

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-03986

BETWEEN

RIVULET INVESTMENT GROUP LIMITED

Claimant

And

ARABCO COMPANY LIMITED

First Defendant

HUSAYN AL-FAYED

Second Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Third Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: August 17th 2023

Appearances:

Mr Farai Hove Masaisai instructed by Ms Jennifer Farah-Tull for the Claimant

Ms Keisha Prosper instructed by Ms Michelle Benjamin for the Third Defendant

DECISION ON APPLICATION FOR DEFAULT JUDGMENT

I. INTRODUCTION & PROCEDURAL HISTORY

[1] Before this Court for determination is the Claimant's Amended Notice of Application filed on March 14th 2022 seeking permission pursuant to **Rule 12.2(2)(a) of the Civil Proceedings Rules 1998** (CPR) to enter Default Judgment against the Third Defendant and for the following order:

1. That judgment be entered as against the 3rd Defendant in the sum of Three Million One Hundred and Forty-Nine Thousand, Two Hundred and Sixteen Dollars and Fifty Cents (\$3,149, 216.50).
2. That the 3rd Defendant do pay the Claimant's costs of their Claim on the prescribed basis in the sum of One Hundred Five Thousand and Three Hundred Dollars (\$105,300.00).
3. Or in the alternative to prayer 1 that the matter do go before a Master of the High Court for Assessment of damages.
4. That the costs of this Application be paid by the 3rd Defendant.

[2] By Claim Form and Statement of Case filed on 3rd October 2019, the Claimant sought the following reliefs against the Defendant:

- i) An Interim Injunction compelling the 3rd Respondent/Defendant by himself, his servant and/or agents or otherwise to immediately return to the Applicant/Claimant one New Holland Evo 215C Excavator which was seised by Police Officers attached to the Cumuto Police Station on the 17th day of July 2019;
- ii) Damages for conversion/dentine;
- iii) Damages for Breach of Contract against the 1st and 2nd Defendants;
- iv) Special Damages
- v) Damages for loss of use;
- vi) Costs;
- vii) Interests;
- viii) All necessary and consequential Orders, Directions and Inquiries that this Honourable Court may order;
- ix) Any other relief that the Honourable Court may deem just and expedient.

[3] On December 10th 2019, the Third Defendant filed a Notice of Application to strike out the Claimant's Claim Form and Statement of Case. This Court determined the application on July 21st 2020 in favour of the Third Defendant and struck out the Claim.

[4] However, the Court of Appeal overruled the decision on September 28th 2020 and reinstated the Claim against the Third Defendant albeit ordering that the Claim be stayed pending the outcome of Complaint Numbers 4240 of 2019 and 5820 of 2019 at the Arima Magistrates' Court.

[5] After several appearances at the Arima Magistrates' Court, the matters against the Claimant were dismissed on May 7th 2021 and June 11th 2021 and the excavator in dispute was released into its possession by Order of the Magistrate.

[6] On the 20th day of January 2022, the Claimant filed an amended Claim Form and Statement of Case and served same on the Instructing Attorney-at-Law for the Third Defendant. By this amendment, the Claimant added the relief of Interests to its Claim and included additional information and particulars updated to reflect the change in circumstances of the case.

[7] After the passage of the forty-two (42) day period for filing a Defence by the State, the Claimant filed an Amended Application for Default Judgment against the Third Defendant on March 14th 2022 pursuant to **CPR 12.2(2)(a)**.

[8] This application was however resisted by the Third Defendant on the following bases:

- (1) The Amended Claim was improperly served on the Third Defendant.
- (2) The Claimant improperly filed its Amended Claim Form, Statement of Case since the last hearing of the matter constituted the first case management conference ('CMC'), and the Claimant had failed to seek the Court's permission before filing its Amended Claim;
- (3) The Claimant was not authorised to file an amended Claim as there was no indication from the Court that the stay of proceedings had been lifted. As such, they could not be out of time in filing their Defence to warrant an application for default judgment; and
- (4) That the Third Defendant intended to defend the amended Claim and was in the process of taking instructions to do so.

[9] The Claimant however contended that the Third Defendant's objections were misplaced for the following reasons:

- (1) The Amended Claim was properly served on the Third Defendant through its instructing attorney who was already on record in the matter.
- (2) The hearing of the matter on December 18th 2021 addressed the interim relief and was not the first CMC. As such, no permission was required from the Court before the Claimant could file its amended Claim.

