bank against both defendants.

Conclusion

[35] I therefore make the following orders:

1. Judgment be and is hereby entered for the claimant against the defendants for the principal sum of $129,572.41 together with interest at the rate of 7% per annum from 19th July, 2014 and continuing on the said sum, until the debt is paid in full.

2. Costs to the claimant in the sum of 2,703.00.

3. The claimant will draw, file and serve this order.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar