

**IN THE SUPREME COURT OF BELIZE, A.D. 2016
(CIVIL)**

CLAIM NO. 382 of 2016

BETWEEN

HOFIUS LIMITED

CLAIMANT

AND

KOSHIA GENTLE

1st DEFENDANT

LYDIA BENNETT

2nd DEFENDANT

Before: The Hon. Mde. Justice Griffith

Date of Hearing: 20th December, 2016

Appearances: Mr. Aldo Reyes for Claimant; Ms. Nazira Uc Myles for 1st Defendant and Mr. Anthony Sylvestre for 2nd Defendant.

RULING

Application to set aside irregular judgment – Claim for Money against more than one Defendant – Whether claim can be dealt with separately – CPR 2005 Rule 12.9(2)(b) - Effect of Request for Entry of Default Judgment – Application for Permission to file defence out of time – Standard to be applied.

Introduction

1. This is a claim for damages for the misappropriation of over \$450,000 or in the alternative, negligence on the part of the Defendants for failing to discharge their duties as accounts employees of the Claimant, thereby causing the said sum to be misappropriated . Both Defendants resist the claim, but whereas the 1st Defendant filed her defence within the time stipulated by the Civil Procedure Rules (CPR 2005), the 2nd Defendant failed to do so. As a result of that failure, the Claimant entered default judgment against the 2nd Defendant for the entire sum of \$450,372.28 as claimed. The 2nd Defendant applied and was successful in having the default judgment set aside as being irregularly entered and thereafter sought to file her defence out of time. The issue was however not a straightforward one and the 2nd Defendant was not in the first instance permitted to file a defence upon set aside of the default judgment, but was required to seek the Court’s permission afresh to do so. By this Ruling the 2nd Defendant has now been granted permission to file her defence out of time and the Court’s reasons for so doing are hereinafter set out.

Background

2. The Claim herein was filed on July 8th, 2016 for misappropriation by the Defendants of the Claimant's funds or in the alternative, for damages for negligence in allowing the Claimant's funds to be misappropriated. The Defendants were both former accounts employees of the Claimant which is a company carrying on a retail business in household goods. Both Defendants acknowledged service of the claim and the 1st Defendant filed her defence within the time stipulated by the Rules. The 2nd Defendant failed to file her defence and on the 29th September, 2016 the Claimant entered judgment in default of defence against her. That judgment in default was served on the 2nd Defendant on 6th October, 2016 and on the 21st October, 2016 the 2nd Defendant applied to set it aside as having been irregularly entered. The default judgment was set aside by the Court on the 23rd November, 2016 but the 2nd Defendant was required file a separate application requesting permission to file her defence out of time. That application was filed and later heard on the 20th December, 2016. The separate application was required by virtue of the peculiar issues raised on the application to set aside the default judgment, which were considered and determined as follows.

Setting Aside the Default Judgment

3. The application to set aside the default judgment was filed pursuant to CPR Rule 13.2(1)(b) which provides that the Court *must* set aside a judgment in default of defence entered under Part 12 of the Rules, if any of the conditions set out in Rule 12.5 is not satisfied. Rule 12.5 provides as follows:-

12.5 The court office must enter judgment for failure to defend at the request of the claimant if - (a) the claimant proves service of the claim form and statement of claim; or (b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired; and (d) the defendant has not – (i) filed a defence to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under Rule 22.1(6)); or

- (ii) where 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*
- (e) the claimant has the permission of the court to enter judgment (where necessary).*

4. Counsel for the 2nd Defendant contended that as required by Rule 12.5(e), the permission of the Court for a default judgment to have been entered against the 2nd Defendant, had been required in this case. This contention was based on Rule 12.9(2)(b) which precludes the entering of a judgment in default of defence where a claim for money is made against two or more defendants and the claim cannot be dealt with separately. Rule 12.9 is set out in its entirety as follows:-

12.9 (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) Where a claimant applies for a default judgment against one of two or more defendants –

(a) if the claim can be dealt with separately from the claimant 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; or

(b) if the claim cannot be dealt with separately from the claim against the other defendants –

(i) the court may not enter judgment against that defendant; and

(ii) the court must deal with the application at the same time it disposes of the claim against the other defendants.

(3) ...”

