

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**No. 995 of 2016**

**BETWEEN:**

**BRIAN MICHAEL HOMER  
ROSLYN CECELIA HOMER**

**1<sup>ST</sup> CLAIMANT  
2<sup>ND</sup> CLAIMANT**

**AND**

**DAVID HAYNES**

**DEFENDANT**

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court**

**Dates of Hearing: 2016 November 2<sup>nd</sup>  
2017 March 8<sup>th</sup>, 14<sup>th</sup>  
April 24<sup>th</sup>**

**Appearances:**

**Mr. Edmund R. King, Q.C. Attorney-at-Law for the Claimants  
No appearance by the Defendant**

## JUDGMENT

### Introduction

[1] This matter raises practical issues surrounding the granting of judgment in those circumstances where there has been no Acknowledgment of Service to a Fixed Date Claim Form.

### Background

[2] The Claimants herein filed a Fixed Date Claim Form on July 15<sup>th</sup> 2016, seeking possession of land with a dwelling house thereon situate at Rosegate, in the parish of Saint John, together with arrears of rent and mesne profits.

[3] The Claimants are the Personal Representatives of Celina Louise Sargeant late of 5A Allan Street Avenue, Diego Martin in Trinidad who died in the Republic of Trinidad and Tobago on September 26<sup>th</sup> 2011, intestate, by virtue of Letters of Administration issued to them by the High Court of Trinidad and Tobago on March 1<sup>st</sup> 2013, resealed with the seal of the Supreme Court of Barbados under the provisions of the **Probate and Letters of Administration (Resealing) Act Cap. 247**.

[4] The premises, they pleaded, were ‘let to the Defendant for a term of years which said term became forfeited to the Claimants by reason of his failure to pay the rent reserved.’

- [5] A document titled “Particulars of Claim” was filed together with the said Fixed Date Claim Form. It alleged, *inter alia*, that the said Celina Louise Sargeant was the owner of and entitled to possession of the dwelling house situate at Rosegate.
- [6] It pleaded the existence of an agreement in writing dated December 5<sup>th</sup> 2009, pursuant to the terms of which the Defendant held over, exercising an Option to Renew on the expiration of the one year term of the above-mentioned agreement.
- [7] It alleged arrears of rent in an amount of \$17,000 at the start of the proceedings.
- [8] It claimed mesne profits at the rate of \$1000 per month, (being the monthly rental in the alleged agreement in writing dated December 5<sup>th</sup> 2009) until possession is given up.
- [9] It claimed interest in an unspecified amount.
- [10] The Particulars of Claim exhibited the following documents:
1. The Resealed Grant dated June 18<sup>th</sup> 2015;
  2. A copy of a Notice dated June 23<sup>rd</sup> 2016 allegedly served on the said Mr. David Haynes on the same date at 7.30 p.m.;
  3. A copy of the Tenancy Agreement between Celina Sargeant and David Haynes dated December 5<sup>th</sup> 2009.
- [11] An Affidavit of Service filed November 1<sup>st</sup> 2016 deposed that the Fixed Date Claim Form and Particulars of Claim were served on the Defendant on the 9<sup>th</sup>

August 2016 by Process Server, Curtis Maloney, who deposed that the Defendant was personally known to him.

- [12] A second Affidavit of Service was filed December 2<sup>nd</sup> 2016 by the same Process Server Curtis Maloney, which deposed that the Defendant was served with the notice required under the **Property Act Cap 236 section 167**. A copy of the said Notice was attached.

### **The First Hearing of the Claim**

- [13] The first hearing of this matter was effectively March 14<sup>th</sup> 2017 at which hearing the Claimants sought judgment in the terms set out in the Fixed Date Claim Form.

- [14] The Court on that date ordered Written Submissions to be filed by the Claimants on or by March 28<sup>th</sup> 2017, as it was the submission of their counsel that the Claimants were entitled (without more) to judgment in the terms set out in the Claim Form. The matter was then adjourned to April 18<sup>th</sup> 2017 to enable the Court to deliver its Ruling.

