THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM NO. 668 OF 2016

MIGUEL ANGEL MESTIZO	**CLAIMANT**
AND	
ROBERT GABOUREL	**1st DEFENDANT**
ERNESTO GABOUREL	**2nd DEFENDANT**
ERNEST GABOUREL	**1st ANCILLARY CLAIMANT**
ROBERT GABOUREL	**2nd ANCILLARY CLAIMANT**

CLAIM NO. 670 of 2016

SABINA CARBALLO	**CLAIMANT**
AND	
ROBERT GABOUREL	**1st DEFENDANT**
ERNESTO GABOUREL	**2nd DEFENDANT**
ERNEST GABOUREL	**1st ANCILLARY CLAIMANT**
ROBERT GABOUREL	**2nd ANCILLARY CLAIMANT**

CLAIM NO. 671 OF 2016

FRANCISCO DE PAZ	**CLAIMANT**
AND	
ROBERT GABOUREL	**1st DEFENDANT**
ERNESTO GABOUREL	**2nd DEFENDANT**
ERNEST GABOUREL	**1st ANCILLARY CLAIMANT**
ROBERT GABOUREL	**2nd ANCILLARY CLAIMANT**

CLAIM NO. 699 OF 2016

DORA PRADO	**CLAIMANT**
AND	
ROBERT GABOUREL	**1st DEFENDANT**
ERNESTO GABOUREL	**2nd DEFENDANT**
ERNEST GABOUREL	**1st ANCILLARY CLAIMANT**
ROBERT GABOUREL	**2nd ANCILLARY CLAIMANT**

CLAIM NO. 700 OF 2016

JOSE ROMERO	**CLAIMANT**
AND	
ROBERT GABOUREL	**1st DEFENDANT**
ERNESTO GABOUREL	**2nd DEFENDANT**
ERNEST GABOUREL	**1st ANCILLARY CLAIMANT**
ROBERT GABOUREL	**2nd ANCILLARY CLAIMANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearing
20th July, 2017

Written Submissions
28th July, 2017
Decision
18th September, 2017

Mr. Kevin Arthurs for the Claimants.
Mr. Hubert Elrington, SC for the Defendants.

Keywords: Civil Procedure – Counterclaim – No defence – Judgment on Admission

RULING

1. The circumstances which give rise to this ruling are simple. The Counter-Defendants did not file a defence to the counterclaims herein within the twenty-eight days prescribed by Rule 18.9(2). They have made no application for extension of time in which to file such a defence either.

2. Counsel for the Counter-Claimants say that in accordance with Rule 18.12(2)(a) the Counter-Defendants are deemed to have admitted the counterclaim. Therefore, they (the Counter-Claimants) are entitled to judgment on admission and that such a judgment would ostensibly bring an

end to the claims which ought to be struck out accordingly. At the first hearing of the Fixed Date Claim he orally moved an application to this effect. The court entertained the application and directed that written submissions be filed by both sides. I am grateful for the assistance rendered by both counsel.

3. In their submissions the Counter-Defendants strenuously opposed the application and maintained that the main proceedings, i.e. the claims are to be determined before the ancillary claims could be considered. This he said, was because the counterclaim was in fact a contingency claim. He valiantly insisted that the claim having been filed first had to be determined first and any judgment given therein could affect the counterclaim. It remained open to a judge only after trial of the main claim, to dismiss a counterclaim even where no counter-defence had been filed. He relied on Rule 18.6 and postulated that it is only where the court did not dismiss the counterclaim, that it change from a contingent claim, to an actual claim not subject to summary dismissal. On survival, the issues on the counterclaim become ripe for consideration and the Counter-Claimant gets a right to proceed with his claim.

4. Neither party was able to provide any precedent on this issue and considered it novel to the jurisdiction. The court for the reasons outlined below granted the Counter-Claimant's application.

