

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

CLAIM NO. SLUHCV2014/0655

BETWEEN:

MINVIELLE & CHASTENET INSURANCE BROKERS LTD

Claimant

and

1. RISK CONSULTANTS AND INSURANCE BROKERS LTD

2. MULCHAN CASERAM

3. ROBERTINA JOINVILLE

4. CHRISPIN LOUIS

Defendants

Before:

Ms. Agnes Actie

Master

Appearances:

Mr. Mark Maragh of counsel for the claimant

Mr. Peter I Foster Q.C with Ms Renee St Rose for the defendants

2016: May 3.

JUDGMENT

[1] **ACTIE, M.:** Before the court is the claimant's application for an order directing the Registrar to enter judgment in default of defence against the defendants or alternatively that this court enter the judgment in terms of the claimant's request for judgment in default filed on 27th October 2014.

Background Facts

- [2] The claimant is in the business inter alia, of the provision of insurance brokerage services and advice. The second, third and fourth defendants were previous employees of the claimant. The second defendant previously held the position of General Manager/Director of the claimant. The first defendant, Risk Consultant and Insurance Brokers Ltd, was incorporated with the second defendant and his wife as directors. The claimant by claim form and statement of claim filed on 23rd September 2014 claims against the first defendant: (i) a declaration that the first defendant as the instrumentality of the second defendant, was conceived for the unlawful purpose of stealing the custom of the claimant resulting in damage and loss to the claimant; and (ii) an account of all sums wrongfully earned by the first defendant as a result of the actions of each of the defendants which resulted in claimant's loss of business. Against the second, third and fourth defendants the claimant claims inter-alia, damages for: (i) breach of fiduciary duty; (ii) breach of contract; (iii) the diversion of the claimant's goodwill towards the first defendant; (iv) misrepresentation; (v) conspiracy (vi); and wrongful solicitation of the claimant's clients.
- [3] The defendants filed an acknowledgement of service but failed to file a defence by the due date, 24th October 2014; however, they filed a late defence on 27th October 2014. On that same day, the claimant filed a request for judgment in default of defence. Counsel for the claimant asserts that his request for judgement in default of defence was first filed as at the time of filing he was informed that a defence had not been filed. The defendants contend otherwise and state that their defence was first in time.
- {4} Counsel for the claimant contends that CPR 12 dictates that the court office must on the request of the claimant enter judgment in default once there is proof of service of the claim and the period for filing of a defence has expired having not been extended by agreement between the parties or by order of the Court.

[5] Counsel for the defendants in response avers that the claimant's application is an abuse of the court's process and ought to be dismissed. Counsel avers that it was always the defendants' intention to file a defence on the due date but withheld the filing on the request of counsel for the claimant who intimated his intention to file and serve an amended claim. Counsel contends that the request for judgment in default of defence can only be considered as sharp practice as counsel for the claimant knew of the defendant's intention to file a defence and had intercepted the filing of the defence until such time as he had filed his amended claim. An email exhibit confirmed the dialogue between the parties in relation to the amended claim and the intention to file the defence on the deadline date for filing. Counsel avers that the two days delay in filing the defence was due to the representations made by counsel for the claimant but contends in any event that the defence was filed prior to the request for judgment in default.

[6] The court notes that there is much contention about the timing of the respective filings. Counsel for the claimant is adamant that the defence had not been filed when he filed the request for judgment in default. Although counsel for the defendants contends that the judgment in default constituted sharp practice, which should not be condoned, he still nonetheless insists that the defence was filed first. The evidence before the court indicates that the defence recorded as document No. 27 on the court's file was filed on October 27, 2014 at 1.11 p.m., the request for judgment in default on file as document No 51 does not bear any time of filing but the request for judgment in default on file as documents No. 54 to 60 bear the time between 1.24 p.m. to 1.29 p.m. The court on the evidence accepts that the defence was filed first in time.

The Law and Analysis

[7] The general rule as provided in CPR 10.3 (1) is that the period for filing a defence is 28 days after the date of service of the claim form. The parties may agree to extend the period for filing a defence¹ or a defendant may apply to the court for an order extending the time for filing a defence². On filing a defence, the defendant must also serve a copy on every other party³. Part 12 contains rules in relation to default judgments. It provides that, if requested by the claimant to do so, the court office must enter judgment if the defendant fails to enter an appearance where the time for doing so has expired and the defendant fails to file a defence where the time for doing so has expired.

[8] The consequences for failure to comply with CPR 10.3 are provided in 12.5 and as follows:-

“The court office at the request of the claimant must enter judgment for failure to defend if:-

- (a) (i) the claimant proves service of the claim form and statement of claim; or
- (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
- (c) the defendant has not –
 - (i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or
 - (ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
 - (iii) satisfied the claim on which the claimant seeks judgment; and
- (a) (d) (if necessary) the claimant has the permission of the court to enter judgment”

[9] Practice Direction 12 No.1 of 2012 (Reissue) makes provisions for Default Judgments and reads as follows:

1.1 This Practice Direction clarifies the application of Rule 12.4 and 12.5.

¹ CPR 10.3(5)

² CPR 10.3(9)

³ CPR 10.4

1.2 In the circumstances where the claimant does not make a request for entry of default judgment pursuant to Rule 12.4 or 12.5 and the time for filing an acknowledgment of service has expired or the last day for filing a defence has expired, the court shall fix a status hearing and notify the parties of the date of that hearing.

1.3 Where there is uncertainty as to the application of any of the Rules relating to the grant of default judgments, the matter must be referred to a master or a judge immediately.

1.4 At the status hearing the court will give directions for the future conduct of the claim.

[10] The court office must enter judgment in default once a request is made and all the conditions in 12.4 and 12.5 are met. The practice direction mandates the court office to place matters before the Judge or master for status hearings where the period of acknowledgement of service or filing of defence has expired and there is no extension of time by agreement between the parties or by order of the court. The practice direction is in keeping with the new dispensation of CPR 2000 for court-driven litigation ensuring that cases are dealt with expeditiously in keeping with the overriding objectives. The practice direction also mandates the court office to refer matters to a Judge or master where there is uncertainty as to the application of Rules 12.4 and 12.5. Once referred, the Judge or master shall at the status hearings give directions for future conduct of the claim. The matter before this court appears to have fallen within the second limb of the Practice Directions in light of the contemporaneous filings.

[11] It is counsel for the claimant's argument that the late filing of defence by the defendants without an agreement with the other party for an extension of time or leave or permission of the court extending the time for filing the defence makes the

filing invalid and ought to be ignored. Counsel contends that if the court were to allow the late defence to trump a timely filed request for judgment in default then the court would be encouraging a defaulting party in flouting and breaking the rules to the detriment of the complying party. Counsel in support of his argument cites the authority of **Oliver Mc Donna v Benjamin Richardson**⁴ where the Court of Appeal held that an appeal brought without leave where leave required is a nullity. He juxtaposed the result for the failure to acquire leave to appeal where required to a defence filed without compliance with 10.3 to declare the late defence filed by the defendants as a nullity.

[12] The Privy Council in **The Attorney General v Keron Matthews**⁵ rejected a somewhat similar argument as posited by counsel for the claimant in the extant case where at paragraph 13 of the judgment states:

“13. It is central to the claimant’s argument that a defendant cannot file and serve a defence once the time for doing so has passed. Rule 10 does not say so in terms, but it is submitted that it is to be interpreted as if it had done so. If the position were otherwise, the defendant would have an unlimited right to file a defence at any time before judgment is entered. If that were the case, what purpose would be served by having rules which impose a time limit for the filing of a defence? Furthermore, it is significant that there is no provision corresponding with rule 9.3(3) in relation to the filing of a defence.”

[13] Lord Dyson rejected the argument and stated as follows:

“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

⁴ Civi Appeal No 3 of 2008

⁵ [2011] UKPC 38

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.

15. Secondly, rules 26.6 and 26.7 must be read together. Rule 26.7 provides for applications for relief from any sanction *imposed* for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, “any sanction for non-compliance *imposed* by the rule....has effect unless the party in default applied for and obtains relief from the sanction”(emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. Examples of such rules are to be found in rule 29.13(1) (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits); rule 28.13(1) (consequence of failure to disclose documents under an order for disclosure); and rule 33.12(1) (consequence of failure to comply with a direction to disclose an expert’s report).

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.(my emphasis) 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.”

[15] Lord Dyson in **The Attorney General v Keron Matthews** has put to rest counsel’s argument. CPR 10.3 merely states the time period for filing a defence subject to an agreement by the parties or an order of the court granting an extension of time for filing a late defence. The Rule is silent on sanctions for failure to file a defence after the time stipulated. A defendant who fails to file a defence within the time prescribed by the rules runs the risk of having a judgment being entered against him **IF** a request is first filed. If the request is not filed after the time for filing an acknowledgement of service or defence has expired, the Practice Direction mandates that the court office to put the matter before the Judge or master for status hearing who will then decide the future conduct of the matter. The case of **Oliver Mac Donna** (above) cited by counsel bears no analogy to a defence filed out of time. Leave to appeal is not as of right, in matters which require the leave of the court to file an appeal. The Court of Appeal in deciding whether to grant leave on application must first consider whether the applicant’s proposed appeal has a realistic chance of success or raises an issue that should be ventilated on appeal. This is not the case with the late filing of a defence unless the matter has been placed for status hearing pursuant to the Practice Direction and the Judge or master, looking at a late defence decides the defence is unmeritorious and enters judgment in favor of the claimant. Counsel failed to provide the court with any authority in support the analogy of the nullity of an appeal filed without leave, when required and the filing of a late defence. According the application to enter judgment in default of defence fails.

[16] Secondly even if the request for judgment in default was filed first in time (which, according to the evidence, is not accepted) the court notes that the application would have had to satisfy CPR 12.10 (4) (5) having regard to the nature of claimant's claim. CPR 12.10 (4) (5) requires default judgment, where the claim is for some other remedy, to be in such form as the court considers the claimant to be entitled to on the statement of claim. It is noted that one of the reliefs claimed by the claimant is a declaration that the first defendant, as the instrumentality of the second defendant, was conceived for the unlawful purpose of stealing the custom of the claimant and causing damage and loss to the claimant and for an account of all sums wrongfully obtained as a result of the actions of each of the defendants which resulted in claimant's loss of business.

[17] It is a rule of practice that the court does not make declarations of right either on admissions or in default of pleading. In the case of **Patten v. Burke Publishing Co**⁶ Millet J. said:

"It is not the normal practice of this division to make a declaration when giving judgment by consent or without a trial as in the case of a judgment in default of defence or of notice of intention to defend the proceedings. That is a practice of very long standing".

[18] In **Wallersteiner v Moir**⁷, the claim, which was contained in a counterclaim, sought a declaration that the plaintiff had been guilty of fraud, misfeasance and breach of trust. The judge granted the declaration in default of the defence and the Court of Appeal struck it out. Buckley LJ said⁸

⁶ [1991] 2 All ER 821.

⁷ [1974] 3 All ER 217, [1974] 1 WLR 991

⁸ ([1974] 3 All ER 217 at 251, [1974] 1 WLR 991 at 1029):

'It has always been my experience, and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery 9 Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation"

- [19] The authorities cited above clearly state the Court will not readily grant a declaratory relief on disputed facts. Cogent evidence must be lead for declaratory reliefs to be granted. A declaratory relief will only be granted where there is no possible defence or factual disputes and the denial of such relief will cause the claimant great injustice. This is not the case before this court. The particulars in the statement of case plead a case of common design by the defendants to deprive the claimants of its business. The declaration sought by the claimant against the first defendant, as the instrument of deception, is inextricably linked to the claims against the second, third and fourth defendants. The matters giving rise to the second, third and fourth defendants' liability are all factual matters that fall to be determined in the proceedings with evidence. The defendants in their defence

challenge the averments made by the claimant. There is need for a more thorough analysis of the facts and pleadings in the respective statements of case, having considered the austere allegations pleaded in the statement of claim. The court, in striving to give effect to the overriding objective, must always seek to do justice between parties. The granting of a default judgment deprives the parties' full ventilation of their cases at trial. The court being mindful of the injustice that may be caused when a case has prematurely ended at the default stage has given the parties a further opportunity to make an application to set aside a default judgment once the conjunctive requirements of CPR 13.3 are satisfied and now amended to take into consideration exceptional circumstances. When what is sought is a declaration, there is the risk of irremediable injustice which if granted and then be set aside on application under 13.3. The need for litigation to be conducted efficiently and at proportionate costs is the hallmark of CPR 2000. The matter before this court is a complex case with grave allegations of conspiracy, breach of fiduciary duties, wrongful solicitation and unlawful interference with the claimant's business which the factual matrix must be proved to enable the court to exercise its discretion in granting or refusing the declaratory relief prayed for by the claimant.

Order

[20] For the foregoing reasons it is ordered and directed as follows

(1) The claimant's application to enter judgment in default of defence is refused.

(2) The defence albeit filed late is deemed to be properly filed.

(3) The claimant is granted leave to file a reply to the defence, if necessary, within 14 days of today's date. Thereafter the matter shall be listed for further case management conference.

(4) Costs to the defendants in the sum of \$500.00

Agnes Actie
Master