- [15] Paragraphs 3 to 15 of the said Written Submissions are set out “*in extenso*”:

- “3. By virtue of an agreement made the 5<sup>th</sup> day of December 2009 between Celina Sargeant of the One Part and David Haynes the Defendant of the Other Part, the premises at Rosegate in the parish of Saint John in Barbados were, let to the Defendant for a term of one year from 5<sup>th</sup> December 2009 with an option to renew for an additional period at the monthly rent of \$1,000.00 payable on the first day of each month. **A copy of that agreement is attached to the Statement of Claim.**
4. By virtue of the agreement, Celina Sargeant is entitled to the reversion, which signifies the residue of her interest after she has granted away a term of years to the tenant and by virtue of Section 3 of the Succession Act her interest devolved and

became vested in the Claimants. As between herself and her tenant the Defendant is he is estopped from denying her title as landlord and her entitlement to the reversion. **Mackley v Nutting [1949] 2 K.B 55.**

5. That agreement contains a specific clause for re-entry and cancellation of the tenancy agreement (**Clause (3)**) if the rent reserved or any part thereof shall be unpaid for 7 days after becoming payable or if any covenant on the Tenant's part herein contained shall not be performed after 14 days' written notice from the landlord requiring the tenant to remedy the same subject to the provisions of the Property Act 236.
6. The **Property Act Cap 236 Section 166** provides:

“(1) The right of forfeiture may-

- (a) be exercised by entering upon the land and remaining in possession thereof;  
or
- (b) be enforced by action before a court”

(2) A lessor may subject to Section 168 and any provisions to the contrary in the lease, forfeit the lease if the lessee among other things

- (a) commits a breach of any agreement or condition on his part expressed or implied in the lease.

7. The Claimants have chosen to enforce their right of forfeiture by commencing this action for possession rather than by making a peaceable entry upon the land, since if any force is used while attempting to make a peaceable entry they may be criminally liable under the Forcible and Clandestine Entries Act Cap 132.
8. The only issue to be decided in this matter is whether the agreement has become forfeited as provided by the contract.
9. The conditions for the exercise of the right of forfeiture are contained in the **Property Act Section 167**, which states:  
“Notwithstanding anything to the contrary contained in a lease, a lessor is not entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease until

- (a) the lessor has served on the lessee a notice
  - (i) specifying the breach complained of,
  - (ii) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice; and
  - (iii) in any case other than non payment of rent requiring the lessee to make compensation in money for a breach;
- (b) the lessee has failed to remedy the breach within a reasonable time, if it is capable of being remedied.

10. The Claimants have satisfied the conditions set out in **Section 167** of the Act. A notice specifying the breach complained of, that is, that the rent was some \$16,000

in arrears and requiring him to remedy the said breach of contract within 14 days, was served on the Defendant on June 23, 2016. Evidence of this is contained in the affidavit of Curtis Maloney, Process Server filed on December 2, 2016.

11. On July 15, 2016 the Claimants' Statement of Claim and Claim Form was served on the Defendant by the said Curtis Maloney, Process Server who swore an affidavit to this effect which was filed on November 2, 2016.
12. A claim, which unequivocally claims possession, operates as a re-entry in law and so brings about forfeiture as soon as it is served on the tenant. **Canas Property Co. Ltd. v. K. L. Television Services Ltd. [1970] 2 QB 433.**
13. Accordingly the tenancy has been cancelled in accordance with the term of the agreement and the term has been forfeited on July 15, 2016 the date the claim form and statement of claim was served on the Defendant.
14. The **Property Act Section 168** gives the tenant a right to apply to the court for relief against forfeiture but the Defendant has failed and/or neglected to file an Acknowledgment of Service in the manner provided by the Civil Procedure Rules Part 9 or at all, thereby indicating he has no wish to contest the proceedings or to avoid judgment being entered against him in default and the effect is the same as under the old rules of court in which the claim is to be treated as admitted if not denied.
15. In the circumstances, the Claimants are entitled to:
  - (1) Possession of the premises;
  - (2) Arrears of rent amounting to \$17,000.00
  - (3) Interest
  - (4) Mesne profits at the rate of \$1,000.00 per month from July 1, 2016 until payment and
  - (5) Cost"

## **Discussion**

[16] This matter was filed by way of Fixed Date Claim Form consistent with **Rule 8.1 (5) of the Supreme Court (Civil Procedure) Rules 2008.**

[17] An often forgotten provision is **Part 8.5 (2)** which provides as follows:

“The claim form or the statement of claim must identify or annex a copy of any document which is necessary to the Claimant’s case.”

[18] In my opinion this provision demonstrates the intended objective that with/under Fixed Date Claim procedure the statement of claim should have annexed to it any documentary evidence needed in support of the claim.

[19] **Part 9.2 (4)** deals with the consequences of failing to file an Acknowledgement of Service as follows:

“Where the defendant fails to file an acknowledgement of service or defence within the specified period, judgment may be entered provided Part 12 allows it.”

[20] Notably, **Part 12.2** does not allow a Claimant to obtain a default judgment where the claim is a fixed date claim. Stated differently, where a Fixed Date Claim Form has been filed, the Registrar has no authority to issue a Default Judgment, the matter has to be set down for hearing before a Judge. Had the proceedings been commenced in a Claim Form, the Claimants could have availed themselves of **Part 12** and applied for default judgment.

