IN THE SUPREME COURT OF BELIZE A.D. 2017
(CIVIL)

CLAIM NO. 261 of 2017
BETWEEN

MARIA MOGUEL **Claimant/Counter-Defendant**

AND

CHRISTINA MOGUEL **Defendant/Counter-Claimant**

Before: **The Honourable Madame Justice Griffith**
Date of hearing: **18th May, 2018.**
Appearances: **Ms. Darlene Vernon for the Counter-Defendant and no Appearance by Mr. Kevin Arthurs for the Counter-Claimant.**

DECISION

Application for Judgment on Counter-claim, CPR Rule 18.12(2) – Application to Strike Out Counter-claim, CPR Rule 26.3(1)(b) - Abuse of Process – Concurrent proceedings – Delay in Seeking Judgment on Counter-claim.

Introduction

1. Before the Court are two competing applications, the first in time being for judgment on a counter-claim pursuant to CPR 2005 Rule 18.12(2)(a), i.e. arising from the failure of the counter-defendant to file a defence. Also before the Court, is an application to strike out the counter-claim for being an abuse of process as a result of a delay in filing the application for judgment and the existence of concurrent proceedings before another Court. The application to strike out has been heard in the absence of counsel for the counter-claimant as he failed to appear and there was no communication forthcoming from Counsel as to his whereabouts or inability to attend Court. The date for the hearing of these applications was issued in open Court on the 19th April, 2018 in the presence of both counsel. The application to strike out was served as directed by the Court. On the 19th April, 2018, Counsel for the counter-claimant had been given liberty to file a response to the application to strike out, on or before the 11th May, 2018. No response was filed. The applications, set for 10am, were commenced at 10.21am, the Court having affording a reasonable time for Counsel to make his appearance.

This is the Court's decision on the applications. In this decision, unless indicated to the contrary, reference to 'the counter-claim' means the counterclaim remaining in these proceedings 261 of 2017 and ' counter-claimant' or 'counter-defendant' is to be construed accordingly. Correspondingly, reference to 'the claim' means the proceedings in claim 350 of 2017 and references to 'the claimant' or 'the defendant' are to be construed accordingly.

Issues

2. Notwithstanding the absence of Counsel for the Defendant, the Court considered the respective applications to be inextricably bound and treated with the following issues which arise having regard to them both:-

   (i) Is the counter-claimant entitled to seek judgment on the counter-claim?

   (ii) Are the circumstances in which judgment is sought on the counter-claim an abuse of the Court's process?

   (iii) If the application for judgment on the counter-claim is not an abuse of process, should the counter-defendant be granted an extension of time within which to file a defence to the counter-claim?

The Applications and Submissions

Chronology of Events

3. The history of this matter is extremely important to the determination of the applications and is set out as below. To begin with, central to the application to strike out, is the fact the substantive claim from which the counter-claim arose was discontinued, but subsequently commenced as a fresh claim and was placed before another court. The chronology in the proceedings before this Court is first set out as a matter of record. Thereafter, the events of the fresh claim are set out as provided by the affidavit filed in support of the application to strike out. No affidavit was filed in response to the application to strike out. The proceedings in this claim 261 of 2017 are as follows:-

(i) The counter-claim was filed pursuant to proceedings commenced by fixed date claim filed on 5th May, 2017. The claim concerned a dispute in ownership of property between family members;

(ii) At the first hearing of the claim on 9th June, 2017, no acknowledgment for service had been filed, but Counsel for the counter-claimant appeared and advised that a defence had been filed on the 8th June, 2017. The defence, which was actually a defence and counter-claim was not yet before the Court at the first hearing;

(iii) Following observations made by the Court in relation to the mode by which the proceedings were commenced, the matter progressed no further on that day and was discontinued on 13th June, 2017. The fixed date claim was replaced by an ordinary claim also filed on the 13th June, 2017, and based upon the same facts pleaded and relief sought;

(iv) That ordinary claim, now 350 of 2017 was assigned to another court and albeit filed since the 8th June, 2017, the counter-claim herein, did not thereafter engage the attention of this Court, and the parties proceeded accordingly, in claim 350 of 2017;

(v) Save for correspondence coming to the attention of this Court in relation to the matter as it was proceeding in claim 350 of 2017, the next pertinent step to have occurred in this claim, was a letter dated 21st February, 2018, sent to the Registrar, for the Court's attention.

