THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-00211

BETWEEN

CURTIS CUFFIE

DEMETRIUS HARRISON

ANNISHA PERSAD

CURTIS MEADE

DUAINE HEWITT

Claimants

AND

THE PUBLIC SERVICES ASSOCIATION OF TRINIDAD AND TOBAGO

First Defendant

WATSON DUKE

(President of the Public Services Association of Trinidad and Tobago

Second Defendant

SHALENE SUCHIT-DWARIKA

(General Secretary of the Public Services Association of Trinidad and Tobago

Third Defendant

DAWN GARCIA

(Trustee of the Public Services Association of Trinidad and Tobago

Fourth Defendant

CARAY PRICE

(Trustee of the Public Services Association of Trinidad and Tobago

Fifth Defendant

Appearances:

Claimant: Mr. Timothy Affonso instructed by Ms. Symone Gordon.

Defendant: Mr. Ravi Rajkumar, Mr. John Heath and Mr. Lionel M. Luckhoo.

Before the Honourable Mr. Justice Devindra Rampersad

Date of delivery: November 7, 2019

Ruling on Application for Judgment and the Defence Filed

Contents

Introduction

1. The court has before it an issue between the parties in relation to a defence that was filed on 26 September 2019 without this court's permission or an application for extension of time. At the same time, the court has the claimants' request for judgment in default of defence before it.

2. The court has decided to strike out the defence that was filed and give directions for the matter to proceed as an undefended action for the reasons given below.

History

3. On 17 January 2019, the claimants brought this action by way of a claim form and statement of case against the defendants. The claimants also filed a Notice of Application for interim relief on 12 February 2019 supported by the affidavit of the second claimant along with a certificate of urgency for the grant of urgent interim relief.

4. In the affidavit of service filed on 9 April 2019 in respect of the service of the said Notice of Application, Selwyn Mark, process server, deposed to the fact that he served the first and second defendants at 8:48 AM on 14 February 2019 and the third and fourth defendants on 25th February and 19th February respectively. A different process server, Ramkarran Ramparas, apparently served the first defendant on 13 March 2019. There is no dispute with respect to service.

5. In the separate appearances filed on 26 April 2019 on behalf of these defendants, the following dates for service of the claim form and statement of case were acknowledged:

    5.1. The first defendant acknowledged service on 22 January 2019;

5.2. The second defendant acknowledged service on 22 January 2019;

5.3. The third defendant acknowledged service on the 21 January 2019;

5.4. The fourth defendant acknowledged service on 19 February 2019;

5.5. The fifth defendant acknowledged service on 31 January 2019.

6. On 17 April 2019, despite the certificate of urgency, the matter had still not yet been listed before this court and a request was made by letter to this court's JSO dated that same day indicating that, up until then, none of the defendants had filed an appearance, a defence nor a response affidavit to the application for interim relief and that the time for the filing and service of a defence had expired. A date for the hearing of the application for interim relief was requested. For some inexplicable administrative reason, the matter was not listed as requested until 6 August 2019 when a notice was sent out to the parties fixing the matter to be heard on 17 September 2019. Regrettably, once again, due to another administrative error, the email notification to the attorney at law for the defendants was addressed incorrectly and, in the circumstances, the defendants did not have notice of the hearing for 17 September.

7. When the matter came up for hearing on 17 September, in the absence of the attorney-at-law for the defendants, the court heard the claimants' attorney's submissions and fixed a date for decision for 25 September. That date was rescheduled to 26 September instead.

8. In the meantime, on 25 September, instructing attorney for the defendants filed an affidavit indicating the error with the email and the resultant failure to receive the notice of hearing. In his affidavit, Mr. Luckhoo said the following:

8.1. He entered appearances on behalf of the defendants on 26 April 2019;

8.2. He made checks with the Court Registry from time to time as he experienced challenges with regard to having certain documents to be filed on behalf of the defendants finalized;

8.3. Up to 15 August 2019, there was no record on the court system as to steps further than the filing of the claim having been taken by the claimants;

8.4. On 20 September 2019, after having found out about the hearing on 17 September, **he assumed that a default judgment had been applied for** since he had not received any information with respect to that hearing. In fact, his email to the court's JSO and assistant JSO on 20 September 2019 indicated that he understood from the court's assistant JSO that **a request for judgment in default of defence was made by the claimants.** In that email, he sought clarification as to whether or not the judgment had as yet been entered since he was of the view that if it had not yet been entered, he had until the hearing on 25 September to put the house in order by filing a defence;

8.5. It was not until 23 September that he became aware that the injunction application had been dealt with in the absence of the defendants on 17 September.

9. The matter next came up for hearing on 26 September. The court's note in respect of that hearing is as follows:

> *"Timothy Affonso appears for Claimants – 1st and 5th Claimants present*
>
> *Ravi Rajcoomar and Lionel Luckhoo for the Defendants – 3rd, 4th and 5th Defendants present – 2nd Defendant out of the country*
>
> *1) Ravi Rajcoomar:*
>
> *a. Can put in defence by Monday*
>
> *b. Need a short adjournment for submissions*

2) Timothy Affonso:

a. Claim filed 17 January

b. Certificate of Urgency filed 12 February with Application

c. Appearance filed in April. The defence was already out of time.

d. There is no application for extension of time to file the defence – There is an Application for Judgment in default already filed. The Defendants need extension of time – see Roland James

3) Court indicates that it is too late now for the Defendants to file an affidavit in response to the Application in light of the length of time that they have had the documents and the fact that the proceedings have already begun. The court will, however, hear the Defendants' submissions on the application.

4) Further hearing of the Claimants' Notice of Application is adjourned to 4 October 2019 at 10:30 AM in POS 09 for the Defendants' submissions."