[21] What is now relevant is **Part 27** and the case management procedures outlined thereunder.

[22] **27.2 (1)** provides that “when a fixed date claim is issued the court must fix a date for the first hearing of the claim”.

[23] What happens at that hearing is determined by the judge/court who ‘in addition to any other powers that the court may have’, has at its disposal ‘all the powers of a case management conference’: **27.2 (2)**.

[24] **27.2 (3)** is of particular relevance as it enables a Fixed Date Claim Form to be dealt with summarily under the Court’s court management powers and states as follows:

“The court, may, however, treat the first hearing as the trial of the claim if

(a) it is not defended; or

(b) it considers that the claim can be dealt with summarily.”

[25] It is also to be noted that **Part 27.6 (1)** empowers the Court to dispense with the holding of a case management conference in any matter where it is satisfied, *inter alia* that ‘the case can be dealt with justly without a case management conference’. In those circumstances, the court may dispense with requirements of a listing questionnaire, preparation of bundles and pre-trial review, but may “give any other direction that may assist in the speedy and just trial of the claim, including any direction that might be given under **Part 38**”.

[26] **Part 29.1(1)** provides that the Court may control the evidence by giving directions as to (i) the issues on which it requires evidence, (b) the nature of the evidence it requires to decide those issues; and (c) the way in which the evidence is to be placed before the Court.

[27] In **Dennis O Poseley et al v Mariner International Bank Limited Civil Suit No. 300 of 2001 (unreported decision of St. Vincent)**, the Statement of Claim did not contain a Certificate of Truth, and (of direct relevance to the matter before us) did not have annexed to it any of the documents required in appropriate cases by their **Part 8.7(3)**, (in *pari materia* with our **Part 8.5(2)**) documents being relied on by the Claimant as necessary to the case. Not

relevant to this present discussion was the issue of whether the Defendant had been given sufficient time within which to file the Acknowledgment of Service.

[28] The relevant ground (to the matter presently before this Court) advanced to the High Court for the setting aside of the default judgment, argued to be irregular, was the submission that “the claim form did not identify or have annexed thereto copies of documents which are necessary to the claimant’s case. **Alleyne J.** (as he then was) set aside the judgment as irregular, one of the reasons being, *inter alia*, the failure of the Claimant to file the documents on which he intended to rely in direct non-compliance with the Rules.

[29] In **DMV Ltd v Vidrine Civil Appeal No. 1 of 2010 (unreported)**, the **Court of Appeal of Belize** in a judgment delivered by **Morrison JA** in an action for specific performance of a sale agreement and damages for breach of contract, one of the grounds of appeal related to the Claimant’s failure to plead and particularize the specifics of the special damages. The Court of Appeal indentified as one of its issues for determination, the question of the requirements of CPR with regard to the pleading of damages.

[30] That jurisdiction’s **Part 8.7(1) to (5)** is drafted in similar terms to our **Part 8.5** and in this Court’s opinion carries the same import. The Court of Appeal in this case examined the importance of pleadings and particulars, both under

the old Rules and the new Rules, concluding that the importance of pleadings and the identification of the documents upon which a party relies, form an important part of marking out the parameters of the case that is being advanced by each party: **Lord Woolf MR in McPhilemy v Times Newspapers Ltd and Others [1993] 3 ALL ER 775.**

[31] The Court adopted the words of **Lord Hope of Craighead in Three Rivers District Council v Bank of England (No. 3) [2001] 2 ALL ER 513** that the new Rules seek to strike a balance “between the need for fair notice to be given on the one hand and excessive demands for detail on the other.” (See also **The White Book Service 2005, para.16.9.2** and **Barrow JA in Eastern Caribbean Flour Mills Ltd v Boyea Civil Appeal No. 12 of 2006 (unreported decision of St. Vincent).**)

[32] In short, pleadings are as important as under the old Rules in spite of the intent of the new Rules to reduce the need for extensive pleadings. **Barrow JA** conducted a useful discussion and analysis in **Eastern Caribbean Flour Mills v Boyea (supra)**, of the dicta of **Lord Woolf** and **Lord Hope of Craighead**, which is most instructive. Of note, is the correlation between pleadings and Witness Statements, which are now expected to contain the particulars:

“... To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars

necessary to serve that purpose. But there is no longer a need for extensive pleadings which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case."

### **Fixed Date Claim Procedure and the old originating Summons Procedure**

[33] It is often stated that the Fixed Date Claim procedure is a replacement of the 'old' Originating Summons procedure.