4. The details of this letter will be referred to shortly, however the relevant events in Claim 350 of 2017 are now introduced, as extracted from the evidence supplied in support of the application to strike out:-

(i) Claim no. 350 of 2017 between the same parties, having been filed on 13th June, 2017 was served on the defendant (counter-claimant herein) on the 23rd June, 2017. An acknowledgment of service for the defendant in that claim was entered by Counsel for the counter-claimant;

(ii) A defence only, was filed on the 4th July, 2017 and a case management conference held on the 24th July, 2017. Both counsel were present at that hearing and the matter proceeded to mediation without success;

(iii) At some point whether before or following the failed mediation, Counsel for the counter-claimant raised the issue of the counter-claim before the judge in Claim no. 350 of 2017;

(iv) On the 2nd November, 2017, the counter-defendant was served with an application filed on 17th October, 2017, for judgment on the counter-claim pursuant to Rule 18.12(2)(a) – i.e. – due to the failure of the counter-defendant to file a defence to the counter-claim thereby being deemed to admit the counter-claim. This application was not brought to the attention of this Court;

(v) On the 16th November, 2017, at an adjourned case management conference before the judge in claim 350 of 2017, the application for judgment on the counter-claim appears to have been administratively set (as opposed to set by the judge) for hearing. The Court therein declined to treat with the application in claim 261 of 2017, as it was not seized of that matter;

(vi) Instead, the judge in claim 350 of 2017, gave directions upon case management, granting permission to the Defendant therein, to file and serve a counter-claim on or before the 24th November, 2017. Further directions were also given, for filing of a defence and reply to the counter-claim to be filed, witness statements and pre trial memorandum;

(vii) The counter-claim in 350 of 2017 was not filed within the time ordered by the judge and was in fact served on the claimant on the 19th January, 2018. The affidavit in support of the application to strike out does not indicate when the counter-claim in 350 of 2017 was actually filed, but deposes that it was definitely not filed within the time ordered as checks were made at the court office to verify whether it had been filed;

(viii) The parties in claim 350 of 2017, continued with their compliance of their case management order of the 16th November, 2017, including, by consent, enlarging the time for filing of witness statements;

(ix) On 13th March, 2018, at further case management, the trial date of claim 350 of 2017 was set by the judge, for 5th June, 2018.

5. Meanwhile, returning to claim 261 of 2017, the letter of 21st February, 2018 referred to above, written by Counsel for the counter-claimant for this Court's attention, alleged certain but not all pertinent facts relating to the filing of the application for judgment on the counter-claim and it not having been heard within the proceedings of 350 of 2017. The letter in effect, requested for the application for judgment on the counter-claim to be placed before this Court, as per the matter's original assignation. Without knowledge of all that had transpired in claim 350 of 2017, this Court after retrieving the file and application for judgment, then set the application for directions on the 19th April, 2018. At this hearing, a chronology of events in claim 350 of 2017 was given by the combined representations of respective counsel, including the fact of the matter being set imminently set for trial on the 5th June, 2018. Counsel for the counter-claimant's position was that having been filed first in time (since October, 2017), his application for judgment on the counter-claim, ought to have been heard as of right. Counsel for the counter-defendant however submitted, that the circumstances were as such that the application for judgment was an abuse of the Court's process and she ought to be allowed to make that submission by formal response to the Court. Against these respective positions, permission was granted for the counter-defendant to file her application and directions given for the hearing of the two applications currently before the Court.

Submissions of Counsel

6. Counsel for the counter-defendant submitted in effect that the abuse of process was borne out of the combined effect of (i) the existence of the same proceedings before another court; (ii) the fact that those proceedings were imminently set for trial (and thus final determination) on the 5th June, 2018 – some 17 days away; and (iii) the delay on the part of counsel for the counter-claimant, in seeking a hearing of the application for

judgment before this court, particularly in light of the conduct of the proceedings in the concurrent claim. Firstly, Counsel for the counter-defendant commended the overriding objective of the Rules to deal with cases justly, having regard to time and expense, but particularly within the context of the use of judicial resources. Counsel referred to the decision of **Worldwide Property Management Ltd. v Belize Offshore Center Ltd. et al**[1]**.** per Legall J in relation to an application by interested parties therein to strike out the claim. Counsel commended the Court's attention to the recognition of Legall J at paragraph 22 therein, of the obligation of the Court, in fulfilling the overriding objective to dealing with cases justly, to have regard to the allotment of limited judicial resources to other cases. This point of course, bore reference to the existence of the concurrent proceedings before another court, imminently set for trial.

