IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 407 OF 2013

BETWEEN:

INDIRA BOWDEN	**CLAIMANT**
AND	
GEOFFREY AUSTIN ARZU	**DEFENDANT/ANCILLARY CLAIMANT**
AND	
MALCOLM SOBERS	**ANCILLARY DEFENDANT**

In Chambers.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

February 11 & 25, 2014.

Appearances: Mr. Philip Zuniga, SC for the Defendant/Ancillary Claimant.
Ancillary Defendant in person.

RULING

[1] The substantive Claim was commenced by Claim Form on July 30, 2013. The Claimant claims the sum of $48,650.00 as the outstanding balance on a deposit made at the request of the Defendant against a proposed investment. Having acknowledged service, the Defendant filed a Defence.

[2] On September 27, 2013, simultaneous with the filing of the Defence, the Defendant commenced an ancillary claim against Malcolm Sobers, the Ancillary Defendant, for $50,000.00 being an amount paid by the Claimant and the Defendant to the Ancillary Defendant for a consideration which had wholly failed. In the alternative, the ancillary Claim was for $25,000.00 as to the Claimant and $25,000.00 as to the Defendant as money due on an account stated.

[3] The Ancillary Defendant was served on October 4, 2013 with the Ancillary Claim together with the Statement of Case (Claim Form, Statement of Claim and Amended Defence). The Ancillary Defendant failed to file a Defence within 28 days of service as per Rule 18.9(2) of the Supreme Court (Civil Procedure) Rules (2005) ("the Rules") or at any time. Thereafter, notwithstanding the non-applicability of Part 12 (see: Rule 18.9(3)), a request for entry of judgment in default was made on behalf of the Defendant and on the same date, November 8, 2013, judgment in default of defence to the Ancillary Claim was purportedly entered for the sum claimed.

[4] The application that has engaged the attention of the Court in the present proceedings has been made by the Ancillary Defendant by way of Notice of Application filed on January 28, 2014 for the following orders:

> "(a) An Order setting aside the judgment of the court made on the 8th November 2013 by the Registrar General (sic) of the Supreme Court and for order that a Defence be filed by a specified date;
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> (b) An Order pursuant to Rule 26.8(1) of the Supreme Court (Civil Procedure) Rules, 2005 for relief from sanction for failure to comply with the Civil procedure rules;
>
> (c) An Order pursuant to the inherent jurisdiction of the Honourable Court for setting aside judgment."

In his affidavit in support of the application, the Ancillary Defendant stated that he was unable to file a Defence because he could not afford the legal fees charged by the Attorneys-at-Law he consulted nor did he qualify for legal aid. In his oral arguments, he made reference to personal domestic circumstances relating to his spouse's pregnancy which was not deposed to. This did not qualify as evidence that could be taken into account by the Court since there was a mere reference in his affidavit to his personal circumstances without details being provided.

[5] No doubt in an attempt to address what was potentially his Defence, it was averred that the contract comprised in the Ancillary Claim was entered into with Xpert Business Solutions Ltd, a company, whereas the Ancillary Claim was against him personally. It was further said that the said contract had been partially performed thus there could be no total failure of consideration.

[6] The arguments by learned Senior Counsel for the Defendant proceeded on the basis of whether or not the application met the three requirements set out in Rule 13.3(1) of the Rules. The affidavit evidence was examined for compliance with Rules 12.4 and 13.3(1). However, in the course of argument, the Ancillary Defendant, who appeared in person, raised a query as to whether judgment in default could have been entered against him on the Ancillary Claim. It is to that question that I now direct the inquiry.

[7] The procedure relating to an Ancillary Claim is set out substantially in Part 18 of the Rules. The Ancillary Claim in question in this matter is not one for contribution or indemnity, therefore, by virtue of Rule 18.4(1)(b), it was permissible for the Defendant to file an ancillary claim without the court's permission before case management conference, as was the case. However, it is salutary to note that Rule 18.2 plainly provides that, among other Rules, Rules 8.12 and 8.3 (which govern the time for service of a Defence to a Claim form) and Part 12 (which deals with default judgments) do not apply to ancillary claims. It must inevitably follow that Part 13 which provides for the setting aside and varying of default judgments does not apply to an ancillary claim.

Instead, there are special provisions set out in Rule 18.12 relating to judgment on failure to file a defence in respect of an ancillary claim within the 28 days as mandated by Rule 18.9(2). So far as relevant, Rule 18.12 provides:

> "(1) This Rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.
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> (2) The party against whom the ancillary claim is made –
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> (a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and
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> (b) Subject to paragraph (5), if judgment under Part 12 is given against the ancillary defendant, he or she may apply to enter judgment in respect of the ancillary claim.
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> (3) ...
>
> (4) ...
>
> (5) The ancillary claimant may not enter judgment under paragraph 2(b) if the ancillary claimant wishes to obtain judgment for any remedy other than a contribution or indemnity for a sum not exceeding that for which judgment has been entered against the ancillary claimant.
>
> (6) The Court mat at any time set aside or vary a judgment entered under paragraph (2) if it is satisfied that the ancillary defendant –

(a) applied to set aside or vary the judgment as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file a defence; and

(c) has a real prospect of successfully defending the ancillary claim."