5. Counsel for the 2nd Defendant firstly submitted that the claim was one against two defendants which could not be dealt with separately. As a consequence, the provisions of Rule 12.9(2)(b)(ii) applied so that the default judgment ought not to have been entered. On this point, Counsel for the Claimant had submitted that the claim was one which could be dealt with separately between the Defendants, as the relief sought was in the alternative and liability could be joint or several.

The Court agreed with Counsel for the 2nd Defendant that the Claim was one against two defendants which could not be dealt with separately, as the Statement of Claim pleaded a case of collusion on the part of the Defendants in the misappropriation of the Claimant's funds. Further, the Statement of Claim alluded to duties and responsibilities which were intertwined or related in such a manner, that findings of fact which could give rise to liability on the part of the Defendants would be similarly intertwined or related.

6. Additionally, the Claimant's statement of case, does not specifically attribute any single instance of loss of funds to either defendant individually. Illustration of the interpretation of the similar English rule to CPR 12.9(2)(b)¹ is found in **Crown Aluminium Ltd v Northern & Western Insurance Company Ltd & Anor**² in the following terms:-

“The rule is about default judgments and when they should or should not be entered. In my judgment it applies where the effect of entering a default judgment would be that the claim could not be pursued separately against another defendant. It therefore applies to the simple claims in the alternative referred to by Miss John, where the doctrine of election would operate to bar the claim against the other defendant. However, it seems to me that it must apply also to any case where the effect of entering default judgment against D1 would prevent the claim being pursued against D2, even though the cause of action against the two defendants is different and the doctrine of election does not apply”

Given the effect of the pleadings as considered by the Court above (para. 5), the Court found that Rule 12.9(2)(b)(ii) applied so that the default judgment ought not to have been entered.

7. Counsel for the 2nd Defendant's submission was that the application of Rule 12.9(2)(b)(ii) meant that the Claimant's request for judgment in default was one in respect of which the Court's permission was required but was neither sought nor given, hence the irregularity of the default judgment. However, the permission referred to in Rule 12.5(e) applies to those categories of cases identified in Part 12 as requiring the Court's permission in order to enter a default judgment.

¹ English CPR 12.8

² [2011] EWHC 277 (TCC)

In particular, Rule 12.3 identifies those cases in which the Court's permission is required to enter a default judgment. Rule 12.9(3) is another instance in Part 12 where the Court's permission is required to enter a default judgment. Rule 12.9(2)(b) however, does not state that the Court's permission is required to enter a default judgment on a claim for money against two or more defendants where the claim cannot be dealt with separately. In fact, in the footnote to Rule 12.3, Rule 12.9(2) is noted as containing restrictions where a default judgment is sought against some but not all defendants.

8. Instead, Rule 12.9(2)(b)(ii) prohibits entry of the judgment in default by the Court Office, and requires that the *Court* deal with the request at the same time it disposes of the claim against the other defendants. The Court's interpretation of this rule, is that it is therefore not a matter of granting permission, the Rule in effect says that if the liability of two or more defendants is bound together, judgment against any single one defendant, must be determined in the same manner as all the defendants. In a case such as pleaded, it is entirely possible that the second defendant's liability may be partial, entire or not at all. It is within this context, that the Court considers, that the effect of the rule is that a claimant's request for judgment in default is in effect deferred, until disposal of the claim against all defendants. In the circumstances, once found that the claim is not one which could have been dealt with separately, it was entirely agreed that the default judgment ought not to have been entered and as such was set aside as of right.

The effect of setting aside the default judgment

9. The default judgment having been set aside, the question now arises, as to the rights of the respective parties vis-a-vis the operation of Rule 12.9(2)(b). Put another way, albeit not a default judgment, does the Claimant not have some tangible right, having requested its default judgment as afforded by the Rule vis-à-vis whether the 2nd Defendant ought with nothing more, to be allowed to file her defence out of time?

As has been recognized by cases dealing with the setting aside of a default judgment (most notably **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.**³) a default judgment is a regular judgment from which a claimant derives property and thus a claimant ought not to be lightly deprived of that judgment. On the other hand, even though there are now strict rules governing the exercise of the Court's discretion to set aside a default judgment, the discretion to set aside nonetheless remains, for as expressed in **Evans v Bartlam**⁴ - the default judgment represents an '*exercise of the court's coercive power consequent upon a failure to exercise one of its rules*'. A court must always have that discretion to set aside in respect of a judgment based on anything less than a determination on the merits.

