

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

**CLAIM NO. 395 of 2016  
BETWEEN**

**ALAIN LANGLOIS**

**CLAIMANT/APPLICANT**

**AND**

**ALBA BARAHONA**

**DEFENDANT/RESPONDENT**

**Before:** The Hon. Mde. Justice Griffith  
**Dates of Hearing:** 9th December, 2016; 19th January, 2017  
**Appearances:** Mr. Kevin Arthurs for Applicant/Claimant and Mr. David Morales for Defendant/Respondent

**RULING**

*Application to Strike out Defence – Defence filed out of time – Request for Entry of Default Judgment refused by Court Office – CPR 2005 Rule 3.5 – Computation of time during Long Vacation – Effect of refusal of request for Default Judgment.*

**Introduction**

1. This is a claim for damages for personal injuries and special damages arising out of a vehicular accident which occurred in April, 2016. The Application is made on the basis that the Defendant failed to file his defence within the time stipulated by the Rules and that he thereafter filed it out of time without the permission of the Court. Further, the Application alleges that prior to the defence being filed, the Claimant presented a request for entry for default judgment which was wrongly refused by the Court Office. The request is said to have been wrongly refused on the basis that the Court Office incorrectly construed CPR Rule 3.5(1) in computing time within the Court's Long Vacation. As a result of the wrongful refusal of the request for entry of default judgment, the Claimant asserts that the defence was wrongly accepted and filed; that it ought to be struck out; and the Claimant be allowed to enter the default judgment accordingly. The Application was heard by the Court on 19<sup>th</sup> January, 2017 and refused in an oral ruling. These are the Court's reasons reduced into writing.

## **Issues**

2. The issues raised by the Application are twofold:-
  - (i) What is the correct interpretation of Rule 3.5(1) as pertains to the computation of time during the Court's Long Vacation;
  - (ii) Even if the Claimant's request for entry of judgment in default of defence was wrongly refused by the Court Office, what effect if any, does this have on the legitimacy of the filing of the defence?

## **Chronology of Events**

3. The Claim was filed on 15<sup>th</sup> July, 2016, the Defendant acknowledged service within time, but filed a defence out of time on the 3<sup>rd</sup> October, 2016 - being almost two weeks short of three months after service of the claim form. On the 10<sup>th</sup> November, 2016, the Claimant filed an Application to Strike Out the Defence and to have a default judgment entered in his favour. That application was amended to add a prayer that the request for entry of judgment in default of defence which was presented by the Claimant to the Court Office on 19<sup>th</sup> September, 2016 be accepted and default judgment accordingly entered on behalf of the Claimant.

## **The Court's Consideration**

### *The Application and Legal Arguments*

4. The Application to Strike Out the Defence was first filed on 10<sup>th</sup> November, 2016. This was approximately five weeks after filing of the defence, on 3<sup>rd</sup> October, 2016. The Application was filed pursuant to CPR 2005 Rule 26.3(1)(a), namely that the Defendant failed to comply with a rule, order or practice direction of the Court. The Rule cited for non-compliance was the requirement that the Defendant file his defence within 28 days of receipt of service of the Claim Form. There was no dispute that the Claim Form was served on the Defendant on the 23<sup>rd</sup> July, 2016. The Court's Long Vacation ensued thereafter from 1<sup>st</sup> August, 2016 to 15<sup>th</sup> September, 2016.

According to the evidence in support of the Application, the Claimant, on the 19<sup>th</sup> September, 2016 (through his attorney), attempted to file a request for entry of a judgment in default of defence at the Court Office but the request was refused. The request was refused, says the Claimant, on the basis that the Court Office held to the view that the time limited for filing a defence had not yet expired, due to the Court's Long Vacation.

5. The Claimant's evidence stated that the Court Office even refused to price the request for default judgment, therefore there was no date or any record to corroborate the Claimant's assertion of having presented it. Short of advancing his own view based upon the advice of his attorney that the long vacation did indeed interrupt the time limited for filing of documents, the Defendant had no evidence to present in relation to the Application. There was no evidence forthcoming from the Court Office confirming or denying the Claimant's assertion of the attempt to have the request for entry of judgment in default filed. There being no evidence to the contrary therefore, the Court accepted the Claimant's evidence of the Court Office's rejection of the request for entry of default judgment which was tendered on his behalf on the 19<sup>th</sup> September, 2016. As seems to be in keeping with its general practice, the Court Office made no record at all of the fact of presentation and rejection of the document sought to be filed<sup>1</sup>.