[8] An ancillary defendant is allowed 14 days within which to acknowledge service according to the general rule in Rule 9.3(1) which applies by virtue of Rule 18.2(1), whereby an ancillary claim is to be treated as a claim for the purposes of the Rules. As earlier iterated the time for service of a defence to an ancillary claim is limited to within 28 days of service. If no acknowledgement of service or defence is filed, a judgment in default may be entered if the substantive claimant has entered judgment in default against the ancillary claimant (see: Rule 18.12(2)(b) above). However, such judgment is restricted to an ancillary claim for contribution or indemnity in respect of a sum not exceeding the sum represented in the judgment against the ancillary claimant. In the present case, there has been no judgment entered in default in favour of the Claimant against the Ancillary Claimant and, in any event, the Claim is not for contribution or indemnity.

[9] The effect of a failure to defend is that it operates as an admission by the ancillary defendant of the ancillary claim and such ancillary claimant is bound by any judgment or decision in the substantive proceedings to the extent that it is relevant to any matters arising in the ancillary claim. What needs to be highlighted is that there is no provision, save as narrowly provided for in Rule 18.12(5), for judgment in default to be entered pursuant to Part 12. The logical corollary is that Part 13 cannot be invoked to set aside judgment. The impact on the present application is that there was no authority conferred on the Court Office to enter judgment against the Ancillary Defendant and accordingly such judgment must be set aside. However, the ancillary

claim is deemed to have been admitted and the Ancillary Defendant would be bound, as far as is germane to the ancillary claim, by any judgment or decision that may be handed down in the main substantive claim against the ancillary claimant.

[10] The follow-up question to be determined on the application is whether or not the Rules permit the Ancillary Defendant to seek permission to file a Defence to the Ancillary claim. The starting point is Rule 18.9(3) which enacts that "the Rules relating to a defence to a claim apply to a defence to an ancillary claim except Part 12 (Default Judgment". It therefore follows that Rule 10.3(8) is applicable and avails the Ancillary Defendant of the liberty to apply for an order extending the time for filing a defence. Such an application can be made after the time for filing a defence has elapsed (see: Rule 26.1(2)(c)).

[11] The Ancillary Defendant seeks relief from sanctions and must therefore satisfy the requirements of Rule 26.8. The identification of the criteria to be applied upon the application for permission to file a Defence is not equally facile. The Rules do not specifically address what conditions must be fulfilled when applying for an extension of time to file a Defence to an ancillary claim.

[12] As earlier stipulated, the so-called judgment in default entered by the ancillary Claimant must be set aside as of right. Had Part 12 applied or had judgment been entered under Rule 18.12(2)(b), the Court would have had to be satisfied as to the pre-requisites set out in Rule 13.3(1) or Rule 18.12(6) which are co-extensive in their terms. It seems to be that against this background, the criteria should at the minimum be as set out in the said Rules coupled with the requirements of Rule 26.8.

[13] In **Belize Telecommunications Ltd v Belize Telecom Ltd et al** – Civil Appeal No. 13 of 2007, the Court of Appeal adopted the interpretation of Rule 13.3(1) that the three conditions therein set out are conjunctive and must each be satisfied. As to the question of delay, to my mind, the delay has been inordinate given that the time for filing defence expired on November 4, 2013. The Ancillary Defendant having applied for

permission to file a Defence on January 28, 2014 over two months and 24 days have elapsed. The Ancillary Defendant would have been alerted as to the consequences of failure to file a Defence when served on November 25, 2013 with a copy of the purported judgment in default. No action was taken until it is clear that the prospect of execution loomed. Accordingly, the ancillary Defendant failed to apply for the requisite permission as soon as reasonably practicable.

[14] Even if it were not the case that the application was not filed with expedition, the reasons offered for failure to file a defence are not acceptable. In essence, the Ancillary Defendant has averred that he was impecunious and unable to afford the services of an Attorney-at-Law and he also failed to pass the means test for legal aid. That state of affairs was not detailed with stated time-lines. It is to be noted that the ancillary Defendant has nevertheless managed to file a Notice of Application and an affidavit in support. As I see it, no good explanation has been offered for the failure to file a Defence within the time stipulated by the Rules.

[15] The affidavit in support of the application did not exhibit a Draft Defence. The prospective defence of the ancillary Defence is shortly set out in para. 6 of the affidavit and briefly asserts that Xpert Business solutions Ltd is the proper party to the Ancillary Claim. This assertion was not elaborated on sufficiently to give any credence to this bald assertion. I do accept Mr. Zuniga's submission that no evidence has been placed before the Court to substantiate this allegation.

[16] In the premises, it is ordered that the judgment in default be set aside and permission to file a defence is refused. In the light of these orders, each party shall bear its own costs on the application. It is further ordered that all execution against the Ancillary Defendant be stayed pending the outcome of the substantive claim.

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KENNETH A. BENJAMIN
Chief Justice