7. Beyond the bare fact of the substantive proceeding before another court, Counsel for the counter-defendant contended that the determination of the application for judgment would require consideration of the merits of the claim, which was shortly about to be tried. This contention was based on the manner in which the Court was obliged to carry out the determination of the application for judgment. This approach, it was submitted, was that recently applied in **Miguel Mestizo v Robert Gabourel et al**[2]as well as **John Palacio v Football Federation of Belize**[3], both cases based upon Trinidadian Court of Appeal decision **Satnarine Maharaj v Great Northern Insurance Co. Ltd**.[4]The approach in that case which Counsel says is to be employed in determining the application for judgment, is that the Court must embark upon the exercise of considering what effect the deemed admissions (for failing to file a defence to the counterclaim), have on the main claim. But more particularly, whether the deemed admissions would dispose of the claim, by reason that the allegation deemed admitted would now be contradictory to the claim.

[1] Belize Supreme Court Claim No. 354 of 2009
[2] Belize Supreme Court Claims (Consolidated) Nos. 668, 670, 671 & 699 of 2016
[3] Belize Supreme Court Claim No. 546 of 2017
[4] Trinidad & Tobago Civ. App. No. P198 of 2015

In this regard therefore, Counsel for the counter-defendant submits that judicial time is being wasted, as that exercise is shortly to be carried out in relation to the main claim, before another court.

8. Finally, Counsel for the counter-defendant contends that the delay in seeking judgment on the counter-claim should preclude judgment being granted in the counter-claimant's favour. It is submitted that the counter-claimant was at liberty to apply for judgment since July, 2017 but did not do so until October, 2017. Further, that having on the 16th November, 2017 been given an opportunity in Claim 350 of 2017 to file the counter-claim in those proceedings, not only was the counter-claim therein not filed within the time limited to do so (24th November, 2017), it was also not served until 19th January, 2018. With respect to this non-compliance, Counsel for the counter-defendant notes that all other case management orders in Claim 350 of 2017 were complied with and both Counsel co-operated with each other by consenting to an extension of time for filing witness statements. Further to those points, Counsel for the counter-defendant submitted that it was in November, 2017 when the judge in Claim 350 of 2017 declined to deal with the application for judgment on the counter-claim in this matter and it was not until February, 2018, that Counsel for the counter-claimant engaged the Registrar to have the application brought before this Court. This request was made after the same counter-claim was filed (out of time), in Claim 350 of 2017. In all of these circumstances, Counsel for the counter-defendant submits that it would be an abuse of the Court's process, to grant the application for judgment on the counter-claim.

9. Brief submissions were made by Counsel for the counter-defendant in her alternative prayer, that in the event her application to strike out be denied, that she be granted an extension of time within which to file her defence to the counter-claim. Counsel was alerted to the Court's position that the application to extend time to file the defence to counter-claim was viewed as an application for relief from sanctions, given that Rule 18.12 imposed a sanction in the form of deemed admission of the counter claim upon failure to file a defence.

As a result, as per the requirements of an application for relief from sanctions pursuant to Rule. 26.8, Counsel would be required to satisfy the Court, inter alia, that there was a good explanation for the failure to file a defence to the counter-claim.

10. With this in mind, Counsel for the counter-claimant submitted that the grounds to be satisfied should be regarded within what was viewed as the unique circumstances of this case. Counsel identified those unique features as the discontinuance of the original claim, re-filing of the claim which then was placed before a different judge, the failure of counsel for the counter-claimant to seek judgment on the counter-claim whilst at the same time fully participating in the new claim, the filing of the application for judgment on the counterclaim when the proceedings in the new claim were well underway, the failure to comply with the permission granted to file the counterclaim in the new claim, the late service of the counterclaim when finally filed, out of time, and seeking a hearing on the counterclaim in this Court in February, 2018, which was after the counterclaim in the new matter had been filed. All of these facts, Counsel for the counter-claimant contended should be favourably considered against the criteria for relief from sanctions.

