

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

NO. 2052 of 2008

BETWEEN

WINDWARD AGENCIES LTD

CLAIMANT

AND

BANK OF NOVA SCOTIA

DEFENDANT

Before: The Honourable Mr. Justice William J. Chandler, Judge of the High Court

Date of Decision: 2018 October 5th

Appearances:

Mr. Ebrahim Lakhi of Stephen Walcott & Co. for the Claimant

Ms. Alicia Richards-Hill of Yearwood & Boyce for the Defendant

DECISION

BACKGROUND

[1] This matter involves an application by the Claimant for entry of judgment against the defendant for default of Defence, filed 26 July 2012. The request for judgment concerns an unspecified amount of money calculated

by the Claimant as a sum between \$388,130.72 and \$440,799.35. Submissions with respect to quantum were filed by the Claimant.

[2] The Claimant in this matter, brought a claim against the Defendant by way of a Claim Form and Statement of Claim filed on the 20th of June 2012, which was served on the Bank of Nova Scotia on the 22nd day of June 2012, claiming the following:

i.Damages

ii.Interest

iii.Costs

iv. Further and other relief which the court thinks fit and just.

It also sought punitive and/or exemplary damages against the Defendant.

[3] The Defendant filed an Acknowledgment of Service on the 28th day of June 2012. The request for Default Judgment was made on the 26th day of July 2012. On the 27th day of July 2012, the Claimant wrote to the Defendant giving notice in accordance with **Rule 12.7 (2) of the Supreme Court (Civil Procedure) Rules, 2008 (CPR)**. The Defendant filed a Defence on the 2nd day of August 2012. The Claimant filed a reply on the 14 August 2012. On the 29th of January 2013, the Defendant made an application for an extension of time within which to file its Defence. On the same date an

Affidavit in support of the application on the 29th of January 2013 was filed and served.

CLAIMANT'S SUBMISSIONS

[4] The Claimant filed submissions on the 14th of August 2012, in support of their application for default judgment made on the 26th day of July 2012. The Claimant argues that in accordance with **Rule 10.2** of the **CPR**, the Defendant had until July 23rd 2012 to file a Defence and that the Defendant had failed to do so. The Claimant filed and served notice to the Defendant to remedy, its default within 14 days, on the 27th of July 2012. The Defendant then filed its Defence on the 2nd of August 2012. The Claimant avers that the Defendant did not remedy its default.

DEFENDANT'S SUBMISSIONS

[5] The Defendant did not make submissions in relation to the request for Default Judgment. However, the Defendant, on the 29th of January 2013, made an application for an extension of time within which to file its Defence. Attorney-at-Law for the Defendant filed and served an Affidavit in support of the application on the 29th of January 2013, stating that the Defendant was not guilty of undue delay in filing its Defence and that the Claimant having filed the request for default judgment before it filed the requisite notice was guilty of non-compliance with **Rule 12. 7 (2)** of the

CPR. The Defendant submits that the Claimant having not suffered any prejudice, the Defence as filed on the 2nd of August 2012 should stand.

THE ISSUE

[6] Whether the Defendant is in breach of the **CPR**, to the extent that default judgment should be granted in the circumstances.

THE LAW

THE OVERRIDING OBJECTIVE

[7] The overriding objective of the **CPR** is to enable the court to deal with cases justly. **Part 1.1 (2) (d)** states “dealing justly with a case includes, so far as is practicable ensuring that it is dealt with expeditiously and fairly.” The timelines as set down in the **CPR** are to ensure that the overriding objective is upheld. A court ought not therefore to allow with impunity the breach of the rules.

[8] The court must at all times balance the factors, which would affect the justice of a case and ensure that its discretion is exercised reasonably to further the court’s function as not only the decision maker, but also the primary administrator of the court process.

PROCEDURAL REQUIREMENTS FOR DEFAULT JUDGMENT

[9] The procedural requirements to obtain a default judgment are set out clearly in the **CPR**. The relevant sections are produced below:

Part 12.1:

“In these Rules, default judgment means judgment without trial where a defendant (a) has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or (b) has failed to file a defence in accordance with Part 10.”

Part 12.5

“The Registrar may at the request of the claimant enter judgment for failure to defend where

- (a) the claimant proves service of the claim form and statement of claim;
- (b) an acknowledgment of service has been filed by the defendant against whom judgment is sought;
- (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
- (d) the defendant –
 - (i) has not filed a defence within time to the claim or any part of it or any defence filed has been struck out;
 - (ii) where the only claim, apart from costs and interest, 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; and
 - (iii) has not satisfied the claim on which the claimant seeks judgment; and
- (e) the claimant has the permission of the court to enter judgment; and
- (f) there is no pending application for an extension of time to file a defence.”