10. Upon the set aside of the default judgment, the relative rights of the two parties is considered by the Court to lay somewhere between the two positions extracted from **Alpine Bulk** and **Bartlam**. To appreciate this position, the mechanism of the entry of a default judgment (regular entry) must first be put in context. The Rules which provide for the entry of a default judgment - 12.4 (in default of acknowledgement); 12.5 (in default of defence) and 12.9 (against more than one defendant), all preface the entry of the judgment with reference to 'a request made by the claimant'. In the Trinidad and Tobago Privy Council decision **Attorney-General v Matthews**⁵, issues surrounding the operation of a default judgment were clarified. It was therein recognized that a default judgment is a consequence borne by a defendant who fails to file his defence within the time stipulated by the Rules. As the Rule permitting default judgment makes clear however, the consequence is not an automatic one and if a claimant fails to file a request for a default judgment, a defendant remains at liberty to file a defence, even if out of time.

³ [1986] 2 Lloyd's Rep. 221

⁴ [1937] 2 All ER 646 per Lord Atkin @ 650

⁵ [2011] UKPC 38

11. In coming to this conclusion, the Privy Council overturned several decisions of the Trinidad and Tobago Court of Appeal⁶, which upheld and affirmed a position that a defendant who failed to file a defence within the time stipulated, was obliged, short of an agreed extension or permission granted upon application to the court, to seek relief from sanctions. Lord Dyson⁷ explained the operation of the Trinidad rules (which, so far as relevant are in pari materia to Belize's Rules, which provide for an agreed extension of time for filing a defence and the courts' powers to extend time to do so)⁸. Whilst lauding the stated intent of the Trinidad and Tobago Court of Appeal to move away from “...a cancerous *laissez faire* approach to civil litigation to a more responsible and diligent one...”, it was definitively held that the decisions of the Court of Appeal were wrong. The idea of an ‘implied sanction’ for failure to file a defence within time which necessitated an application for relief from sanctions, was rejected by the Privy Council. Instead, the position affirmed by the Privy Council was that an application for relief from sanctions being required in relation to any sanction *imposed* as a result of a failure to comply with any rule, order or direction of the court - meant an application requiring relief from any sanction *itself imposed*, by that rule, order or direction.
12. In that regard, the rule requiring the filing of a defence within the stipulated time, itself imposed no sanction, thus unless and until a claimant requested judgment in default, the only consequence faced by a defendant, was the risk of the claimant exercising his or right to apply for a default judgment⁹. After rejecting the argument of the implied sanction for failure to file a defence, Lord Dyson stated the position thus¹⁰ (emphasis mine):-

“...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.”

⁶ **Trincan Oil Ltd. v Schnake** (Civ App. No. 91 of 2009); **Khanhai v Cyrus** (Civ. App. No. 158 of 2009); and **The Attorney-General of Trinidad & Tobago v Regis** (Civ. App. No. 79 of 2011).

⁷ AG for Trinidad & Tobago v Matthews supra. @ paras 11 - 16.

⁸ CPR 2005 Rules 10.4; 10.8 and 26.2(c).

⁹ AG v Matthews supra. Per Lord Dyson @ para 14.

¹⁰ Ibid

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 r. 10.3(5) between applications for an extension of time before and after the period for filing a defence.

13. After referring to several examples of rules which themselves contained sanctions and so attracted the effect of a 'sanction imposed' as contemplated by the application for relief from sanctions, Lord Dyson continued:

"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 within the prescribed period...

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..."

With respect to the instant case, it so happens that the claimant has made its request for entry of judgment in default. The fact that the judgment ought not to have been entered and has been set aside does not change the fact the Claimant exercised its right to seek the default judgment. The setting aside, as was the Court's order, therefore restores the status quo to the position that the 2nd Defendant failed to file a defence within time and the Claimant sits with a request for entry in default of that defence. What does this mean for the 2nd Defendant who has now applied to file a defence out of time?

The 2nd Defendant's Application to file a Defence out of time.

14. It is the Court's view, that whilst precluded from obtaining a judgment in default of defence - (and this is not a rule which is merely unfair to the Claimant, it arises as a result of how the Claimant has pleaded its case) - the Claimant possesses an advantage having made the request for the default judgment.