6. The argument on behalf of the Claimant commences with the construction of Rule 3.5 which speaks to time in the Court's long vacation. Rule 3.5 provides as follows:-

*“(1) During the long vacation, time prescribed by these Rules for serving any statement of case other than the statement of claim, does not run*

*(2) However paragraph (1) does not override any order of the court which specifies a date for service of a statement of case.”*

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<sup>1</sup> It would seem prudent, that even if the Court Office declines to accept and file a request for entry of default judgment (or any other document), particulars of the date and time of its presentation should be recorded, as the fact of presentation, might become relevant at some point during the proceedings.

Counsel for the Claimant submits that as the Rule speaks to 'serve' as distinct from 'file and/or serve', time continues to run for filing of any statement of case other than a statement of claim in the long vacation. In such case, the time limited for the defence in this case would have expired on August 22<sup>nd</sup>, 2016. (According to the Court's calculation time would have expired on August 21<sup>st</sup>, but the day's difference is of no moment). Therefore, when the request for entry of default judgment was presented for filing at the Court Office on the 19<sup>th</sup> September, 2016 the request ought to have been accepted. Additionally, Counsel for the Claimant contended that there having been no consent between the parties for late filing of the defence as provided for in Rule 10.3(5), the Defendant was obliged to seek the Court's permission to file his defence out of time, pursuant to Rule 10.3(8). Having not done so, and the request for entry of the default judgment having been wrongfully rejected, Counsel for the Claimant submitted that the defence ought to be struck out and default judgment entered for the Claimant.

*Analysis by Court*

*(i) Interpretation of Rule 3.5*

7. It is considered that the difference between 'file' and 'serve', within the context of civil procedure generally ought to be accepted as uncontroversial. For the avoidance of doubt however, in Part II of CPR 2005 - Application and Interpretation of the Rules - 'filing' is defined with reference to Rule 3.7 which sets out the various ways in which documents can be filed. These methods of course all concern the presentation, acceptance and recording of documents by the Court Office. Various and sundry rules make provision for different modes of service of different kinds of court documents so that 'service' is clearly a matter of *how* notice of documents filed is provided to the other parties in proceedings. Rule 3.8 for example makes a distinct reference to documents filed or served by fax, with the result that it is clear that the words are not used interchangeably. On the face of Rule 3.5 therefore, the reference to serve must be taken to mean exactly that.

When one examines the predecessor to CPR 2005 – Rules of the Supreme Court, Cap. 82 – Order LXV (65) made provision for time; and with respect to delivery of pleadings O.65 r.4 provided as follows:-

*“The time of the vacation in any year shall not be reckoned in the computation of the times appointed or allowed by these Rules for amending, delivering or filing any pleading unless otherwise directed by the Court.”*

(In the RSC, pleadings were ‘delivered’ whilst writs and other documents were served, but the context of delivery in relation to pleadings is clearly that of service.) It is clear from the old rules therefore that the functions of ‘file’ and ‘serve’ were distinctly provided for in relation to time running during court vacations.

8. In Jamaica, the old RSC made similar provision as Order 65, r. 4 above. The new Jamaica Civil Procedure Rules 2002, first made provision only for service of statements of case during court vacations in identical terms as Rule 3.5 above. By amendment<sup>2</sup> however, Jamaica’s Rule 3.5 now provides as follows:-

***“Time - vacations***

*3.5 (1) During the long vacation, the time prescribed by these Rules for filing and serving any statement of case does not run.*

*(2) However this rule does not override any order of the court which specifies a date for service of a statement of case.”*

This was also the position in the OECS CPR 2000, where the single reference to ‘serve’ in the originally identical (to Belize’s) Rule 3.5(1) was amended<sup>3</sup> to reflect ‘file or serve’ as follows:-

*“During the long vacation, the time prescribed by these Rules or by any practice direction for filing or serving any statement of case (other than a statement of claim) does not run unless the court orders or directs that time shall run.”*

It is therefore clear, that regardless of how the practice might have evolved in Belize, without legislative intervention, a judicial interpretation of ‘serve’ in Rule 3.5 can mean only serve. The Claimant’s attempt to file a request for entry of default judgment in September, 2016, was therefore erroneously refused by the Court Office.