Discussion and Analysis

11. The Court commences its consideration of the application to strike out, which at the same time implicitly engages consideration of whether to grant judgment on the counterclaim with examining the context and meaning of the term 'abuse of process'. A useful starting point is **Henderson v Henderson**[5] from which is extracted the following statement by Wigram V-C

> *"…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case…"*

[5] [1843-60] All ER Rep 378

This statement has been cited time and time again, within the context of the consideration of claims to strike out proceedings for abuse of process. Albeit spoken within the context of a plea of res judicata, the rationale underpinning the power to strike out for abuse of process as explained in subsequent cases, is the safeguarding of the public interest in the certainty of litigation and avoidance of multiple or unnecessary proceedings, resulting in additional expense to parties and a waste of court time which could be available to others.[6] This rationale, is part and parcel of the CPR's overriding objective, but can further be placed within the context of the importance to the rule of law, of the existence and availability of the courts as recourse to citizens to resolve their disputes.

12. With respect to this rationale, it is equally to be said that a litigant must not easily be deprived, of his or her right to bring a dispute before the courts and to have it resolved on its merits.[7]With particular reference to this case however, there is also that context of the term 'abuse of process', which relates to those inherent powers possessed by a court in order to safeguard its very character as such. In this regard, reference is made to **Hunter v Chief Constable of West Midlands**[8], a civil appeal from an application to strike out a claim for abuse of process. Lord Diplock opened his consideration of the appeal as follows (emphasis mine):-

> *'My Lords, this is a case about abuse of process in the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'*

[6] Talbot v Berkshire County Council [1994] Q.B. 290
[7] Johnson v Gore Wood & co (a firm) [2001] 1 All ER 481 per Lord Bingham of Cornhill @ 490
[8] [1981] 3 All ER 727 at 729

13. His Lordship went on to identify that inherent power of the court, as that contained in the UK's Rules of the Supreme Court and thereafter, the current, Civil Procedure Rules. In Belize, this power is expressly contained in the Civil Procedure Rules 2005, Rule 26.3(1)(b). This extract places in stark context, the issue that is raised for determination in considering both applications. It concerns the application of a procedural rule, consistent with its literal application, but which Counsel for the counter-defendant says would be manifestly unfair to her client. It is not necessary to consider the application in the alternative light of otherwise bringing the administration of justice into disrepute amongst right thinking people, as this is not what arises on the circumstances of this case. Without any attempt to delve further into the plethora of authorities which exist on the subject of striking out a claim for abuse of the court's process, it is sufficient to rest here on the context provided by the above two paragraphs and consider whether in the circumstances of the instant case, the Court's power to strike out would be appropriately exercised.

14. Firstly, the point is taken in respect of the existence of the second claim on the same facts and issues shortly awaiting trial before another judge. As a result, Counsel for the counter-defendant asserts that for this Court to determine the application for judgment on the counterclaim would be a waste of judicial time and resources. Notwithstanding the absence of Counsel for the counter-claimant, it is anticipated that the answer to this assertion would have been the clear terms of Rule 18.6(b)[9] in conjunction with the entitlement to seek judgment further to Rule 18.12(2)(a). The Court does not consider that the facts of the existence of the fresh claim and imminence of the trial thereof, should of themselves preclude the Court from entertaining the application for judgment. The counter-claim is separate and regardless of whatever may have been occurring with the fresh claim, prudence would have dictated, at the material time, that a defence thereto be filed.

[9] I.e. that the counterclaim survives even upon the dismissal or discontinuance of the claim.

Further, it was open to either Counsel, to seek to have the undefended counter-claim consolidated with the fresh proceedings, and any relevant applications filed and determined in that claim. To some extent therefore, the counter-defendant has ownership for the application for judgment given the failure to file a defence to the counter-claim.

15. To grant judgment on the counterclaim however, would be the literal application of the Rules, on the bases that the counter-claimant is with nothing more entitled to apply for the judgment given the failure to defend; and that the application for judgment was first in time. The wider circumstances of the filing and conduct of both claims however, are relevant to the exercise of the Court's discretion in determining the applications and as such, must be weighed in the balance. The Court makes the following determinations in relation to the overall facts and circumstances surrounding both claims.