Nature of a Counterclaim or Ancillary Claim:

5. Rule 18.2 prescribes:

> *"18.2 (1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as provided by this Rule.*
> *(2) Particulars of an ancillary claim must be contained in or served with the ancillary claim form in Form 9.*

(3) An ancillary claim form must include –
(a) the ancillary claimant's address for service in accordance with Rule 3.11; and
(b) a certificate of truth in accordance with Rule 3.12.
(4) The following Rules do not apply to ancillary claims –
(a) Rules 8.12 and 8.13 (time within which a claim form may be served);
(b) Part 12 (default judgments); and
(c) Part 14 (admissions) other than Rule 14.1 (1) and Rule 14.1 (2), Rule 14.3 and Rule 14.4
(5) Where the ancillary claim is a counterclaim by the defendant against a claimant (with or without any other person), the claimant is not required to file an acknowledgment of service and therefore Part 9 (Acknowledgment of Service) does not apply to the claimant."

6. **Blackstone's Civil Practice 2013** at paragraph 28.1 explains:

> *"The ability to bring a counterclaim within existing proceedings allows a defendant to wrest some of the initiative away from the claimant. Its main purpose, however, is to promote the general policy of ensuring that, so far as convenient, all issues between the parties are resolved together, with a view to saving costs, avoiding a multiplicity of claims and avoiding the risk of irreconcilable judgments."*

7. Although an ancillary claim is to be treated as a claim and under the UK rules a default judgment may be entered where no defence is filed in response, the Belize position is different. It is, in effect similar to the position of the UK additional claim against a third party. However, the need to file a defence to a counterclaim in Belize is of no less importance than it is in the UK.

8. The Counter-Defendants assert that Rule 18.9(1) gives a Counter-Defendant some discretion as to whether or not to file a defence. That Sub-rule reads:

"A person against whom an ancillary claim is made may file a defence." The use of may is permissive, but the sub-rule has to be considered in light of Rule 18.9(3) which states clearly that: *"The rules relating to a defence to a claim apply to a defence to an ancillary claim except Part 12 (Default Judgment)."* Therefore,

Rule 10.2(1) applies with equal force to an Ancillary Defendant as it does to an ordinary Defendant and:

"A Defendant who wishes to defend all or part of a claim must file a defence …"

9. ***Muhammad v ARY Properties Ltd (2016) EWHC 1098(ch)*** reiterated that a defence to a counterclaim is not a formality and a full and detailed defence to the points made in the counterclaim is required. Therefore, if a party wishes to defend a counterclaim he must file a proper defence.

The issues now to be determined are:

10. 1. Can a judgment on admission be entered when no defence is filed to a counterclaim within 28 days of service of the counterclaim.
    2. Can a judgment be entered when no defence is filed to a counterclaim within 28 days of service of the counterclaim.

Can a judgment on admission be entered when no defence is filed to a counterclaim within 28 days of service of the counterclaim:

11. The court has, out of an abundance of caution, decided to deal with this issue since counsel for the Counter-Claimant insisted on referring to a judgment on admission. Rule 18.2(1) directs that an ancillary claim is to be treated as a claim except as provided by Rule 18. Rule 18.2(4) generally precludes the issuing of a judgment on admission where it states that Part 14 (Admissions) does not apply except Rules14.1(1), and (2), 14.3 and 14.4.

12. Rule 14.1(1) and (2) read:

"(1) A party may admit the truth of the whole or any part of any other party's case.

(1) A party may do this by giving notice in writing (such as a Statement of Case of by letter) before or after the issue of proceedings."

13. In the present case there has been no such admission in writing. It is such a formal admission alone which ignites Rule 14.4:

> *"(1) Where a party makes an admission under Rule 14.1(2) (admission by notice in writing), any other party may apply for judgment on the admission.*
>
> *(2) The terms of the judgment shall be such as it appears to the court that the applicant is entitled to on the admission*."

