

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

GRENADA

Claim Number GDAHCV2017/0403

BETWEEN:

TERRENCE R. JOSEPH

Claimant

-and-

RBTT (GRENADA) LIMITED

Defendant

Appearances:

Gennilyn E. Ettienne for the Claimant; and
Shireen Wilkinson and Dylan Charles for the Defendant

2021: November 30;
2022: February 10
March 08 – via email

**Claimant's applications for judgment and
Defendant's application for extension of time to file defence**

[1] **PARIAGSINGH, M. (Ag.):** - The matter before the Court has had a long and meandering history of applications leading to the present applications before the Court. There are three (3) applications pending. The first in time is the Claimant's application for judgment filed on October 30, 2019 for judgment in default of a defence in favour of the Claimant against the Defendant. The second application is the Defendant's application filed on November 08, 2019. By this application the Defendant seeks an order deeming its defence filed on January 17, 2018 properly filed or alternatively an extension of time to file a defence. The third application is the Claimant's application filed on November 30, 2021 for leave to file a Form 7 in support of or in lieu of the first application for judgment following the Court of Appeal decision in **Lux Locations Limited v Yida Zhang**¹.

¹ ANUHCVP2020/0025

PROCEDURAL HISTORY:

- [2] This claim was commenced on November 03, 2017 by Fixed Date Claim Form and a Statement of Claim.
- [3] An acknowledgement of service indicating an intention to defend was filed on November 09, 2017.
- [4] On December 11, 2017 the Claimant filed an application for final judgment to be entered in default of a defence. This application was made by notice of application supported by an affidavit.
- [5] On December 15, 2017 Glasgow J refused the request for judgment on the basis that the Claimant could not obtain a judgment in default of a defence on a fixed date claim form.
- [6] On December 29, 2017 the Claimant filed a second application. This application was for the Court to deal with the matter summarily at the first hearing. The main ground of this application was that the Defendant did not file a defence to the claim. This application, like the first was made by notice of application and supporting affidavit.
- [7] On January 17, 2018 the Defendant filed a defence to this claim. This defence was filed after the time limited, without permission of the Court and without the consent of the Claimant. It was filed whilst the second application for judgment was pending.
- [8] On February 12, 2018 the Claimant's fixed date claim form came on for hearing and the following order was made:
 - 1) The Court deems the claim to be an ordinary claim in accordance with CPR 8.1

2) The Court Office is to list the matter before the Master for case management at the earliest date.

3) The application for summary judgment is refused with no order as to costs.

[9] This order was appealed to the Court of Appeal which by order made on October 28, 2019 ordered that:

1) The matter is remitted to a Master of the High Court to case manage the claim as a regular claim form on the basis that a defence has not been properly filed.

2) The Registrar is directed to list the matter before the Master as soon as possible

3) Each party to bear their own costs.

[10] On October 30, 2019, 2 days after the order of the Court of Appeal was made, the Claimant filed his third request for default judgment, the first application now before the Court. This request was made by notice of application and supporting affidavit.

[11] On November 08, 2019 the Defendant applied for an extension of time to file its defence or in the alternative to deem its defence already filed as proper. This is the second application now before the Court.

[12] On November 30, 2021 the Claimant filed the third application now before the Court. This application is for permission to file a Form 7 in support of or in lieu of the first application for judgment following the Court of Appeal decision in **Lux Locations Limited (supra)**.

PRIORITY OF APPLICATIONS:

[13] The general rule is that applications are heard in order of their filing unless there is some good reason not to do so. In this case I see no reason to depart from this accepted position. The Claimant made heavy weather in his written submissions

about focus being placed on the Defendant's application for an extension. I agree with Counsel for the Claimant that the application for judgment filed on October 30, 2019 takes precedence.

[14] My understanding of **Attorney General v Matthews**² is that once the Claimant takes the next step towards obtaining a default judgment, the door is essentially closed on the Defendant. That means, on October 30, 2019 when the Claimant made his third application for default judgment, the door was closed on the Defendant. The Claimant's application of October 30, 2019 must therefore be heard first.

ANALYSIS:

[15] The issues which arise on the application of the Claimant for default judgment are; (i) the procedural issues with the application for judgment and (ii) the status of the defence filed.

Procedural issues with the application for judgment:

[16] This Court is bound by the Court of Appeal decision in **Lux Locations Limited** which prescribes that the procedure to obtain default judgment is inter alia, by making a request to the Court Office.

[17] Whilst **Lux Locations Limited** emphasizes that the granting of default judgment is an administrative act performed by the Court Office, in my respectful view Rule 2.6 CPR provides jurisdiction for a Judge or a Master to deal with a request for default judgment.

[18] **Part 2 Rule 2.6 (3) CPR** specifically provides that:

If a step may be taken by a member of the court staff –

² [2011] UKPC 38

- (a) That person may consult a judge, master or registrar before taking that step, and
- (b) That step may be taken by a judge, master or registrar instead of a member of the court staff.

[19] Whilst the form of the application was incorrect in my view the substance of the application was clear. Lord Collins in his introductory remarks in the decision of the Board in **Texan Management Limited & Ors -v- Pacific Electric Wire & Cable Company Limited**³ stated that:

‘It has often been said that, in the pursuit of justice, procedure is a servant and not a master’

[20] It appears that the only hurdle to the Claimant obtaining default judgment is the form used. This, in my view, is a procedural matter which can be resolved by the Court treating the application filed as a Form 7 request for judgment. This is in fact the application that the Claimant filed on November 30, 2021. I see no prejudice in doing so. Further, the Claimant did file a Form 7 request on November 30, 2021. Whilst this request was filed after the Defendant had applied for an extension, I see this application as a part of or sequel to the application filed on October 30, 2019.