(3) The Court of Appeal stayed the substantive matter pending the outcome of the proceedings before the Magistrates' Court, as such, upon their dismissal, the stay was automatically lifted without any requirement for the High Court to authorise it.

[10] Having regard to differing positions, the Claimant and Third Defendant were invited to file submissions with respect to the application and they did so on June 22nd 2022 and September 13th 2022, respectively.

II. ISSUES

[11] The following issues fall for consideration in my determination of this application:

- (i) Whether the Claim Form and Statement of Case were properly served on the Third Defendant?
- (ii) Whether the period for filing a Defence had expired?

In answering issue (ii), the following sub-issues must be addressed:

- (a) Was the stay of proceedings lifted automatically upon the dismissal of the complaints against the Claimant before the Magistrates' Court?
- (b) Did the Claimant require permission of the Court to amend its Claim?

III. LAW AND ANALYSIS

[12] **CPR 10.2 (3)** provides that if a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered if Part 12 allows it.

[13] In matters against the State, the period for filing a defence is 42 days after the date of service of the claim form and statement of case: **CPR 10.3 (3)**. Where the State has failed to file their defence within the allotted time, a Claimant must seek the permission of the Court if he wishes to obtain default judgment on a claim which is against the State: **CPR 12.2 (2)**.

[14] **CPR 12.4** outlines the circumstances under which default judgment is generally granted. It states:

“At the request of the claimant the court office must enter judgment for failure to defend if—

- (a) *the court office is satisfied that the claim form and statement of case have been served; or*
- (b) *an appearance has been entered; and*
- (c) *the period for filing a defence has expired;*
- (d) *the defendant—*
 - i. *has not served a defence to the claim or any part of it;*
 - ii. *where the only claim is for a specified sum of money, has not 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. *has not satisfied the claim on which the claimant seeks judgment; and*
- (e) *(where necessary) the claimant has the permission of the court to enter judgment.”*

Service of the Amended Claim and Statement of Case

[15] **Section 20 of the State Liability and Proceedings Act Chap 8:02** provides as follows:

“In any civil proceedings instituted against the Attorney General, or to which the Attorney General is joined as a party or third party, as mentioned above, the first document required to be served on him, and any other document required to be served before an address for service has been given by him, shall be served on the Attorney General by the delivery thereof to the Solicitor General or such officer in the Department of the Solicitor General as he may designate by Notice published in the Gazette, or by leaving it at the office of the Solicitor General of that officer, or by sending it by post in a registered letter addressed to the Solicitor General or of that other officer, or by sending it by post in a registered letter addressed to the Solicitor General or to that other officer at his office.”

[16] The Third Defendant in their affidavit in opposition posited that service of the Amended Claim Form and Statement of Case is only effected when served on the Solicitor General as a proper means of service on the Attorney General.

[17] The Claimant however argued that service of the Amended Claim on the Solicitor General was irrelevant as the originating claim and statement of case were served on the said Solicitor General on October 9th 2019. Following this, counsel for the Claimant received an address for service from the Third Defendant, for instructing attorney, Mr Sean Julien, who was then assigned to the matter and documents were served via his email address.

[18] On December 10th 2019, the Third Defendant filed an application to strike out the Claimant's Claim. In this application, Ms Josefina Baptiste-Mohammed as counsel and Mr Sean Julien as instructing attorney, represented the Third Defendant.

[19] Upon the conclusion of those proceedings before this Court and the Court of Appeal, the Claimant served their Amended Claim Form and Amended Statement of Case on Ms Michelle Benjamin who replaced Mr Julien as instructing attorney.

[20] It is this Court's view that the wording of **Section 20** is quite clear. The provision requires service on the Third Defendant by the delivery to the Solicitor General when it is the first document required to be served on him or in the case of any other document if he has not provided to the party an address for service.

[21] It is apparent that the first document(s) to be served by a party on the State (Third Defendant) and delivered to the Solicitor General is typically the Claim Form and Statement of Case. After this, the Third Defendant provides the party with an address for service for one of his designates. Thereafter, all future documents should be served at the specified address.

[22] The Third Defendant has not disputed that the originating Claim was properly served. Thus, in the given circumstances, it was unnecessary for the Claimant to serve the Amended Claim Form and Statement of Case on the Solicitor General when there were already counsel and instructing attorney on record for the Third Defendant seized of the matter.

[23] I am therefore satisfied that the Amended Claim Form and Statement of Case were properly served.