14. Rule 14.3 deals with admissions where the party is a minor or a patient and is irrelevant to these proceedings.

15. Briefly, then, it is only where a Counter-Defendant makes an admission in writing (before or after proceedings have been issued) that the Counter-Claimant or any other party may apply for a judgment on admission. There has been no such admission in this case and the Counter-Claimant therefore has no right to apply nor is he entitled to such.

Can a judgment be entered when no defence is filed to a counterclaim within 28 days of service of the counterclaim:

16. Rule 18.12 on which the Counter-Claimant relies is different. Its side note proclaims *"Special provisions relating to judgment on failure to file defence to ancillary claim."* And it reads:

> "18.12 (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 57.*
> *(2) The party against whom the ancillary claim is made –*
> *(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*
> *(b) subject to paragraph (5), if judgment under Part 12 is given against the ancillary claimant, he or she may apply to enter judgment in respect of the ancillary claim.*
> *(3) However, paragraph (2) does not apply in ancillary proceedings against the Crown unless the court gives permission, subject to Rule 18.7.*

(4) An application for the court's permission under paragraph (3) may be made without notice unless the court directs otherwise.
(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 may 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."

17. The Counter-Claimants referred to the Belizean case ***Marva Rochez v Clifford Williams Claim No. 179 of 2009*** and quotes from paragraphs 9 and 10:

> *"A Counter Defendant has 28 days after service of the counter claim in which to file a defence - Rule 18.9(2). From the Supreme Court (Civil Procedure) Rules it is clear that a defence to a counterclaim is somewhat different to a defence to an ordinary claim form. The most glaring difference being that when no defence is filed to an ordinary claim, the claimant is entitled to apply for default judgement and if he does not, there is no sanction for filing that defence out of time …*
>
> *On the other hand, where no defence has been filed within 28 days after service of the counterclaim, the Counter Defendant is deemed to have admitted the counterclaim in accordance with Rule 18.12(2). Part 12 (Default Judgement) does not apply - Rule 18.9(3). The Counter Defendant is then bound by any judgement or decision in the main proceedings in so far as it is relevant to any issues arising in the counterclaim. All this occurs through application of the rule and without any action from the counterclaimant. It is triggered simply by the expiration of those 28 days.*
>
> *A Counter Defendant simply does not have the same freedom enjoyed by an ordinary defendant. By way of comparison, neither does a defendant to a fixed date claim. A Claimant on a fixed date claim is precluded from applying for a default judgement by Rule 12.2(a). However, Rule 27.2(3) allows for the first hearing of the fixed date claim to be treated as a trial of the claim, if it is not defended. This is done through operation of the rule and not through any act of the Claimant."*

18. To be clear, although <u>the admission</u> is deemed through operation of law there is undoubtedly a need for a special judgment to be given to ensure a remedy. This entails the making of an application for judgment as the

Counter-Claimant has done here. Although the proper procedure ought to have been the making of a written application pursuant to Part 11. The court also states for completion that there is nothing which precludes a Counter-Defendant from applying to extend time in which to file a defence to a counterclaim as he is able to do in relation to a claim. Again, all in keeping with Rule 18.9(3) as earlier discussed. This court feels certain that a judgment could be entered at this stage since Rule 18.12(6) explains that:

> *"The court may at any time set aside or vary a judgment entered under paragraph 2 and not simply entered under paragraph (2)(b)."*

19. With that said, the court now considers the Counter-Claimants' application; whether a special judgment should be issued at this stage and what effect this would have on the claim.

20. The Trinidadian Court of Appeal case of ***Satnarine Maharaj v The Great Northern Insurance Company Ltd et al Civil Appeal No. P198of 2015*** offers ***excellent*** guidance on the application of Sub-Rule 2 (a). In that case a judgment had accordingly been entered for the Counter-Claimant and the claim was struck out thereafter as being unsustainable. The Appeal Court grappled with similar issues as those now before this court. Whether a special judgment could or should be issued on a counterclaim and what effect the deemed admission has on the entire case. They considered, in particular, whether the Counter-Claimant was only entitled to rely on the deemed admissions in the main claim and nothing more.