[21] What is uncontroverted is that a claim was served with a statement of claim. If the Defendant wished to defend the claim it had to file a defence within 28 days of service of the claim. That was not done. In the circumstances, the Claimant satisfies the requirements which entitle him to a grant of default judgment.

[22] In terms of the relief to be granted to the Claimant, it has to be for a sum to be decided by the Court. The subject matter of the perpetual injunction sought no longer exists as the property has since been sold and that relief is now otiose.

³ [2009] UKPC 46

Status of defence filed:

[23] The defence was filed before the first hearing of the Fixed Date claim (as the claim was originally brought) but after the 28 days had expired. Time runs for the filing of a defence from the date a claim is served. In my view there is no difference with the period of defending whether the claim is commenced by fixed date or regular claim form.

[24] To defend a claim, the Defendant must file a defence. An acknowledgement of service indicating an intention to defend is not the same as defending the claim.

[25] **Rule 10.2 (2) CPR** states that:

- 1) A defendant who wishes to defend all or part of a claim must file a defence (which may be in Form 5).
- 2) If –
 - (a) A claim is commenced by a fixed date claim form in Form 2 and there is served with that claim form an affidavit instead of a statement of claim; or
 - (b) Any rule requires an affidavit in answer instead of a defence the defendant may file an affidavit in answer instead of a defence.
- 3) In this Part the expression “defence” includes an affidavit under paragraph (2)
- 4) If a defence fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered if part 12 allows it.

[26] From the above rule, a defendant who wishes to defend must file a defence. The time for filing a defence is 28 days of service. Rule 10.3(1) CPR makes no distinction between the time for filing a defence to a fixed date claim form and the time for the filing of a defence to an ordinary claim form. It certainly does not say that the Defendant can file his defence any time before the first hearing as the Defendant submitted.

[27] In my view, the fact that the claim was commenced by the wrong originating process is immaterial to the time limited for the Defendant to have filed its defence. The Defendant was served on November 06, 2017 and filed its defence on January 17, 2018. On December 11, 2017 the Claimant applied for default judgment and it was refused. The Claimant again applied on December 29, 2017 and that application was dismissed but on December 29, 2017 when the second application was made, the door was effectively closed on the Defendant.

[28] The Defendant submitted that on a proper interpretation of **Keron Matthews** no permission was required from the Court to file a defence since judgment was not obtained. At paragraphs 14 and 16 the Board stated that:

- '14. I would reject these arguments largely for the reasons given by Mr Knox QC. First, a defence can be filed without the permission of the court after the time for filing has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises. If, as in the present case, judgment has not been entered when the defendant applies out of time for an extension of time, there is no question of any sanction having yet been imposed on him. No distinction is drawn in rule 10.3(5) between applications for an extension of time before and after the period for filing a defence.
- 16. It is striking that there is no similar provision in relation to a failure to file a defence within the time prescribed by the rules. There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the defendant fails to file a defence with the prescribed period: rule 10.3(5) provides that the defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a 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 in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.'

[29] Whist I agree that a defence can be filed after the time limited to do so has expired, there is a qualification to that statement and a distinguishing fact in this case. That is, if the Claimant does nothing then the defence stands. In this case the Claimant took the next step, the Claimant applied for judgment before the defence was filed.

[30] It is not open to the Defendant to simply file a defence at any time before judgment is entered where the Claimant makes an application for judgment as in this case. In the language of the Court, the door is closed on the Defendant when the application is made.

[31] In my view, the Defence filed on January 17, 2018 was improperly before the Court and cannot be considered. A similar approach was adopted in the case of **Mark Brantley v Hensley Daniel**⁴.

[32] In respect of the Defendant's application filed on November 08, 2017 for an extension of time to file a defence, this application was filed after the door was closed to the Defendant. The Claimant's application for judgment having been resolved in his favour, any challenge to the judgment by the Defendant in my view can only properly be made by an application to set aside the default judgment and not by an application for an extension at this time at this stage. In consideration of the foregoing, I hold that the Defendant's application for an extension of time must fail.

[33] Notwithstanding the conclusion above, I will, for completeness, address the point of my jurisdiction to attend to the Defendant's application for an extension of time to file a defence as has been opposed to by the Claimant's attorney.

[34] I do not agree with the submission of Counsel for the Claimant that I do not have jurisdiction to deal with the Defendant's application on the basis that an oral

⁴ NEVHCV2013/0118

application for the same relief was refused by the Court of Appeal. This is not reflected in the order of the Court of Appeal.

COSTS:

[35] On the issue of costs, both sides have done considerable work on these applications.

The Claimant's applications, although ultimately successful, had its procedural challenges. Objection to them was therefore not unreasonable. Similarly, objection to the Defendant's application was not without merit. In the circumstances, I am of the view that a fair balance is that each party is to bear its own costs of the applications.

ORDER:

[36] In the circumstances, it is hereby ordered that:

1. Judgment is granted for the Claimant against the Defendant in default of a defence to this claim for damages, interest and costs to be quantified by the Court;
2. The Claimant's assessment of damages shall proceed before the Master on a date to be fixed by the Court Office;
3. The Defendant's application filed on November 08, 2017 is dismissed; and
4. Each party to bear their own costs of the applications filed on October 30, 2017, November 07, 2017 and November 30, 2021.

**Alvin Shiva Pariagsingh
Master (Ag.)**

By the Court,

Registrar