[34] Under that procedure, whether a claim was defended or undefended, affidavit evidence was a primary and fundamental evidential platform from which the Court made its determination. In fact, under the 'old' Rules, summary proceedings for the possession of land were most often commenced by Originating Summons, but only continued as a writ action where there were substantial disputes of fact that could not be resolved on the face of the affidavit evidence or brief examination and cross-examination (originating summons procedure being most suitable where there was no substantial dispute as to the facts, but disagreements as to the legal consequences arising from the undisputed facts. It was meant to be more speedy than a writ action).

[35] A most comprehensive discussion of the procedure can be found at **pages 14 to 24** of the text **Commonwealth Caribbean Civil Procedure**. It makes clear the importance of Affidavit evidence in this procedure, disclosing sufficient particulars to identify a cause of action on which the plaintiff is proceeding. See **Williams CJ in Nall v Cox [1987] High Court, Barbados, No. 718 of**

**1987 (unreported); Eldemire v Eldemire [1990] 38 WIR 234; Esquivel v Usher [1991] 44 WIR 96. See also Odgers' Principles of Pleading and Practice at pages 314 to 320.**

### **Conclusion and Disposal**

[36] The failure of a Defendant to acknowledge service or file a Defence does not relieve a Claimant from discharging his evidential burden (usually a provisional burden discharged by establishing a *prima facie* case) of proving the case that he has alleged, and satisfying the court that he is entitled to the relief sought.

[37] The very fact of the existence of a Fixed Date Claim procedure in circumstances such as these, disallowing a default judgment, speaks to the rationale behind this process/procedure. A judgment obtained, that failed to discharge this basic evidential burden would be easily set aside as irregular should a Defendant appear and provide an acceptable reason for his failure to acknowledge service and a good prospect of successfully defending the action. The failure of the Defendant to Acknowledge Service means that the Defendant waives his right to test the merits of the claim. It does not, in the Court's opinion, relieve the Claimant of his evidential burden.

[38] The effect of the Claimant's application for judgment, is in my opinion, an application to the Court to deal with this matter 'summarily' in accordance

with this Court’s discretion to do so under **Part 27.2(3)** in the exercise of its case management powers: see the approach taken by the Organisation of Eastern Caribbean States’ Court of Appeal in **HCVAP 2008/037 Frederick & Frederick v Comptroller of Customs et al (unreported decision of St. Lucia)**, where it was observed that dealing with a matter ‘summarily’ does not mean entering ‘summary judgment’, but requires a trial of the issues between the parties to be conducted in a summary manner. A claimant must still prove that he is entitled to the relief sought. In that case, the judge refused the application by the Claimants for summary judgment and moved to direct that the matter be fixed for directions for trial to be given.

[39] At **para. 46** of the judgment, **George-Creque JA** (as she then was) had this to say:

“Dealing with a claim summarily under Part 27.2 and giving summary judgment under CPR 15 entails very different considerations and engages distinctly different procedures .. Dealing with a claim summarily does not mean entering summary judgment. The Claimant must still prove that he is entitled to the relief sought. Therefore a trial must be conducted albeit in a summary way.”

[40] The circumstances of this case do not require a trial, but they do require the direction of the Court as to what evidence is required, be it affidavit or oral evidence, before the evidential burden of the Claimants can be deemed to have been discharged. Only then, in the opinion of this Court, would this matter be

properly positioned for a summary disposal (as distinct from summary judgment.)

[41] The only appropriate course, in my opinion is to exercise the Court's case management powers under the CPR and I so do, and give directions intended to effect the "just, expeditious and economical disposal of the proceedings" as follows:

1. Leave is granted to the Claimants to file supplementary Affidavit evidence establishing the claim of Celina Louise Sargeant to the legal and/or beneficial right to the possession of the property the subject of this action;
2. Evidence of the registration of the premises pursuant to the requirement of the **Landlord and Tenant (Registration of Tenancies) Act Cap 230A**.
3. With respect to the damages claimed leave is granted to Claimants to particularize and document the specifics of the quantum claimed in the Fixed Date Claim Form and Particulars Claim. (It is noted that in the UK in 'possession proceedings where there arises a claim for arrears of rent the standard information required is a full schedule of rent arrears in proper form' (i.e dates when rent due, amounts due, dates and amounts of payments, running total.)

[42] The issue of estoppel that arose in the particular circumstances of **Mackley v Nutting [1949] 2KB 55** (cited and relied on by counsel in his submissions) do not arise in the circumstances of this matter, and that case is distinguished.

**MARGARET A. REIFER**  
Judge of the High Court