Failure to file Defence

[24] It is an undisputed fact that the Third Defendant has not filed a defence in the matter since its commencement. The foreboding question, however, is whether their time period for filing has elapsed to the effect that judgment in default can be entered against them.

[25] In answering this question, it is necessary to consider whether the stay of proceedings declared by the Court of Appeal was lifted.

Lifting of Stay of Proceedings

[26] Pursuant to **CPR 26.1(1)(f)**, the Court (including the Court of Appeal) has within its case management powers, the discretion to “stay the whole or part of any proceedings generally or until a specified date or event”. Built into this power is, by implication, the inherent power of the Court to lift a stay when it deems it just and appropriate.

[27] In the case of **Grant v Dawn Meats [2018] EWCA Civ 2212**, the English Court of Appeal provided some useful guidance on the effect of a stay of proceedings and its subsequent lifting. Lord Coulson stated the following at paragraphs 10-11:

10. The Glossary to the CPR provides that "a stay imposes a halt on proceedings, apart from taking any steps allowed by the Rules or the terms of the stay. Proceedings can be continued if the stay is lifted". This definition is further expanded at paragraph 3.1.8 of the 2018 White Book in these terms:

"The making of a stay imposes a halt, not only upon proceedings, but also upon the expiration of any time limit in those proceedings which have not expired when the stay was imposed."

11. In UK Highways A55 Limited v Hyder Consulting (UK) Limited [2013] BLR 95, the particulars of claim were not served during the prescribed 14 day period following the service of the claim form. However, during that period the parties had agreed a stay of proceedings. When the stay expired, the defendant said that the proceedings had come to an end because no particulars of claim had been served in accordance with the CPR. Edwards-Stuart J disagreed, ruling that the claimant had the balance of the 14 days

following the expiry of the stay in which to serve the particulars of claim. He said of this outcome at [48]:

"It seems to me that this submission avoids the impossibility problem raised by Mr White and has the sensible result that the proceedings can resume where they left off without any party having to go to the trouble and expense of making an application to the Court in order to enable that to happen. There is nothing in the rules which provides that, once stayed, no further step need be taken in the proceedings unless there has been an order of the court, even if the stay has been lifted automatically (because it expired on a particular date or the happening of a particular event)."

[28] From the above learning, it follows that not every stay imposed by a Court requires a later judicial act or order for it to be lifted. When a Court exercises its powers to stay a matter or part thereof, and it halts the proceedings generally, it does so without specific limiting terms or duration for the stay. Therefore, to avoid uncertainty, it would be necessary for the Court to consider whether it would be appropriate in all the circumstances for the stay to be lifted. As such, it is incumbent on a party or parties to seek the permission of the Court to lift a stay before it takes any action.

[29] However, where a stay is imposed until the expiration of a particular date or the occurrence of a particular event, the Court has already integrated into its order the terms and the duration upon which the stay will be lifted that it deems appropriate. Accordingly, on the passage of the relevant time or occurrence of a specified event, the stay lifts automatically unless the Court makes such further order that parties should approach the Court to lift the stay.

[30] In this case, this Court, on July 21st 2020, ruled in favour of the Third Defendant on their application to strike out the claim. The Claimant appealed and was successful as the Court of Appeal set aside this Court's order and reinstated the matter as against the Third Defendant. The matter was also **"stayed pending the outcome of Complaint Numbers 4240 of 2019 and 5820 of 2019 at the Magistrate's Court."**

[31] On May 7th 2021, the Magistrate dismissed both complaints and made an order for the release of the excavator to the Claimant.

[32] By letter dated June 24th 2021 and emailed to the Court, Counsel for the Claimant informed the Court that the matters before the Magistrate's Court were dismissed and made a request that the stay of proceedings be lifted. Notably, the former instructing attorney for the Third Defendant, Mr Julien, was copied in the email. In this regard, the Third Defendant and its servants are deemed to have notice of the dismissal of the proceedings.

[33] In the absence of further correspondence from the Court, the Claimant filed its Amended Claim Form and Statement of Case on January 20th 2022. This was done on the premise that the stay was automatically lifted upon the dismissal of the matter before the Magistrate's Court.