That advantage is that in disposing the claim, the Court is at liberty to assess the liability of the second defendant with reference only to the cases of the Claimant and 1st defendant, in the absence of a defence of the 2nd Defendant. With such an advantage in the Claimant's hand, it cannot be the case, that the 2nd Defendant is at liberty with nothing more, to be permitted to file her defence late, simply because she has applied. There is no issue as to be Court's power to grant such permission (as per Rule 10.8 or Rule 26.2(c)). The difficulty lies however, in ascertaining according to what grounds such permission ought to be granted if granted at all, as neither of these rules makes provision for such grounds.

15. As already explained in accordance with ***Attorney General v Matthews***¹¹, this application to file a defence out of time is not one for relief from sanctions, as there is no sanction imposed by Rule 10 which prescribes the time for filing the defence. There is also no order or direction by the Court herein containing a sanction which affects the 2nd Defendant's position either. It is considered, that the Claimant's position is but for Rule 12.9(2)(b), practically as good as a Claimant who has obtained a default judgment. Correspondingly, the position of the 2nd Defendant, is as good as a defendant, who must apply to set aside that judgment. In other words, the 2nd Defendant, having failed to file a defence and the Claimant having made a request for default judgment, the Court considers that the 2nd Defendant must satisfy the conditions required when setting aside a default judgment regularly obtained. These conditions, are of course those of Rule 13.3(1) that the Court may set aside a default judgment only if the defendant:-

- (i) *Applies to the court as soon as reasonably practicable after finding out about the default judgment;*
- (ii) *Gives a good explanation for failure to file an acknowledgment of service or a defence;...and*
- (iii) *Has a real prospect of successfully defending the claim.*

¹¹ Supra, paras 10 – 12 herein.

Consideration of the 'set aside' grounds.

16. The 2nd Defendant was served with the default judgment on 6th October, 2016 and applied on the 21st October, 2016 to set it aside. With respect to the requirement to apply as soon as reasonably practicable after being served with the default judgment, both sides proceeded on the basis that the time for filing a defence was interrupted by the Court's long vacation as presumed to be the effect of Rule 3.5¹². It must be noted, that unlike the OECS CPR 2000, where the equivalent rule specifies time limited for *filing* in addition to *service*, Belize's Rule 3.5 refers to *service* of documents only, as distinct from filing of documents within the Court's long vacation. The two terms are clearly not interchangeable within the context of civil procedure generally and even within Rule 3 as a whole, are used with distinct difference. Short of acknowledging that if called upon to do so, the Court would be obliged to interpret Rule 3.5 according to the clear and unambiguous use of the term 'serve', nothing further need be said about the issue in this case. A direct ruling on the issue does not arise, as both parties proceeded on the basis that Rule 3.5 includes the stoppage of time for filing of documents during the long vacation and the 2nd Defendant was late even with that stoppage of time.

17. The material time for consideration of the reasonableness or not of the 2nd Defendant's application to set aside the default judgment is the date from which she received service thereof. The time elapsed in this case was two weeks from receipt of service of the default judgment and whilst not indicative of due dispatch, that time is not considered unreasonable. The second ground is that the 2nd Defendant must have a good reason for failing to file a defence. This is a matter of evidence put forward by the 2nd Defendant. In the affidavit filed in support of her application to set aside, the 2nd Defendant states that she received service of the claim form and statement of claim on the 12th July, 2016 and acknowledged the claim on the 22nd July, 2016.

¹² Rule 3.5 states that in the Court's long vacation, the time limited for service of any other statement of case besides a claim form, does not run.

The 2nd Defendant then states (and repeats this account in her second affidavit filed in support of the application for permission to file her defence out of time), that on the 29th September, 2016 she consulted her attorney and gave instructions for a defence to be filed. A defence was not filed and on the same day (29th September) she was served with the default judgment.