But what effect does this ruling have on the parties’ respective positions herein?

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<sup>2</sup> No. 18/9/2006

<sup>3</sup> Eastern Caribbean Supreme Court Civil Procedure (Amendment) Act No. 92 of 2011 of St. Lucia (applicable to all Territories)

(ii) *The prayer to strike out the defence*

9. In determining the issue of the strike out of the defence, the first question that the Court must consider is whether the defence was properly filed. For if properly filed, short of an applicable ground to strike out the defence under the Rules, the only other option for a strike out available to the Claimant is to seek to invoke the Court's inherent jurisdiction. It is Counsel for the Claimant's submission, that having not been filed within the stipulated time, and there being neither consent for an extension between the parties nor the Court's permission upon an application to extend time - the defence was actually not properly filed. Short of an agreed extension of time between the parties, the Defendant was obliged to seek the Court's permission under Rule 10.3(8). This submission begs the question of what generally is the position when a defendant fails to file a defence within the stipulated time. With respect to the answer to this question, the Court entirely disagrees with the submission of Counsel for the Claimant.
10. Counsel submits that the Defendant could only have filed his defence with the permission of the Court. Other submissions in other cases have been that a late defendant is obliged to seek relief from sanctions. The Court's position is that when a defendant fails to file a defence in time, there is no automatic sanction for that failure. Instead, the defendant becomes exposed to the risk of having a default judgment entered against him or her and the word 'risk' is used, for as provided in Part 12, a default judgment is entered, upon the *request* of a claimant.<sup>4</sup> Reference is made to the Privy Council decision from Trinidad & Tobago **The Attorney-General v Matthews**.<sup>5</sup> The Trinidad Rules under consideration in this case are identical to Belize's CPR 2005 Rules 10.3(5) - consent to extend time for filing defence; 26.1(2)(c) - the Court's general power to enlarge time; and 26.8 – applications for relief from sanctions.

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<sup>4</sup> Rules 12.4; 12.5; & 12.9.

<sup>5</sup> [2011] UKPC 38

11. The defendant in **Matthews**, failed to file a defence within time; a request for consent for an extension (made after time had expired) had been refused; the claimant thereafter filed a request for permission to enter default judgment (the case being against the Crown); and after the request for permission for entry of default judgment was filed, the defendant filed an application for permission to file his defence out of time. The judge at first instance dismissed the claimant's request for permission for entry of default judgment and instead granted permission to the defendant to file his defence out of time. The permission granted to the defendant was given on the basis that whilst the claimant would not be prejudiced by the late filing of the defence, the defendant would be prejudiced if deprived of the opportunity to defend the claim. Additionally, the judge held that contrary to the claimant's submission, the case was not one requiring an application for relief from sanctions, as there was no automatic sanction occasioned by the failure to file a defence within the time stipulated.
12. The claimant appealed to the Court of Appeal which allowed the appeal following two of its earlier decisions.<sup>6</sup> These decisions both held that where there is a failure to take any procedural step within the time specified by the rules and that time has passed, there was an 'implied sanction' as a consequence of non-compliance, which necessitated an application for relief from sanctions. A procedural step includes the filing of a defence hence the submission of the claimant that the defendant was obliged to apply for relief from sanctions. The doctrine styled 'the implied sanction' doctrine, was noted by the Privy Council<sup>7</sup> as having been reasserted in emphatic terms by the Trinidad and Tobago Court of Appeal in **Attorney-General for Trinidad & Tobago v Regis**<sup>8</sup>. In **AG v Matthews** Lord Dyson reduces *counsel for the claimant's* argument as follows<sup>9</sup>:-

*"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.*

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<sup>6</sup> **Trincan Oil Ltd. v Schnake** (Civ App No. 91 of 2009); **Khanhai v Cyrus** (Civ App No. 158 of 2009).