Part 12.7

- “(1) A claimant applies for default judgment by filing a request in Form 6.
- (2) **No request for final judgment in default of defence shall be filed unless notice in writing has been served upon the defendant calling upon the defendant to remedy his default within 14 days after service of the notice** (emphasis added).
- (3) A copy of this notice shall be filed in the Registry immediately after service of the notice with an endorsement on the copy of the time, place and particulars of the service of the notice.”

DISCUSSION

[10] The timelines given in the CPR ensure that matters are dealt with expeditiously. There are also procedural stipulations that ensure fairness. Implicit in the overriding objective is the role of the court to balance the rights of parties to have their matters heard and disposed of in a timely manner, while giving due credence to fairness within the bounds stipulated. This is succinctly put by **Goodridge JA in June Blackman aka June Gill v. Elma Carmen Gittens et al (Civil Application No.6 of 2012, Unreported)** as follows:

"The overriding objective of the CPR is to enable the courts to deal with cases justly and the court must take into account the matters set out in rule 1.1 (2). Parties are required to assist the courts in furthering this objective. This means that parties are under an obligation to adhere to any time limits prescribed ... Courts no longer treat non-compliance lightly, and a litigant

will pay the ultimate price unless he or she can convince a court to exercise its discretion to forgive non-compliance."

[11] **Part 12** of the **CPR**, which gives parties the right to apply for a default judgment, was written with the intention that such measures would sift out weak Defences of parties, who were not forthcoming with proceedings. The procedures set out in **Part 12** of the **CPR**, make it clear that the use of the default judgment was not intended to be a draconian measure, applied merely with regard to expedition but also addresses the issue of fairness. The right of a defendant to put forward a Defence is a natural justice right that must be guarded.

[12] In **Thorne v Co-operators General Insurance Company Ltd. BB 1213 HC 30, Worrell J** discussed the intention of **Part 12 of the CPR**. This case differs from the instant matter, as a default judgment had already been entered when the Defendant sought to file a Defence. The discussion is however of some relevance to us. It was there highlighted that the Civil Procedure rules of the UK, (The White Book Service 2011), states, that

"In practice, if the time for filing a defence has expired but the claimant has taken no step to obtain default judgment and the defendant files a late defence, the court office will accept the defence, file it and proceed as usual so that the claimant will not now be able to obtain default judgment... the reality is that the court office will accept a late defence unless the claim is stayed."

[13] The court therefore will not act to prohibit a party entering a Defence, unless a default judgment has correctly been filed. The procedure for so filing is not a mystery. **Part 12.7** of the **CPR**, outlines the procedure required to file a default judgment. In keeping with the overriding objective, the **CPR** has built into the procedure a notification to the party who has found him/herself out of time, to remedy the default, so as to ensure that parties who intend to defend have an opportunity to do so, before a clandestine attempt to prohibit them is made. The **CPR** thereby ensures that a party, who after receiving such a notice still fails to enter a Defence, is intentional about their disregard of the timelines stipulated. This was highlighted in **Olympiad Incorporated and Chandler v RBTT Bank Barbados Ltd, BB 2014 HC 17**, where **Kentish J** in an application to set aside a default judgment, stated that the default judgment had been regularly obtained. Included in the determination of regularity was the fact that a notice to remedy the default had been sent to the Defendant and filed in accordance with **Part 12.7**, prior to the request for Default Judgment.

FINDINGS

[14] The Claimant in this instance filed the Notice to remedy the default (27th of July 2012), after the filing of the Request for Default Judgment (26th of July 2012). This was not in accordance with the procedure as stipulated in the

CPR, and as such the application for Default Judgment is invalid, and there is therefore no bar to the Defence as filed before the court. It must be further noted that, even in the instance where the Notice had been filed correctly, the period given to remedy the default is 14 days. The Defendant having filed its Defence within 6 days of receiving the notice would thereby have remedied its default.

DISPOSAL

[15] The Court therefore orders that:

1. The application for Default Judgment is dismissed;
2. The application for an extension of time within which to file a Defence is granted;
3. The Defence filed by the Defendant in this matter, on the 2nd of August 2012 do stand;
4. Costs are awarded to the Defendant to be assessed if not agreed.

William J. Chandler
Judge of the High Court