

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Numbers: **BVIHCV2019/0332**

Between

DAMION MORGON

Claimant

and

(1) THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant

Appearances

Mr. Jamal S. Smith of Counsel for the Claimant

Mrs. Jo-Ann Williams-Roberts Solicitor General for the Defendant

2020: March, 3rd

2020: June, 3rd

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: This is an application by the claimant for request of entry of a default judgment against the Attorney General of the Virgin Islands for failure to file a defence in the matter advanced by the claimant.

Background/Chronology

- [2] On February 13th, 2020, the claimant brought to the attention of the Court and the defendant that he intended to amend the Fixed Date Claim Form, **CLAIM NO. BVIHCV2018/O201**, in essence to give life to the matter **CLAIM NO. BVIHCV2019/0332**, which he had already filed on December 17th, 2019.
- [3] Accordingly, the Court took to case managing the issues that arose and that also made it necessary for the trial date to be vacated. The defendant was of the belief that the application to

amend **CLAIM NO. BVIHCV2018/O201** was only a technical separation of the issues so that the trials of the issues would continue, albeit in separate claims.

- [4] The claimant never fully disclosed to the Court that there was a related and connected request for Default Judgment filed since 17th December, 2020, in the connected **CLAIM NO. BVIHCV 2019/O332**.
- [5] On 3rd March 2020, the Defendant was called to the Registry to collect a Notice indicating that the Case Management Conference in the **CLAIM NO. BVIHCV2019/O332** was to proceed before the Master at 9:15am.
- [6] The claimant had filed on December 17th, 2019, and served the defendant on January 31st, 2020, an application to amend their Fixed Date Claim Form on the day set for Trial in **CLAIM NO. BVIHCV 2018/O201**.
- [7] The claimant on February 13th, 2020, also orally alerted the Court and the defendant of the other applications in **CLAIM NO. BVIHCV2018/O201**, in an effort to seek to have the trial date in **CLAIM NO. BVIHCV 2018/O201** vacated.
- [8] The defendant at this time had already filed a Defence in **CLAIM NO. BVIHCV2018/O201** and the Court proceedings were halted, by the claimant on the date set for trial, from completing the trial on the issues in **CLAIM NO. BVIHCV2019/O332**.
- [9] The defendant had also made an effort to file on January 20th, 2020, a Defence, which failed to comply with the required period for filing the Defence to **CLAIM NO. BVIHCV2019/O332** while preparing for trial in **CLAIM NO. BVIHCV2018/O201**.

Analysis & Findings of the Court

- [10] The right of the claimant to make an application for judgment in default and the power of the court to entertain it is not expressly stated in the **Civil Procedure Rules, 2000 (CPR, 2000) Part 59**, which deals with proceedings by and against the crown. However it has long been recognized and accepted that the Crown Proceedings Act section 29 (2) is to be given full effect.

Section 29 (2) “Provision shall be made by rules of court and Resident Magistrates Court rules with respect to the following matters- (c) ...for providing that in the case of proceedings against the crown, the plaintiff shall not enter judgment against the crown in default of appearance or pleading without the leave of the court to be obtained on application of which notice has been given to the crown.”

[11] A separate rule deals with proceedings against the Crown or State. Guidance to this fact is helpfully provided in **CPR 2000** by a note below rule 12.3(1) (b), which refers the reader to Part 59 which is headed 'Proceedings by and against the Crown'. The opening provision of this Part establishes its scope, by stating:

“59.1(1) This Part deals with claims to which the Crown or the State is a party.”

[12] In order to properly render Judgment in respect of this application, it is absolutely necessary for this Court to carefully consider the provisions of Rule 59.2 of the Civil Procedure Rules, which, as they fall under Part 59 of the Civil Procedure Rules, concern, **“Proceedings by and against the Crown.”** Rule 59.2 (1) – (4) are as follows:- **“(1) Where a claim is made in proceedings against the Crown, the Claim Form or Particulars of Claim must contain reasonable information as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the government department and officers of state involved. (2) At any time during the period for filing an acknowledgment of service under rule 9.3 the Defendant may request information under Part 34. (3) The Defendant’s time for filing an acknowledgment of service is then extended until four (4) days after – (a) the Defendant gives notice in writing to the Claimant that it is satisfied with the information supplied or (b) the Court on the application of the Claimant decides that no further information is reasonably required. (4) The Defendant’s time for filing and serving a defence under rule 10.3 is extended to 28 days after the time for filing an acknowledgment of service under paragraph (3).”** (Emphasis mine)

[13] In a judgment delivered September 18th, 2006 **Rutair Ltd. v. Civil Aviation Authority** [2005] HCV 1748, in the Jamaican court, Campbell J said in his ruling on the issue, that although the CPR is silent on the point, regard had to be given to the express provision in the Crown Proceedings Act as it applied to default judgments. I also adopt the analysis of McDonald-Bishop J (Ag) (as she then was) in **Marcia Jarrett v South East Regional Health Authority, Robert Wan and the Attorney General** [2006] HCV00816 where she expressed that, the purpose and rationale for such a rule remains the same today as it was under the former rules. So, the fact that there is an omission to make such provision in the CPR cannot override the mandatory provisions of the statute which stand in effect until repealed.