[34] The Third Defendant however contends that the Court of Appeal's order did not contemplate an automatic reinstatement of the matter without the lower Court's intervention for the following reasons:

- (i) The order of the Court of Appeal did not state that the High Court matter would automatically be reinstated, without more, by the determination of the Magisterial matters;
- (ii) The Claimant's letter to this Court dated 24.6.2021 requested that the stay be lifted and the matter be set for C.M.C. to proceed. This was the substance of later emails to the Court by the Claimant dated 14th September and 12th and 15th October 2021.
- (iii) A number of issues have arisen since the filing of the Claimant's Statement of Case. The Claimant has based his claim in detinue and conversion, however this Court as well as the Court of Appeal determined that the State could no longer release the excavator since same was in the Magistrate's Court possession since December 2019. The Claimant had the opportunity to make the appropriate application for the release before the Magistrate. These facts therefore should be stated in the Claimant's Statement of Case and therefore a Case Management Conference would have been appropriate to deal with the necessary amendments to the Statement of Claim so that the Defendant could properly respond to the amended Claim. The learning in the case of Real Time (supra) is therefore applicable.

[35] In support of its argument against the automatic lifting of the stay, the Third Defendant referred the Court to **CPR Practice Direction 51R Rule 16 of the Civil Proceedings Rules of the UK** that outlined a procedure to be followed by a party seeking to lift a stay imposed on proceedings.

[36] Upon review of this authority cited, it is this Court's view that the Practice Direction is irrelevant to the case at bar. This Practice Direction was implemented in 2020 for the specific purpose of establishing a pilot to test an online claims process, called "Online Civil Money Claims" which is applicable to certain claimants and enacted for a specific duration.¹ In this regard, I do not find it a persuasive precedent to assist the Court.

[37] Further, I am of the considered opinion that the Court of Appeal's order did not demand an express indication that the stay would be automatically lifted on the dismissal of the magisterial proceedings for the matter to be reinstated. These words can be impliedly read into the Order given that it specified the particular event that triggered the lifting of the stay. In this regard, on the dismissal of the complaints, the matter was automatically reinstated and it was not necessary for the Claimant to get the permission of this Court to lift the stay before it proceeded to recommence certain actions in the proceedings.

[38] While permission is not necessary to continue the matter, the Third Defendant raised the question, whether the Claimant required the permission of the Court to amend their Claim.

Amendments to Statement of Case

[39] Amendments to the statement of case are governed by **Part 20 of the CPR** which states:

- (1) *"A statement of case may be changed at any time prior to a case management conference without the court's permission.*
- (2) *The court may give permission to change a statement of case at a case management conference.*

¹ See **Section 2.2(2) Scope of the Pilot**

The purpose of this practice direction is to establish a pilot to test an online claims process, called "Online Civil Money Claims". Claimants may use the pilot to make their claim, if their claim is suitable for the pilot. (Sub-paragraph (3) sets out the conditions that need to be met for a claim to be suitable for the pilot). The pilot is to run from 7th August 2017 to 30th November 2023. The pilot applies in the County Court.

(3) The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that—

(a) there is a good explanation for the change not having been made prior to that case management conference; and

(b) the application to make the change was made promptly.

(3A) In considering whether to give permission, the court shall have regard to—

(a) the interests of the administration of justice;

(b) whether the change has become necessary because of a failure of the party or his attorney;

(c) whether the change is factually inconsistent with what is already certified to be the truth;

(d) whether the change is necessary because of some circumstance which became known after the date of the first case management conference;

(e) whether the trial date or any likely trial date can still be met if permission is given; and

(f) whether any prejudice may be caused to the parties if permission is given or refused.

(4) A statement of case may not be changed without permission under this rule if the change is one to which rule 19.2 (change of parties) applies.

(5) Any amended statement of case must be filed promptly at the court office.

(6) Where a statement of case is amended, the amendments must be verified by a certificate of truth unless the court orders otherwise.”

[40] The Third Defendant in opposition to this application, sought to argue that the Claimant had no permission to file its amended Statement of Case since the matter had passed the first case management conference (‘CMC’). It was asserted that the matter first came for a CMC hearing of interim relief on October 29th 2019 which was adjourned to 18th December, 2019. Thereafter, the interim relief application and striking out application of the Third Defendant was heard on July 21st 2020 and struck out.

[41] This argument is however froth with contradictions and ignores the clear Rules of the CPR. The Third Defendant plainly identified that in the first two Court hearings related

specifically to the applications for interim relief by the Claimant as well as their application to strike out the claim. During this time, no defence was filed by the Third Defendant which also prompted an application for default judgment that was filed on November 26th 2019.