18. In considering evidence, the Court is generally entitled to rely on common sense in coming to its assessment of individual facts and circumstances. Taking the 2nd Defendant's assertion at its highest, no explanation has in fact been provided as to why after receiving service of the claim on the 12th July, 2016, the 2nd Defendant failed to give instructions for her defence until more than two months had passed to the end of September, 2016. Additionally, the irony or improbability of the 2nd Defendant claiming to have given instructions to her attorney on the same day as having been served with the default judgment is not lost on the Court. Also noted by the Court is the improbability of a lay person having knowledge of the Court's long vacation and effect of Rule 3.5 (even as generally misapplied), so as to be misguided into thinking that time was not running during a significant portion of the time which elapsed in this case. It is fair to say therefore that no good reason is found to have been put forward by the 2nd Defendant for a failure to file her defence. With respect to the third requirement of having a real prospect of success. The draft defence exhibited by the 2nd Defendant denies liability and responsibility for the accounting duties attributed to her. Short of a trial on the merits, the draft defence has to be accepted as presenting an arguable defence with real prospect of success, as success either way will depend in large part on the view taken by the Court of the facts presented.

The exercise of the Court's discretion

19. In setting aside a default judgment, it is common ground, that a defendant must satisfy the court of all three grounds of Rule 13.3(1), for as has been stated on numerous occasions, the effect is cumulative¹³.

¹³ **Belize Telecommunications Limited v Belize Telecom Limited et al, Belize Civil Appeal No. 13 of 2007** per Morrison JA at paragraphs 24-26.

Counsel for the Claimant pounced upon the fact that the 2nd Defendant had failed to put forward a good reason for failing to file her defence within the time stipulated and in such case, the standard being applied by the Court in determining the application for permission had not been met. On the other hand, Counsel for the 2nd Defendant submitted that the Court was not actually dealing with a default judgment which was in fact precluded by Rule 12.9(2)(b). Moreover, that there were no parameters provided either by Rule 10.8 or Rule 26.2(c) to address the permission sought by the 2nd Defendant. Finally, it was submitted that the Claimant, having not been permitted to enter a default judgment, would not be prejudiced by a defence filed by the 2nd Defendant. In such circumstances it was submitted that whilst the Court's application of the grounds of Rule 13.3(1) was accepted, those grounds ought not to be as strictly applied in the same manner as if a default judgment had been issued.

20. The Court acknowledges that no Rule specifically addresses the peculiar situation at hand. It is also acknowledged, that although Rules 10.8 and 26.2(c) empower the Court to permit the filing of a defence out of time, the basis for the exercise of the Court's discretion is not prescribed. It has been considered appropriate to apply the grounds of Rule 13.3(1) as the 2nd Defendant was late in filing her defence and the Claimant has made its request for judgment in default which provides some advantage to the Claimant in the Court's disposal of the claim. It is considered material however, that the Court is actually not dealing with an application to set aside a default judgment; that the Court's discretion for the grant of permission has not been defined by the Rules for this particular situation; and that the inability of the Claimant to capitalize on the 2nd Defendant's failure to file a defence in time is due to how the Claimant has chosen to plead its case. It is also considered that even without a defence put forward by the 2nd Defendant, the Claimant will still have to prove liability by evidence, given that the 1st Defendant has filed a defence.

21. With these circumstances in mind, even though the Court was at liberty to define the basis for the exercise of its discretion to grant permission herein by applying the grounds of Rule 13.3, the same rigid standard required to be applied upon determination of an application to set aside an actual default judgment, is not appropriate. In the circumstances, it is found that with an arguable defence raised, greater injustice will be occasioned to the 2nd Defendant in not being allowed to advance her defence of the claim, as opposed to the Claimant retaining a slight advantage in the degree of proof that will be required for his claim to succeed against multiple defendants. Notwithstanding the failure to advance a good reason for failing to file a defence within the time stipulated, it is held that the 2nd Defendant, within the peculiar circumstances of this case, is granted permission to file her defence out of time. Pursuant to Rule 64.11(3)(b), the 2nd Defendant, upon her application to extend time limited for filing her defence, is ordered to pay the Claimant's costs upon this application in the sum of \$1,000.00.

Disposition

22. The application by the 2nd Defendant for permission to file her defence out of time is determined in the following manner:-

- (i) Permission is granted for the 2nd Defendant to file and serve her defence on or before the 31st January, 2017;
- (ii) The Claimant is at liberty to file a Reply on or before the 14th February, 2017;
- (iii) The case management conference is rescheduled for the 23rd day of February, 2017; and
- (iv) Costs in the sum of \$1,000.00 are awarded to the Claimant pursuant to Rule 64.11(3)(b).

Dated this 23rd day of January, 2017.

Shona O. Griffith
Supreme Court Judge.