    (i) The discontinuance of claim 261 of 2017 had no effect on the viability of the counterclaim;

    (ii) It was therefore open to the counterclaimant, to seek judgment on the counterclaim, pursuant to Rule 18.12(2)(b) from sometime in July, 2017 when the time limited for filing a defence thereto would have expired;

    (iii) Having filed a defence only (as opposed to a defence and counterclaim) to the fresh claim (350 of 2017) on the 4th July, 2017, it is not unreasonable to infer that Counsel for the counter-claimant either harboured an intention to pursue the counterclaim in 261 of 2017 or did not intend to pursue the counterclaim at all;

    (iv) Considering however that Counsel for the counterclaimant is alleged to have raised the issue of the Counterclaim before the judge in claim 350 of 2017 quite early in the proceedings, it is not unreasonable to expect that an application for judgment on the counterclaim would have been made much earlier than 18th October, 2017, when it was in fact filed.

In this regard, it is considered that there is no circumstance (particularly given the then perilous position of the counter-defendant), which alters the fact that the application for judgment on the counterclaim was untimely, having been made more than three months after the entitlement to file it arose;

(v) In addition to being untimely, it is considered that after being put on notice on 16th November, 2017 by the judge in 350 of 2017, that the application for judgment in 261 of 2017 was not properly before that judge, it was not until 21st February, 2018, when Counsel for the counter-claimant, by letter to the Registrar, sought to have his application for judgment brought up before this Court, as the Court having conduct for that claim. This step again, was untimely;

(vi) Given that the position on the counterclaim was that there was a failure to file a defence and that this would have remained the position in claim 261 of 2017 until an intervening order of this Court, it was open for Counsel for the counter-claimant, to retain and pursue the advantage of that position in claim 350 of 2017 by making an application for the claims to be consolidated.

16. In the context of the above findings and determinations, what the Court is left with, is firstly Counsel for the counter-claimant's delay of (3) three months in availing himself of the entitlement to file for judgment on the counterclaim as enabled under Rule 18.12(2)(b). This delay is inexcusable given the fact that the dispute remained live by virtue of the filing of the new claim on 13th June, 2017 and more particularly, by the fact that only a defence was filed in response to the new claim. The obvious inference the Court draws from the filing of the defence only in the new claim, is that it was fully intended to take advantage of any failure to file a defence to the counterclaim in 261 of 2017. Secondly, notwithstanding the delay in filing the application for judgment, which was done on the 18th October, 2017, when it became apparent (in November, 2017) that the application was not being entertained before the judge in claim 350 of 2017, the available course of action of seeking a consolidation of the claims which would have preserved the status quo in relation to the application, was not taken.

Further, Counsel for the counter-claimant sought the relisting of his application before this court, in February, 2018, some three months after it can fairly be held to have been within his contemplation.

17. As stated before, there is ownership on counsel for the counter-defendant for failing in the first place, to have filed a defence to the counter-claim. In terms of there being a good explanation for not doing so, it is doubtful whether the explanations foreshadowed in Counsel's brief submissions in relation to the alternative application to extend time for filing a defence to the counter-claim, would have sufficed. It has never been asserted that the defence and counterclaim was not served, thus the failure to file a defence is either attributable to oversight, a mistaken apprehension of the effect of the discontinuance (hardly likely), or the mistaken apprehension as to opposing Counsel's intentions in pursuing the counterclaim (perhaps likely). Be that as it may in relation to such ownership, the pursuit of judgment on the counterclaim, remained within the purview of the counterclaimant, thus the delays or failures to take appropriate action remain attributable to the counterclaimant. Against these circumstances therefore, paying due regard to the words of Lord Diplock in **Hunter v Chief Constable of West Midlands**[10] it is considered that to entertain the application for judgment on the counterclaim would be an abuse of the Court's process.

Conclusion and Disposition

18. The application for judgment on the counterclaim is accordingly to be dismissed. The success of the counter-defendant's application notwithstanding, costs will not be awarded given that it was counter-defendant's own failure to file a defence which gave rise to the application for judgment in the first place.

[10] Supra para. 12 herein

The matter is therefore disposed of as follows:-

(i) The application for judgment on the counterclaim is struck out as an abuse of process;

(ii) There is no order as to costs.

Dated this 24th day of May, 2018.

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Shona O. Griffith
Supreme Court Judge.