10. Clearly, therefore, by the hearing of 26 September 2019, the defendants knew that their defence was outstanding and out of time, that an application for default judgment had already been filed (since 19 September 2019 by way of a request for entry of judgment in default of defence) and the court had already engaged in the process of hearing the claimants' notice of application. Notwithstanding all of that, without this court's permission, the defendants filed a defence on the same afternoon after the hearing was adjourned on 26 September.

The issue for determination

11. The defendants rely upon the statements of Lord Dyson in ***Attorney General v Keron Matthews***[1] for the contention that no application for an extension of time

[1] (2011) UKPC 38.

is necessary and that a defence can be filed without the permission of the court after the time for filing has expired[2] .

12. The claimants say that an application for extension of time is necessary in the circumstances of this case.

13. The issue, therefore, is whether the court's permission is required by way of an application for extension of time for the filing and service of a defence in the circumstances.

Discussion of Keron Matthews

14. This was an appeal to the Privy Council in which the Board disapproved of the previously adopted Court of Appeal principle of "implied sanctions". In that case, the claim form and statement of case were served on 29 September 2009 and, after the entry of an appearance on 15 October, the period for filing a defence expired on 11 November 2009. On 11 December, the claimant filed an application for permission to enter judgment in default of defence. On 14 January, the defendant filed an application for an extension of time for the filing and service of the defence.

15. Gobin J heard both applications on 18 January, dismissed the claimant's application and granted the defendant an extension of time until 9 February to file and serve the defence, with a default clause for judgment in default. The claimant appealed, Gobin J's decision was set aside and permission was granted to the claimant to enter judgment in default of defence. The Court of Appeal's rationale[3]

[2] See paragraph 8 of the defendants' submissions.

[3] Based on its decisions in ***Trincan Oil Ltd v Schnake*** (Civ App No. 91 of 2009), ***Kanhai v Cyrus*** (Civ App No. 158 of 2009) and ***The Attorney General of Trinidad And Tobago v Regis*** (Civ App No. 79 of 2011).

was that the application ought to have been an application for relief from sanctions because of an implied sanction that, without the permission of the court, no defence could be served after the time for filing a defence had elapsed. Since the conditions of rule 26.7 (1) and (2) had not been satisfied, the application for the extension of time should fail.

16. There was no criticism of the exercise of Gobin J's discretion in allowing the extension of time application. The appeal was centered on the issue of the implied relief from sanctions.

17. Lord Dyson, after reviewing the facts, opined at paragraph 14:

> *14. 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) between applications for an extension of time before and after the period for filing a defence.*
>
> *…*
>
> *16. ….. 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 with the prescribed period: rule 10.3(5) provides that the defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. It is straining language to say that a sanction is imposed by the rules in such circumstances. 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. That is not a sanction imposed by the rules.*

Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose."

18. To my mind, the defendants have placed inordinate weight upon the second sentence of paragraph 14 - *"First, a defence can be filed without the permission of the court after the time for filing has expired."* - without properly considering the rest of the paragraph and the other statements made. This court is also guided by the statement made by Lord Dyson when he goes on to say in the very next sentence - *"If the claimant does nothing or waives late service, the defence stands and no question of sanction arises"*. He went on at paragraph 16 to say as well, as highlighted:

> *16. ….. 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 with the prescribed period: rule 10.3(5) provides that the defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant****. It is straining language to say that a sanction is imposed by the rules in such circumstances.* ***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****. …."*

19. The situation in this case before this court is different from what the defendants seek to postulate. The claimants have not stood by and done nothing[4]. They have requested that judgment be entered in default of defence. Clearly, there has been no waiver of late service and therefore, to my mind, the defendants were ill-

[4] Arguably, neither did the claimant in ***Keron Matthews*** but that case turned on the issue of the implied sanction principle. There was no issue with the exercise of Gobin J's discretion to extend the time as per the application that was filed. That was not a case of a defence being filed without an application when the matter was actively engaging the attention of a court for hearing.

advised to file a defence without making an application for an extension of time. Even worse is the fact that this matter is actually engaging the attention of the court in the notice of application before it upon which the court has heard the parties. Further, the issue of the failure to file a defence was raised and the indication that one could be filed by the next Monday was opposed. The claimants' opposition to the late filing of a defence was well articulated. Yet, in apparent disregard to the court and its process, the defendants filed a defence out of time without any application for extension of time, a defence upon which they also seek to rely as a backdoor defence/response to the notice of application before the court[5]. That is quite apart from the submissions at paragraph 44 of the defendants' submissions in respect of which there is absolutely no evidence before this court in support.

20. Lord Dyson in ***Keron Matthews*** did not give an unqualified opinion as to the validity of defences which are filed late. He specifically planted provisos. Those provisos apply in this case and therefore the defence that was filed out of time, against the background of the circumstances of this case, must be struck out. It seems an affront to this court which has the conduct of the matter before it. It almost seems to be an abuse of process to try to avoid the application for an extension of time and having to explain the considerable delay in such an application by clinging on to only a portion of the statement of Lord Dyson.

The Order

21. In those circumstances, the defence filed without an application made for extension of time on 26 September 2019 is struck out. Against the background of the defence having been struck out and the request for judgment in default filed

[5] See for example paragraphs 41 and 42 of the defendants' submissions.

on 19 September 2019, the court further directs that the substantive claim proceed as an undefended claim.

22. The court directs that the claimants file witness statements to be used as examination in chief by 19 December 2019 so that the court can determine what, if any orders, the claimants are entitled to as sought on their claim form.

23. The trial of the claim as an undefended claim is fixed for 16 January 2020 at 11 AM in POS 09.

/s/ D. Rampersad J.