[42] **CPR 27.3(1)** clearly outlines that, *“The general rule is that the court office shall fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim form.”*

[43] It therefore stands to reason that if the Third Defendant did not file a Defence, the Court cannot fix a case management conference in this case. **CPR 27.3(1)** is however subject to **CPR 27.3(10)** which provides that any party may apply to the court to fix a CMC at a time earlier than that provided in sub-rule (1). The record shows that no one has applied for a CMC to be fixed before the filing of a Defence. As such, the hearings referred to by the Third Defendant cannot constitute the first CMC [see **Super Industrial Services Ltd and Another v National Gas Company of Trinidad and Tobago Ltd [2018] UKPC 17**].²

[44] In the absence of the first CMC, the Claimant, pursuant to **CPR 20.1(1)**, was well within its rights to amend its Statement of Case without permission of the Court.

[45] Notwithstanding the Court’s findings that the Claimant has satisfied the general requirements for obtaining default judgment, that is, that the claim was properly filed and served and no defence was filed by the State, it does not necessarily mean that its application must be granted by the Court.

[46] Unlike **CPR 12.4** which requires the court office to enter default judgment if the relevant conditions are satisfied, **CPR 12.2(2)(a)** allows the Court to retain its discretion to grant default judgment in a claim against the State. The Third Defendant, The Attorney General represents the State.

[47] In accordance with **CPR 1.2(1)**, this Court must seek to give effect to the overriding objective whenever it exercises any discretion given to it by the Rules.

² See also **SAISCON Ltd v Estate Management and Business Development Co Ltd Civ App No 104 of 2016**

[48] The overriding objective demands that the Court deals with cases justly. According to **CPR 1.1(2)** this includes:

- (a) ensuring, so far as is practicable, that the parties are on an equal footing;*
- (b) saving expense;*
- (c) dealing with cases in ways which are proportionate to—*
 - (i) the amount of money involved;*
 - (ii) the importance of the case;*
 - (iii) the complexity of the issues; and*
 - (iv) the financial position of each party.*
- (d) ensuring that it is dealt with expeditiously; and*
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

[49] It is undoubted that in the absence of a Defence the Third Defendant and the Claimant are not on equal footing in this contest. It is to be noted that the Third Defendant has, from the inception of the Claim, taken a very active role in seeking to have the claim struck out. Moreover, this Claim is important to both parties and given the complexity and challenges to the substance of the Claim raised by the Third Defendant and the significant amount of money involved, it is highly likely that the entry of default judgment will be followed by a procedural appeal of the decision. Such a course will only seek to delay the proceedings even further and certainly cause the parties to incur more costs.

[50] Further, taking into consideration the Third Defendant's uncertainty as to whether the stay was in fact lifted before it took any action, I find it prudent to grant the Third Defendant one final opportunity to put in its Defence. To deny the Third Defendant the opportunity to defend the Claim after being so integrally involved in this Claim, the procedural appeal and the Magistrate's Court matters, from all perspectives, does not seem fair in keeping with the overriding objective of dealing with all cases justly. However, in exercising my discretion to allow the Third Defendant the opportunity to defend the Claim, I cannot fault the Claimant's attorneys for proceeding with alacrity to seek to enter judgment for the Third Defendant's misstep. In this regard, I propose to order the Third Defendant to pay the Claimant's costs of and incidental to the Amended

Notice of Application for permission to enter default judgment, to be assessed pursuant to CPR 67.11, in default of agreement. This, in my opinion, is in keeping with the tenor of the UK Court of Appeal decision in **Biguzzi v Rank Leisure Plc [19990 1 WLR 1926]** and meets the justice of this stage of the proceedings.

IV. DISPOSITION

[51] Having regard to the above analyses and findings, the Order of the Court is as follows:

ORDER

- 1. The Claimant's Amended Notice of Application for permission to enter Default Judgment against the Third Defendant filed on March 14th 2022 be and is hereby dismissed.**
- 2. The Third Defendant shall file and serve its Defence on or before September 18th 2023.**
- 3. The Third Defendant shall pay to the Claimant costs of and incidental to the Amended Notice of Application filed March 14th 2022 to be assessed pursuant to CPR 67.11, in default of agreement.**
- 4. In default of the parties agreeing on the quantum of costs, assessment shall take place on the next date of hearing.**
- 5. The First Case Management Conference is hereby fixed for October 24th 2023 at 9:45am via MS Teams virtual platform.**

Robin N Mohammed
Judge