21. The court found that on a plain reading of their rule 18.12(2)(a) (which is identical to Belize's Rule) the defaulting Counter-Defendant is deemed to admit both the allegations and reliefs claimed in the Counter-Claim. This

court holds a somewhat different view. A party may admit factual allegations and those issues are removed. However, the court must determine whether what has been admitted is sufficient to establish the claim for relief some other relief or no relief at all. Hence, the giving of relief as the court considers the party is entitled to.

22. The judgment goes on to explain at paragraph 22-24, that in order to determine the effect of these admissions: *"It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admission the court must assess how that impacts on the claim.* (Claim here refers to main claim, not the counterclaim).

23. There of course need be no connection between the claim and the counterclaim (see Rule 18.5(2). In such a case it is unlikely that the failure to defend the counterclaim will have any significant impact on the claim. Where, however, the counterclaim is wrapped up in the claim and intimately connected to it the position can be expected to be different.

24. It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim. The appellant's position was that the claim should not have been struck out by the Judge. The appellant, however, conceded that in an appropriate case the admissions deemed to arise from the failure to defend the counterclaim can result in the dismissal of the claim. We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process. The respondents submitted that that was this case."

23. The court then went on to consider what issues remained in the claim after the admitted factual allegations had been removed. They found that a single issue of contributory negligence remained unresolved in the claim and the judge had therefore erred in striking out the claim in its entirety.

24. The Counter- Claimants here urge that the counterclaims are vastly different from the claims and therefore judgment on the counterclaims would have no impact whatsoever on the claims. This contradicts their application to strike out the claim. The claims seek declarations on the status and terms of alleged tenancies, purportedly given by the Counter-Claimants' agent, for the life of the Claimants. They clearly strive to protect the lessees from termination of the lease by the Counter-Claimants. The counterclaim on the other hand seek to recover possession of the leased properties pursuant to notices to quit issued by the owners. The two are undoubtedly related and inextricably bound up.

25. The court finds, having considered the counterclaims, and due to the Counter-Defendants failure to file timely responses thereto, that they have admitted the following:

    1. That Ernest Gabourel and Robert Gabourel are the owners of the property situated at Mile 8 ½ Phillip Goldson Highway.
    2. That all of the Ancillary Defendants are their tenants.
    3. That, as the owners' agent, Kenneth Gabourel was to collect rent from the tenants and effect repairs. He was not authorized to and did not enter into lease agreements as described by the Ancillary Defendants.

4. That rent was to be paid at $200 per month but was subsequently reduced to $100 per month due to consistent default in payment.
5. That the default in payment has persisted.
6. That the Ancillary Defendants have all been duly served with notices to quit the premises by September 1, 2016 and have not complied.
7. That the Counter-Claimants are entitled to possession of the premises.

26. These admissions significantly impact the claims. Their effect is that Kenneth Gabourel had no authority whatsoever to and did not enter into the lease arrangements they claim he entered into with them. That particular admission is the footing upon which their claims rest and one on which they can no longer rely. Moreover, one of the conditions upon which the Claimants say their lease was made was that they pay their rent. They have also admitted that they have defaulted on payment of that rent which would be a fundamental breach of that agreement. Any declarations which the court could possible make on the claims would be in vain since the evidence is uncontroverted that the Counter-Claimants are entitled to possession. Therefore, there is nothing left to be determined on the claim and it is accordingly struck out.

Determination:

1. Judgment to the Counter-Claimants on the counterclaim pursuant to Rule 18.12(2)(a).
2. The Counter-Defendants are to vacate the said premises by October, 31st, 2017.
3. The Counter-Defendants may take any moveable structures or parts of structures with them.
4. Damages to be assessed upon application by the Counter-Claimants.

5. The Claims herein are struck out.
6. Costs to the Counter-Claimants in the sum of $3,000.00 from each Counter-Defendant.

SONYA YOUNG
JUDGE OF THE SUPREME COURT