[14] Part 59 of the CPR provides specific rules for matters being brought by and against the Crown. Rule 59.2(1) provides that the claim form and particulars of claim must include reasonable information as to the circumstances which lead to the Crown’s liability in the matter and rule 59.2(2)

gives the Crown the right to request further information. This right must be exercised within the 14 days a defendant is required to file an acknowledgement of service. Rule 59.2(3) stipulates that the time for acknowledging service extends for an additional four days after a defendant informs the claimant, in writing, that the response is sufficient, or the court makes a ruling on an application brought by a claimant to the effect that the information given was sufficient and no further information was required. A defendant then has an additional 28 days in which to file a defence as provided for by rule 59.2(4).

[15] The present Rules in England do not contain the requirement for permission to obtain judgment in default against the Crown. It is stated in **Blackstone's Civil Practice 2007** at 20.7, that

“Default judgment in claims against the Crown may now be entered upon filing a request for judgment. An application is no longer necessary. However, a request for a default judgment against the Crown must be considered by a master or district judge, who must be satisfied that the claim form and particulars have been properly served on the Crown in accordance with the Crown Proceedings Act 1947, s. 18, and CPR, r. 6.5 (8).” (Emphasis added.)

[16] Similarly, the present Rules of the Eastern Caribbean Supreme Court do not contain a requirement for permission to obtain judgment in default against the Crown. We have followed the English position. It may be noted, as regards the English position, that the permission requirement in the **English Crown Proceedings Act 1947** was expressly removed by legislation that repealed¹, among other things, paragraph (c) of section 35 (2) of the English Act, which was the provision that the British Virgin Islands Crown Proceedings Ordinance replicated in section 29(2)(c). It does not appear that there has been a corresponding amendment to the British Virgin Islands' legislation.

[17] The Crown Proceedings Act or Ordinance of each Member State and Territory of the Eastern Caribbean Supreme Court is a replication of the English enactment of the same or similar name. The former Rules of the Supreme Court of England provided, in Order 77 rule 9, for permission to first be obtained before entering judgment in default of defence against the Crown. So did the former Eastern Caribbean Rules of the Supreme Court 1970, in Order 54 rule 7(1).

[18] Also, under part 20 of the CPR, 2000, a claimant has the right to amend his statement of case at any point before the case management conference without the permission of the court, and as this case is one in which the defendant had filed a defence resulting in the matter being brought to the

¹ Civil Procedure (Modification of Crown Proceedings Act 1947) Order 2005

stage of case management, the claimant could have amended his statement of claim if the situation so warranted.

[19] **Rule 20.3** of The CPR, 2000 is titled and recites

Consequential amendments

20.3 (1) A defendant served with an amended particulars of claim or a claimant served with an amended counterclaim may amend the defence once without permission within 28 days of service of the amended particulars of claim or counterclaim as the case may be.

[20] When the application for permission to enter default judgment was made in December 2019, the relevant claim was the one filed on December 17th, 2019. It is noted that the defendant had received two almost identical claims on the same issue. It is understandable then, that the defendant's attorney would be dumbfounded as to which matter was to be addressed and this may have caused or contributed in no small way to the defendant not filing a defence as prescribed.

[21] Without any indication of a request for Default Judgment and pursuant to the mutual comprehension and implied undertakings between the parties at the 13th February 2020 extemporaneous Case Management Conference/hearing by my learned sister Justice Ellis, of an Application (filed by the claimant on December 17th, 2019, and served on the defendant on the 31st January, 2020) to amend the Fix Date Claim Form on the day set for Trial in **CLAIM NO. BVIHCV2018/0201**, it was submitted that it was reasonable for the Defendant to understand the Case Management Conference Notice as the next step of the Court's Management of **CLAIM NO. BVIHCV2019/0332** as the process to trial, pursuant to the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000, Part 27, Rule 27.3**.