<sup>7</sup> **AG v Matthews** supra per Lord Dyson @ paras. 11-14.

<sup>8</sup> (Civ App No. 79 of 2011) referred in para 12 of Lord Dyson in **Matthews** supra.

<sup>9</sup> **Matthews** supra @ para 13.

*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...Thus an application to file a defence out of time where the agreement of the claimant has not been obtained is not merely an application under rule 10.5. It is in reality an application for relief from the automatic sanction imposed by the rules..."*

Lord Dyson responds to those arguments of counsel as follows<sup>10</sup> (emphasis mine):-

*"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)<sup>11</sup> between applications for an extension of time before and after the period for filing a defence.*

13. Counsel for the Claimant herein was of the view that **AG v Matthews** was not applicable to this case as it was a case dealing with implied sanctions. On the contrary, it is directly applicable to the case at bar. At the root of counsel for the Claimant's case is that the defence herein was improperly filed because time had expired and no prior consent or permission for extension had been obtained. That was the very issue at the root of the appeal in **AG v Matthews**. The argument in Matthews was that the defence could not have been filed in those circumstances because there was an implied sanction for failure to follow a rule and this position had been upheld by the Court of Appeal in prior decisions. The categorical position of the Privy Council was to reject that argument and to hold that there was *no sanction imposed by any rule for failure to file a defence within time*, so that in the event of such failure, *unless or until a claimant requested default judgment, a defence filed out of time stands*.

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<sup>10</sup> Ibid @ para 14.

<sup>11</sup> Belize CPR 2005 Rule 10.3(8)

On the basis of the Privy Council decision in **AG v Matthews**, which speaks to filing a defence out of time upon consideration of rules identical to Belize's Rules 10.3(8) and 26.1(2)(c), as well as 26.8 (relief from sanctions *imposed* by a rule, order or direction of the court), it is found that there not being any request for default judgment filed as per record, the defence herein was properly filed.

14. The question now to be considered is what if anything should the Court do about the fact that the Claimant says (and the Court accepts) that he did present a request for default judgment and it was refused by the Court Office. It has already been stated by the Court that the interpretation of Rule 3.5 ought to be taken literally as it is written, which means that it applies only to service of statements of case (other than statements of claim) with the effect that time continues to run during the long vacation in respect of filing statements of case. This was an error by the Court Office in interpreting and applying Rule 3.5 and this error operated to the detriment of the Claimant. Counsel for the Claimant submits that this is an injustice to his client and this may well be so. However, procedurally, the defence was properly filed as there was on record, no request for default judgment. There is no applicable rule which allows the Court to strike that defence out. Therefore, to strike out this defence, the Claimant can only appeal to the Court's inherent jurisdiction which is available in all cases, to prevent abuse of its process.
15. The inherent jurisdiction of the court is that which exists in order to enable it to fulfill its mandate as a superior court of record. It preserves the authority of the court by way of summary process and is exercisable in relation to matters of procedure as opposed to substantive law.<sup>12</sup>In a case such as this, there was an error committed by the Court Office in refusing to accept the Claimant's request for entry of default judgment. The error was made in computing time. This was neither the fault of the Claimant nor the Defendant, but has resulted in the loss of an advantage to the Claimant.

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<sup>12</sup> "The Inherent Jurisdiction of the Court" by Master I.H. Jacob (1970) Vol. 23 Current Legal Problems 23.

Unfortunately for the Claimant, albeit late, when the Defendant filed his defence he was perfectly entitled on the face of the record to be able to do so. Had it been a situation where there was some fault attributable to the Defendant in the injustice occasioned by the Claimant, the Court might have been minded to exercise its inherent jurisdiction to prevent the Defendant from reaping a benefit obtained by his own misdeed. But that is not the situation, the Defendant filed his defence when there was nothing on record preventing him from so doing. The defence must therefore stand.

**Disposition**

16. (i) The application by the Claimant to strike out the defence is refused.
- (iii) Counsel for the Defendant's request for costs upon the dismissal of the Application to Strike Out is also refused.

Dated this 31<sup>st</sup> day of January, 2017.

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Shona O. Griffith  
Supreme Court Judge.