[22] At the time of filing the claim; **CLAIM NO. BVIHCV2019/0332**, the Court Office would have been cognizant of the previous claim already before the Court and that the claimant and the defendant were parties to the said **CLAIM NO. BVIHCV2018/0201**, which was another matter before the Court, and which included the same substantial claims as those in **CLAIM NO. BVIHCV2019/0332**. The defendant had already filed a Defence to the identical issues raised in **CLAIM NO. BVIHCV 2019/0332** in the ongoing matter listed as **CLAIM NO. BVIHCV2018/0201**. Indeed, **CLAIM NO. BVIHCV2018/0201** was at the trial stage having gone through all case management conferences and disclosure applications.

[23] On February 13th, 2020, the defendant brought to the attention of the Court and the defendant that he intended to amend the Fixed Date Claim with **CLAIM NO. BVIHCV2018/0201**, in essence to

give life to the matter **CLAIM NO. BVIHCV2019/0332** which he had already (prematurely) filed on the 17th day of December, 2019. Between the filing of **CLAIM NO. BVIHCV2019/0332** and the request to enter Default Judgment and the February 13th, 2020 hearing, the claimant did not notify the defendant of his intentions concerning the request for Default Judgment.

[24] Therefore, the defendant was of the view that all the related matters and issues concerning the amendment of the Fixed Date Claim Form on the trial date of February 13th, 2020, in **CLAIM NO. BVIHCV2018/0201**, were already dealt with previously. The claimant's acts should be interpreted other than his being less than frank to the Court and the defendant.

[25] This court has said repeatedly that the CPR 2000 provides for timelines that should be adhered to, unless good reason is given for non-compliance. Litigants cannot abuse the process and expect the court to sanction such abuse.

[26] Rule 12.1(1) of the CPR, 2000, also gives a claimant the right to apply for judgment in default where a defendant has failed to file an acknowledgment of service or a defence within the time frame provided for by the CPR. However, where the claim has been brought against the Crown, permission must be sought and granted by the court before an application for default judgment may be pursued. It is a procedural requirement that this permission is sought and granted before the application is permissible and failure to adhere to this rule will result in the application being faulty - see rule 12.3 (1) (A). The claimant had in fact applied for such permission.

[27] I find that this is a reasonable starting point for the defendant to have determined that the way was clear to file a defence in the matter, certainly in the defendant's mind this is when a clear indication came as to which claim the parties were now to give their full attention. The application to enter default judgment would then have been premature as even though strictly speaking the period allowed by the rules had indeed passed, the defendant would have been at a disadvantage based on the confusion created by the claimant.

[29] From the submissions of the defendant and the submissions filed, it would appear that this obfuscation triggered some discussion as to an extension of time being granted for the defence.

[30] In any event **CPR Rule 20.3** would then become applicable also, since the defendant would then be entitled to a further 28 days from the receipt of the amended claim to file a defence to the amended claim.

[31] Having proceeded to take the defendant to task for not filing a defence in time to the claim filed previously by the claimant, and with a request for judgment in default pending, the claimant then

proceeded to amend his claim in a substantial way, changing the whole basis of the claim, that is, to ask for redress in response to breaches of constitutional rights. In the court's view this could not be allowed since if the court were to accede to the claimant's request it would be giving judgment to a claim which had not been before it at the time of the application and the issues raised were never put before the defendant for a defence to be filed addressing the new and substantial issues raised.

[32] This is in sharp contrast to the previous claim to which the first defence was filed and which would not have formed the factual substratum for this original application by the claimant to enter default judgment. It also does not take into account the fact that the statement of case was substantially amended and as such time began to run for the defendants giving another 28 days after the amended claim was served.

[33] In resolving the present 'Issue' I find then that the application to enter default judgment in default of the filing of a defence could not properly be said to be in respect of the current claim form that is before the court for determination.

[34] There is no question then that the claimant, having amended the Fixed Date Claim Form on several occasions, was premature in his application to enter default judgment as the time permitted by the rules had not expired for the defendant to file its defence in the case.

[35] **Order**

- (i) The claimant's application for default judgment is refused on the basis of the foregoing reasons.
- (ii) The costs of \$USD2, 500.00 of the claimant's application for default judgment are awarded to the defendant. Such costs shall be assessed, if not sooner agreed.
- (iii) The defendant is granted leave to file its defence with respect to the claimant's particulars of claim, if necessary, within 28 days of the lifting of the present emergency curfew orders.
- (iv) The claimant shall file a Reply to the Defence, if necessary, within 14 days of service of the Defence.

- (v) The matter is to be referred to mediation.
- (vi) The matter is to be set for further case management on September 21st, 2020, at the next sitting of the Master's Court in the British Virgin Islands.
- (vii) The Claimant shall file and serve this order.

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar