

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. 2065 of 2012**

**BETWEEN:**

**CONSOLIDATED FINANCE CO. LIMITED**

**CLAIMANT**

**AND**

**DOUGLAS DACOSTA DAWE**

**DEFENDANT**

**Before Dr. The Hon. Madam Justice Sonia Richards, Judge of the High Court.**

**2014: February 20**

**June 06**

**Mr. Omari Drakes, Attorney-at-law of Clarke Gittens Farmer, for the Claimant.**

**Mr. Dale Marshall Q.C. and Mr. Khamaal Collymore, Attorneys-at-law of George Walton Payne & Co., for the Defendant.**

## **DECISION**

### **Introduction**

[1] By an Application filed on 14 November, 2013, the Defendant applied for the following orders:

(1) that the judgment entered against him on 26 March, 2013, be set aside;

and

(2) that he be at liberty to file and serve an Affidavit in answer on a date set by this Court.

The Defendant also filed an affidavit in support of the application.

**Background**

[2] The Claimant began this matter by filing a fixed date claim form on 28 November, 2012. The claim sought the following:

(1) Payment of \$76,014.83 being the outstanding sum due to the Claimant by the Defendant under a hire purchase agreement;

(2) legal costs in the sum of \$2,000.00;

(3) interest;

(4) costs; and

(5) further or other relief as the Court deems fit.

[3] The claim was accompanied by a supporting affidavit sworn by Christopher McConney, the Claimant's Recoveries Manager.

[4] The Defendant twice acknowledged service of the claim form on 19 December, 2012, and 02 January, 2013, through his then attorney-at-law Mr. Arthur Holder. In those acknowledgments the Defendant indicated his intention to defend the claim. He did not admit to the whole or to any part of the claim.

- [5] The matter came before Kentish J on 31 January, 2013. Kentish J ordered the Defendant to file and serve a defence on or before 15 February, 2013. A perfected copy of this order is not on the court file. However, the parties agree that this order was made, and that the matter was further adjourned to 26 March, 2013.
- [6] On 26 March, 2013, neither the Defendant nor his counsel appeared before Kentish J when the matter was called. The Claimant's counsel on that date was Mr. Benjamin Norris. No defence had been filed on behalf of the Defendant. Kentish J granted the Claimant an order for judgment which was filed on 15 July, 2013, and served on the Defendant on 02 August, 2013.
- [7] The order is in the following terms:

**“UPON** the Claimant's application by Fixed Date Claim Form filed on 28<sup>th</sup> day of November, 2012 coming on for hearing;

**AND UPON** reading the affidavit of Mr. Christopher McConney filed herein on the 28<sup>th</sup> day of November, 2012;

**AND UPON** hearing Mr. Benjamin D. Norris of Clarke Gittens Farmer Attorneys-at-law on behalf of the Claimant herein;

**AND UPON** the Defendant's failure to file a Defence in compliance with the Order made on 31 January 2013 the Defendant not appearing;

**IT IS ORDERED** that the Defendant pay to the Claimant the sum of **\$76,014.83 INCLUSIVE**

of interest up to the 28 November 2013 and in addition thereto Fixed Costs in the sum of \$2,453.20 ('the Judgment Debt') with interest on the sum of **\$76,014.83** at the rate of 6% per annum commencing on the 26<sup>th</sup> day of March 2013 until Judgment debt and interest have been fully satisfied.”.

This order is the backdrop to the application now before the Court.

### **Issues**

- [8] A number of issues arise, under this application, for resolution by the Court. The primary issue is the relevant rule of the Supreme Court (Civil Procedure) Rules 2008 (“the CPR”), under which the application is to be considered by the Court. After that determination, the Court must also assess whether the Defendant has satisfied the conditions stipulated in the relevant rule.

### **The Relevant Rule**

- [9] The Defendant’s application does not mention which rule of the CPR is being invoked. However, counsel for the Defendant is of the view that Rule 13.3 is the appropriate rule. Counsel argued that Kentish J’s order of 26 March, 2013 amounts to a default judgment under Rules 26.3 (1) and (2) of the CPR; and, therefore, the application should be heard under Rule 13.3. But Counsel for the Claimant countered that Rule 39.5 is the appropriate rule

for applications to set aside orders or judgments made in the absence of a party.

**(1) Rule 27.2**

[10] To determine the proper procedural route, the Court will start with the rules pertaining to the fixed date claim form. Rule 27.2 provides in part as follows:

“(1) When a fixed date claim is issued the court must fix a date for the first hearing of the claim.

(2) On the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.

(3) 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.”.

[11] A fixed date claim form is appropriate in claims arising out of hire-purchase agreements. (See Rule 8.1 (5) (b)). The claim before the Court is for monies alleged to be due to the Claimant under a hire-purchase agreement. The claim was first heard by Kentish J on 31 January, 2013. On that occasion both parties were represented by counsel. Kentish J ordered that a

defence be filed on or before 15 February, 2013, and she adjourned the matter to 26 March, 2013.

[12] When the matter resumed on 26 March, 2013, that was not the first hearing of the claim. The first hearing occurred on 31 January, 2013, and it was conducted as a case management conference in accordance with Rule 27.2 (2) of the CPR. In keeping with her case management powers, the Judge made an order for the filing of a defence. It is however critical for the Court to determine the nature of the proceedings before Kentish J on 26 March, 2013.

[13] As it was not the first hearing of the claim, it cannot be said definitively that the learned Judge gave her order under Rule 27.2 (3) of the CPR. This Court is called upon to make an assessment with very limited information available. Both the Defendant and his counsel were absent when the matter was called. However, the Defendant's affidavit speaks to what occurred outside the courtroom. After receiving a copy of the order, he swears in his affidavit that:

“I was very surprised that judgment had been entered against me. I immediately contacted my then attorney-at-law who informed me that on the date in March when my matter came on for hearing, he was involved in another matter in the High Court. He further informed me that the Claimant's attorney was aware of this and had agreed to inform the Court.”. (See para.4).

[14] The Defendant also said in this affidavit, that prior to 26 March, 2013, he had inquired of his then attorney-at-law whether his defence was filed. The information he received was that his counsel “was awaiting information from the Claimant’s attorney, and [he] assured me that he would be granted any necessary extension.”. (See para.3).

[15] This account of what transpired, prior to the court proceedings, is substantiated somewhat in the written submissions of Mr. Drakes on behalf of the Claimant. At page 3 of that document, under the chronology for 26 March, 2013, Mr. Drakes wrote that:

“Mr. Norris indicates that he spoke to Mr. Holder outside of the Court and that Mr. Holder requested an adjournment because he had to attend another matter at ‘District C’ Magistrate’s Court. This is recorded in the Court’s notebook.”.

[16] This Court obtained a copy of the page from the Order Book where the records for matters before Kentish J on 25 March, 2014, were entered in the handwriting of the Clerk assigned to the Judge. This Court takes judicial notice of the following entry:

“2065/12 Consolidated Finance Co. Ltd. vs.  
Douglas Dawe  
Appearances: Benjamin Norris for Clm.  
Order: In terms of draft submitted and approved  
by the Court as amended.”.

- [17] There is no mention here of Mr. Norris explaining Mr. Holder's absence, or of Kentish J being apprised of Mr. Holder's request for an adjournment. Perhaps Mr. Drakes was referring to the Judge's notebook, to which this Court had no access. It is most unfortunate that in these circumstances, counsel for the Claimant did not find it necessary for Mr. Norris to file an affidavit in this matter. During the hearing of the application, the Court commented on the absence of an affidavit from Mr. Norris. The explanation received from Mr. Drakes was that his firm was not prepared to put Mr. Norris in a position in which he did not wish to find himself.
- [18] The Court accepts that there was a conversation between Mr. Norris and Mr. Holder prior to the commencement of proceedings on 26 March, 2013. In fact, the Court accepts the content of the Defendant's affidavit, in so far as he was not cross-examined or challenged on his affidavit; and there was no application before this Court to strike out any part of that affidavit. Mr. Drakes in his written submissions also conceded that Mr. Holder requested an adjournment, because he had a conflicting engagement at another court.
- [19] Except for the fact that an order was granted against the Defendant, there is nothing to indicate whether Mr. Norris objected to the adjournment. Would Mr. Holder have left had he been aware that Mr. Norris did not consent to an adjournment and would be requesting judgment for the Claimant? And it is

curious that there is no reference to the outstanding Defence in either version of the conversation between Mr. Holder and Mr. Norris, as related by the Defendant and Mr. Drakes.

[20] What is known is that Mr. Norris had in his possession that morning, a draft order for judgment in favour of the Claimant. What this Court does not know is what Mr. Norris said to the Court in connection with the draft order he presented to the Judge. The order says in the third recital that the Judge heard from Mr. Norris during her deliberations about the order. The draft presented to Kentish J is on the court's file with her amendments, her signature, and the date of 26 March, 2013. The Judge amended Mr. Norris' draft, inter alia, by the insertion of the fourth recital.

[21] There is nothing in the order indicating that Kentish J gave judgment for the Claimant under Rule 27.2 (3) of the CPR. As noted previously, this was not the first hearing of the matter. There is also no statement on the face of the order that the learned Judge intended to treat this second hearing of the matter as a trial of the claim, either because it was not defended, or because she considered that the claim could be dealt with summarily. But can the order be so interpreted?

[22] At this hearing, no defence had as yet been filed. And the Defendant was clearly, in breach of the time frame granted to him to file his defence. So

that Rule 27.2 (3) (a) was satisfied in that the claim was not defended. One may also surmise that Rule 27.2 (3) (b) was in play, because the claim was dealt with summarily. However, this Court is of the view that the Rules Committee deliberately limited the powers of a court under Rule 27.2 (3) to the first hearing for a reason. It was open to the Rules Committee to extend this rule to any hearing of the claim.

[23] Included in a fixed date claim form (Form 2) is a notice to defendants warning them that if they do not attend the first hearing, “judgment may be entered against you in accordance with the Claim”. In preparation for this possibility, Rule 27.2 (6) directs that:

“Unless the defendant files an acknowledgement of service the claimant must file evidence on affidavit of service of the claim form and the relevant documents specified in rule 5.2 (3) at least 7 days before the first hearing.”.

[24] Therefore, it is envisaged that at the first hearing, a court has before it the claim, a statement of claim or an affidavit in support of the claim, and either the defendant’s acknowledgement of service or the claimant’s affidavit of service. It is on these documents alone that a court determines, at a first hearing, that the matter is not defended.

[25] The acknowledgement of service would indicate to a court whether a Defendant intends to defend the claim, and whether he admits the whole

claim or any part of the claim. Where there is no acknowledgement of service filed by a defendant, a court can deduce from the affidavit of service that a defendant is aware of the claim; that he has all the relevant documents; and that he has not defended the claim.

[26] At the first hearing of this matter on 31 January, 2013, the fixed date claim form, the affidavit of Christopher McConney, two acknowledgements of service, and an affidavit of service were before Kentish J. The learned Judge did not treat this first hearing as the trial of the matter under Rule 27.2 (3). The first hearing was treated as a case management proceeding, and the Defendant given a deadline by which to file his defence.

[27] The rules do not permit a court to proceed under Rule 27.2 (3) at a subsequent hearing of the matter. Therefore, the order of 26 March, 2013 was not granted under the aegis of Rule 27.2 (3). It follows that there is no need for this Court to decide whether a trial was conducted by Kentish J in the context of Rule 27.2 (3).

**(2) Rules 26.3 and 26.4**

[28] The inclusion of the fourth recital suggests that the Judge thought it to be sufficiently important to mention the failure of the Defendant to comply with the order to file a defence. This was perhaps the *raison d'être* for her judgment in the Claimant's favour. So that it would not be unreasonable to

conclude that the judgment for the Claimant was the ultimate of sanctions against the Defendant, because of his failure to file a defence. It is in this context that Rule 26.3 of the CPR, and the submissions of counsel for the Defendant in that regard, will be considered. (See para. [9] supra).

[29] Part 26 of the CPR makes provision for the powers of a court during case management. Rule 26.3 is under the rubric “Sanctions – striking out of statement of case”. Rule 26.3 provides in part that:

“(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.

(2) An order under sub-rule (1) may be made on an application upon notice, and may include an order staying or dismissing the claimant’s application or any part of it with costs, where the claimant was in default, or an order entering judgment for the claimant with costs against a defendant who was in default, such a judgment for the claimant to be of the same nature as a judgment in default of the filing of a defence would have been in respect of the same claim.”.

[30] Rule 26.3 (1) permits a court to strike out a statement of case as a sanction against a party in certain circumstances. A statement of case is defined in

Rule 2.3 of the CPR as including “an application, statement of claim, defence, counterclaim, third party (or subsequent) notice or other ancillary claim or defence and a reply to a defence”.

[31] This Court is not persuaded that the order of 26 March, 2013 may be interpreted as the striking out of the Defendant’s statement of case by way of sanction for his failure to file a defence. Rule 26.3 (1) has no relevance in circumstances where no defence was filed. There was no defence or statement of case for the Defendant before Kentish J, that could be struck out as a sanction against the Defendant.

[32] Another consideration is that Rule 26.3 (2) envisages that the Claimant makes an application to the court requesting the imposition of a sanction under Rule 26.3 (1). No such application was filed by the Claimant. And there is no evidence before this Court, either in the order or by inference, that the Claimant’s counsel, Mr. Norris, made such an oral application before Kentish J on 26 March, 2013.

[33] When read together, Rules 26.3 (1) and (2) are not appropriate for the resolution of this matter. The combined effect of these two rules does not make the order tantamount to a judgment for the Claimant “of the same nature as a judgment in default of the filing of a defence”. In addition, care should be taken before Rule 26.3 (2) is engaged, because a default judgment

is not permitted by the CPR in relation to a fixed date claim form. (See Rule 12.2 (a)).

[34] The Court also considered Rule 26.3 (5) of the CPR, which provides that:

“Where a party fails to comply with an order of the court directing that party to take a step in the proceedings, any other party may move the court on notice for an order that the step in the proceedings be taken within the time limited in that order, or for relief of a kind referred to in sub-rules (1), (2), (3) and (4) of this rule, and the court may make an order as sought or any other order it thinks just.”.

[35] Di Mambro, in “The Caribbean Civil Procedure Practice”, describes this provision as conferring “a general discretionary power (subject of course to the overriding objective) to make an order relieving sanctions if [the court] thinks it just.” (See 1<sup>st</sup> ed, 2008, NOTE 23.6 at page 224). With respect, Rule 26.3 (5) does no such thing. The reference to “relief” in this provision does not mean relief from sanction. Rather, it is referring to the imposition of a sanction on a defaulting party, at the request of the other party to the proceedings.

[36] It was open to the Claimant to apply, under Rule 26.3 (5), for a sanction against the Defendant, pursuant to his failure to file a defence within the time specified by Kentish J. And Rule 26.3 (2) contemplates an order entering judgment for a claimant on that basis. However, this Court does not

know whether Mr. Norris made an oral application before Kentish J under Rule 26.3 (5). He filed no affidavit in this matter, and there is no reference in the order to Rule 26.3 (5). In any event, if such an application was made by Mr. Norris, it would have been done without notice to the Defendant.

[37] Had Mr. Norris presented the draft order to Kentish J as an application under Rule 26.3 (5), seeking judgment under Rule 26.3 (2), the judgment granted would be considered by Rule 26.3 (2) “to be of the same nature as a judgment in default of the filing of a defence would have been in respect of the same claim.”

[38] If this Court was satisfied that Kentish J proceeded under Rule 26.3 (5) and 26.3 (2), it would have no difficulty in considering the application before the Court as an application to set aside a default judgment. Why else would Rule 26.3 (2) deem the judgment to be akin to a default judgment? This Court believes that Rule 26.3 (2) is so crafted in order to provide a procedural route for challenging a judgment obtained via Rule 26.3 (2).

[39] There is no rule in Part 26, or in any other part of the CPR that allowed the Defendant to seek relief from sanctions. However, Di Mambro posits that Rule 26.4 of the CPR gives the court power to grant relief from sanctions. (Supra NOTE 23.37 at page 239). Rule 26.4 only applies in circumstances where no order was sought or granted under Rule 26.3 for the striking out of

a statement of case or a part of a statement of case. (See Rule 26.4 (1)). In other words, Rule 26.4 is not appropriate where a court has not entertained or granted an application for a striking out sanction under Rule 26.3. If there is no order for a striking out sanction, how then can Di Mambro interpret Rule 26.4 as empowering a court to grant relief from sanctions?

[40] All that Rule 26.4 does is to empower a court to rectify procedural errors, or to rectify a failure to comply with a rule, practice direction or court direction. It cannot be construed as permitting the grant of relief from sanctions. It must also be noted that the Defendant could not access Rule 26.4, because neither he nor his counsel were present before Kentish J to request an order rectifying his failure to file a defence.

[41] The peculiarity of the Barbados CPR is that they neither make provision for relief from sanctions, nor for “unless” orders. Also, there is no regional counterpart to Rule 26.3 (2) of our CPR. Under other regional procedural codes, the provision for relief from sanctions is drafted quite differently from Rule 26.4 of the Barbados CPR.

[42] For example, the CPR of the Eastern Caribbean Supreme Court provides as follows:

**“26.8 Relief from sanctions**

(1) An application for relief from any

sanction imposed for a failure to comply with any rule, order or direction must be –

- (a) made promptly; and
- (b) be supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that –

- (a) the failure to comply was not intentional;
- (b) there is a good explanation for the failure; and
- (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

- (a) the interests of the administration of justice;
- (b) whether the failure to comply was due to the party or his legal practitioner;
- (c) whether the failure to comply has been or can be remedied within a reasonable time;
- (d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

(See also Jamaica CPR Rule 26.8, and Trinidad & Tobago CPR Rule 26.7).

[43] Incidentally, there is also a provision in the Eastern Caribbean CPR that is similar to the Barbados Rule 26.4. (See EC Rule 26.9). This reinforces the point that our Rule 26.4 should not be interpreted as providing for relief from sanctions.

[44] In the absence of a procedural rule that allows a defendant to seek relief from sanctions, the combined effect of Rules 26.3 (5), 26.3 (2) and 13.3 provides a defendant with an alternative procedural route. The default judgment procedure under Part 12 is not utilised, but Rule 13.3 is available for an application to set aside or vary a judgment that is akin to a default judgment. A resort to Rule 13.3 would not offend the mandate in Rule 12.2 (a) that forbids a default judgment in the case of a fixed date claim form.

[45] It was noted previously that had Kentish J proceeded under Rule 26.3 (1), (2) or (5), it would have been without notice to the Defendant. However, the proceedings were conducted, and the order made, in his absence. The CPR

provides for a party to apply to the court to set aside an order made in his absence. In this regard, both Rules 11.15 and 39.5 of the CPR are relevant.

**(3) Rules 11.15 and 39.5**

[46] The requirements of Rules 11.15 and 39.5 are similarly worded. Rule 11.15 provides that:

“(1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made within 14 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence showing

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the party attended, some other order might have been made.”.

An “order” is defined in Rule 2.3 of the CPR as including a judgment.

[47] The difference between the two rules is that Rule 39.5 makes a specific reference to a trial scenario. Rule 39.5 (1) states that:

“A party who was not present *at a trial* at which judgment was given or an order made in the absence of that party, may apply to set aside that judgment or order.”.

[48] The question that arises is whether what occurred on 26 March, 2013 was a trial. Counsel for the Claimant submitted that the Defendant's application is governed by Rule 39.5. He relied on the case of **I.H.M. Incorporated Limited v. Wilson et al (H.C. St. Lucia, No. 0423 of 2003, decision dated 19 January, 2004)**. In that case the defendants applied to set aside a judgment made in their absence. The application was made under the equivalent of Rule 11.15 of our CPR. Hariprashad – Charles J ruled that the application should have been made under part 39.5 of the Eastern Caribbean (Civil Procedure) Rules 2008, to set aside a judgment made at trial where one party was absent. (Para.[6] of judgment). Part 39.5 is in pari materia with Rule 39.5 of our CPR.

[49] In **I.H.M.**, orders had been made for the filing of the defence, and for the fixing of a trial date to hear the fixed date claim. The judgment was given in the absence of the defendant on the date set for the trial. Clearly then Rule 39.5 was the appropriate rule against which the court in **I.H.M.** considered the application to set aside the judgment.

[50] Rule 39.5 is one of seven rules in Part 39 of the CPR that focus on the conduct of a trial. These rules cover the documents for use at trial (39.1); failure of a party to attend trial (39.4); **applications to set aside judgments given in the absence of a party (39.5)**; adjournment of a trial (39.6); and

inspection by a judge (39.7). A reading of these rules indicates that Part 39 is dedicated to the actual hearing of the case where evidence is taken by the judge. For example, Rule 39.1 (1) refers to “the date fixed for hearing”; and Rule 39.1 (5) mentions “the date fixed for the trial”.

[51] In this matter, no dates for trial had been set. The proceeding before Kentish J was not the first hearing of the fixed date claim, so that it was not a trial of the claim under Rule 27.2 (3) of the CPR. No case management orders had been made for the implementation of Rule 39.1.

[52] Rule 39.4 provides that:

“Where the Judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules and

(a) where neither party appears at the trial, the Judge may strike out the claim; or

(b) where only one party appears, the Judge may proceed in the absence of the other.”.

This rule refers to the absence of parties from the actual trial of the claim.

[53] Both the Defendant and his counsel at the time were aware of the adjourned date. On 26 March, 2013, the court was expected to give further case management orders had a defence been filed. The learned Judge would have been satisfied that the Defendant had notice of the adjourned date. But, in the context of Rule 39.4 (b), she could not be satisfied that notice of the

hearing of a trial had been served on the Defendant, when no trial dates had been set.

[54] It is Rule 27.10 that regulates the fixing of trial dates. This rule provides in part that:

“(2) The Registrar must give the parties at least 8 weeks’ notice of the date of trial.

(3) Notwithstanding sub-rule (2), the court may give shorter notice

(a) where the parties agree; or

(b) in urgent cases.”.

[55] There is no evidence of any agreement between the parties to treat the hearing on 26 March, 2013, as a trial, or that Kentish J gave shorter notice of a trial on that day because the matter was urgent. Therefore, Rule 39.4 could not be activated where a trial date was never set either by the Registrar, or by agreement between the parties, or by Kentish J.

[56] As the trial of the fixed date claim was not set for 26 March, 2013, the reference to a hearing, in the first recital to the order, is not determinative of the conduct of a trial. This Court finds that the order granting judgment to the Claimant was not considered in the context of Rule 39.4 (b). It was the failure to file a defence, together with the absence of the Defendant and his

counsel, and the presentation of a draft order for judgment by Mr. Norris, that precipitated the court into an expedited summary process.

[57] Counsel for the Claimant argued that, in these circumstances, a trial occurred. He pointed to the fact that the second recital to the order states that Kentish J read the affidavit filed on behalf of the Claimant. And from this he deduced that the learned Judge conducted an analysis of the Claimant's evidence. In order to resolve this issue, the Court sought guidance from the case of **Forcelux Ltd. v. Binnie** ([2009] EWCA Civ.854).

[58] In **Forcelux**, the Court of Appeal considered Rule 39.3 of the English CPR. This rule is similar to Rule 39.5 of the local CPR. The facts of **Forcelux** were described as unusual by another Court of Appeal in **Hackney London Borough Council v. Findlay**, ([2011] EWCA Civ.8). And these facts were succinctly reproduced in **Findlay**. (See para.19 of the **Findlay** judgment).

[59] In **Forcelux**, a landlord initiated proceedings to terminate a residential lease for non-payment of a minor sum for ground rent. The proceedings were served on the tenant, but he had no notice of them because he had moved. A possession order was made at a brief hearing. The **Forcelux** Court of Appeal found that this hearing was not a trial, therefore Rule 39.3 could not be invoked.

[60] Warren JA, supported by Jacob and Ward L.JJ, reasoned thus:

“35. The defendant might not appear at the hearing...Where a defendant does not appear at all, the task of the Judge is entirely straightforward and routine once he is satisfied that service has been properly effected. He looks at the evidence and, having no material which would suggest that the defendant had a case at all, let alone one that is genuinely disputed on grounds which appear to be substantial, he makes an order for possession.

36. I do not consider that such a process of determination can sensibly be called a trial as a matter of the ordinary use of the word. Nor do I consider that it is...seen as a trial within Rule 39.3; the word is not to be given some special and wider meaning in the context of that Rule. Rather, it can be seen more as a summary procedure in the sense of a procedure carried out rapidly with the omission of most of the steps which in an ordinary case lead to trial...”.

[61] Warren JA, at paragraph 35 of the **Forcelux** decision, generally described what occurred in the case before this Court. The facts here are that neither the Defendant nor his counsel appeared; the Judge was satisfied that they were aware of the adjourned date of hearing; the Judge read the evidence contained in the affidavit filed on behalf of the Claimant, as is confirmed by the second recital to the order; there was no material before the Judge to suggest that the Defendant had a case at all, or a case that was genuinely disputed on grounds that appeared to be substantial; and on that basis the Judge made the order for judgment in favour of the Claimant.

[62] Warren JA also observed that the word “trial” was not defined for the purposes of the relevant rule. Therefore, “It must accordingly take its meaning from its context in Rule 39.3 and in the context of the role of Rule 39.3 in the CPR as a whole.” (Supra, at para.18). That exercise was undertaken at paragraphs [50] to [55] of this judgment. Applying the analysis of Warren JA in **Forcelux**, this Court concludes that there was no trial before Kentish J on 26 March, 2013.

[63] Kentish J also reached the same conclusion in the recent case of **The Bank of Nova Scotia v. Mottley (HC B’dos., Cv No. 1459 of 2010, decision dated 17 February, 2014)**. The learned Judge opined that a previous hearing of the matter, in the absence of the applicant, “was not a full trial requiring the examination and cross-examination of witnesses and legal submissions.”.

(Para.[68] of judgment). Therefore, the court found that “...on a close examination of the ...Rules, the applicable Rule is to be found in Part 11 of the CPR and, more specifically, Rule 11.15 thereof.”. (Para.[69] of judgment).

[64] Having excluded Rule 39.5, the Court proposes to assess the application before the Court against the three criteria in Rule 11.15. These criteria are the filing of the application within 14 days of service of the order on the

Defendant; evidence showing a good reason for the Defendant's failure to attend the hearing; and evidence showing that it is likely that if the Defendant had attended the hearing, some other order might have been made.

**(i) The 14 Day Deadline**

[65] By Rule 11.15 (2), an applicant is required to file the application within 14 days after service of the order. The order was signed by an acting Deputy Registrar on 04 April, 2013. But it was filed on 15 July, 2013, more than three months after it was processed by the Registration Department. The Defendant was served with the order on 02 August, 2013, approximately two weeks after it was filed. Therefore, under the rule, the Defendant was required to file his application on or before Friday 16 August, 2013.

[66] The application was filed on 14 November, 2013, some three months after the prescribed date for filing. Counsel for the Defendant urged the Court to retroactively extend the time for filing the application to 14 November, 2013. The CPR allows a court to extend time limits retroactively. Rule 26.1(2) (b) states that as part of its case management powers, and unless the rules provide otherwise, the court may:

“extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;”.

- [67] The Court did not find any rule in the CPR that would preclude it from considering an extension of the time limit in Rule 11.15 (2). There appears to be no rule that provides otherwise. In **Walker et al v. Francis (HC St. Lucia, No. 361 of 1994, decision dated 13 June, 2003)**, Shanks J extended the time to hear an application under a similar provision in Part 26 of the EC CPR. (See paras. [9] to [11] of judgment).
- [68] **Walker** may be distinguished from **Vinos v. Marks & Spencer plc ([2001] 3 All ER 784)**. In **Vinos**, the Court of Appeal was unable to grant the appellant an extension of time to serve a claim form, because Rule 7.6 (3) of the English CPR expressly prohibited that court from so doing. This distinction was mentioned by Saunders CJ (Ag.), as he then was, in **Treasure Island Company v. Audubon Holdings Ltd. (BVI Civil Appeal No. 22 of 2003, decision dated 20 September, 2004, paras. [16] and [17]; see also Di Mambro, supra, at NOTE 1.2, pages 64-68)**.
- [69] In the exercise of its discretion under Rule 26.1 (2) (b), the Court will consider any reasons offered by the Defendant for the delay in the filing of his application. At paragraph 4 of his affidavit in support of the application, the Defendant says that, having received the order, he immediately contacted his then attorney-at-law. After speaking to that lawyer, the Defendant sought the advice of his current counsel.

- [70] The Court is left to draw inferences as to what caused the Defendant to file the application months after the deadline, as the affidavit does not advance any specific reasons for his delay. This lack of reasons may be due to the fact that his affidavit was directed towards satisfying the criteria in Rule 13.3, and not towards the criteria in Rule 11.15. This is deduced from the fact that the ground of the application is that the Defendant has a real prospect of successfully defending the claim.
- [71] The Court noted that there was no rush on behalf of the Claimant to file and serve the order. The Defendant received it more than four months after Kentish J signed the approved draft. It would have taken time for the Defendant to consult with his former lawyer, and then retain and brief new counsel. The Court was informed that after the Defendant retained new counsel, both sides consulted about the possibility of a consent order. After an agreement was not forthcoming, the application was filed.
- [72] Counsel for the parties were of the view that the relevant rule to be applied was either Rule 13.3 or Rule 39.5. Neither side referred to Rule 11.15 in either their written or oral submissions. This indicates a genuine misapprehension on both sides as to the appropriate rules applicable to the hearing of the application. And before this Court, counsel for the Claimant did not press the point about the lateness of the application.

[73] Additionally, the Court has no evidence before it that the failure to observe the time limit was intentional; and counsel for the Claimant has not argued in his written submissions that the grant of an extension of time would prejudice the Claimant. There is, however, a note on the court file indicating that a judgment note was registered on behalf of the Claimant before the expiration of the 14 day time frame for the filing of the Defendant's application. But the greater prejudice would be to the Defendant. In these circumstances, the Court will grant a retroactive order to the Defendant permitting him to extend the time for the filing of his application to 14 November, 2013.

**(ii) Rules 11.15 (3) (a) and (b): Cumulative or Disjunctive?**

[74] A number of cases have emphasized that both requirements in Rules 11.15 (3) (a) and (b) must be satisfied by an applicant. In **Watson v. Roper (CA Ja., No.68 of 2005, decision dated 18 November, 2005)**, the Jamaica Court of Appeal considered provisions similar to Rules 39.5 (3) (a) and (b) of the CPR. The Court of Appeal held that these provisions are cumulative, and that:

“There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied...”. (Pages 8-9 of judgment; see also page 14 of judgment).

- [75] The Belize Supreme Court also confirmed that the Belizian equivalent of Rules 11.15 (3) (a) and (b) are cumulative, although not applicable to the case then being considered. (See **Zipline Adventures (Belize) Ltd. v. Travellers Rest Lodge (Belize) Ltd, No. 1019 of 2009, decision dated 10 May, 2010**, per Sir John Muria J. at page 12). And in **Cummins v. The Central Water and Sewerage Authority (HC SVG, No.0124 of 2009, decision dated 31 March, 2011)**, Master Mathurin found that the applicant did not have a good reason for failing to attend the hearing. In her view, this finding rendered the rest of the application otiose. However, she addressed the second limb of the rule in the event that her conclusion was wrong. (Para.[9] of judgment; see too **Harricharan v. Campbell, HC TT No. 64 of 2011, decision dated 28 February, 2011**, at para.18).
- [76] More recently, however, Kentish J in the **Bank of Nova Scotia** case (supra), determined that Rules 11.15 (3) (a) and (b) were disjunctive and not conjunctive. Therefore, although the applicant before her was unable to show that he had good reason for failing to attend the hearing, nevertheless the application succeeded because the learned Judge found that, had he been present when the judgment was entered against him, it was likely that the court would have made “an order very different in character...”. (Paras. [81] to [93] of judgment).

[77] Kentish J did not refer to any of the judgments mentioned above (supra, paras. [74] and [75]), or to any recognised text books on this aspect of the CPR. (See eg. Di Mambro, supra, at NOTE 26.2, page 294; Blackstone's Civil Practice, 2011, page 897 at paras.60.1 and 60.2). This Court will adhere to the authorities that pronounced that these rules should be applied cumulatively.

**(iii) Good Reason For Failing to Attend**

[78] The guidelines for evaluating whether the applicant tendered a good reason for failing to attend the hearing of his matter on 26 March, 2013, were laid down by Mummery LJ in **Brazil v Brazil ([2002] EWCA Civ.1135)**, in this way:

“There has been some debate before us, as there was before the judge, about what is or is not capable of being a “good reason.” In my opinion the search for a definition or description of “good reason” or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree with Hart J that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a “good reason.” The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true “reason” for non-attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not

appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase “good reason” as used [in the CPR] is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance.”. (See para.12 of judgment).

[79] Following these guidelines, this Court will consider the relevant evidence, including the Defendant’s affidavit, in order to determine the reason for his absence. Then the Court will decide whether the reason moves it to exercise its discretion in his favour. In conducting this exercise, the Court will bear in mind that the Defendant is guaranteed a right to a fair hearing by the Constitution. It was a Court of Appeal in **Estate Acquisition and Development Ltd v. Wiltshire** ([2006] EWCA Civ. 553), that adopted the guidelines in **Brazil**, but warned that:

“If the phrase “good reason” is interpreted too strictly against an applicant, there is a danger that the interpretation will not give effect to the overriding objective and not comply with [the right to a fair hearing].” (Para.25 of judgment).

(See also **Good v Martin**, [ 2001] EWCA Civ. 1899, para.35, per Brooke LJ).

[80] What then was the Defendant’s reason for his non-attendance? At paragraph 4 of his affidavit he stated, inter alia, that:

“My own absence was due to my belief that Mr. Holder was handling everything and that I did not need to attend.”.

This statement must be understood against the background of paragraphs 3 and 4 of the affidavit.

[81] Paragraph 3 describes what occurred at and subsequent to the first hearing on 31 January, 2013, as follows:

“At the hearing the Hon. Madam Justice Elneth Kentish ordered that my defence was to be filed by a special date which I am unable to recall, and the matter was adjourned to a date in March. Sometime after that hearing, I sought to confirm with my then attorney-at-law that we had complied with the Court’s said Order. However, I was informed by Mr. Holder that he was awaiting information from the Claimant’s attorney, and he assured me that he would be granted any necessary extension.”.

(See paras.[13] and [80] supra for the content of para 4. of the affidavit).

[82] No affidavit was filed by Mr. Holder confirming these statements by the Defendant. However, the Court notes that the Defendant found it necessary to engage new counsel to pursue this matter on his behalf. And in so far as there is no evidence before the Court to challenge the Defendant’s affidavit, his reason for his non-appearance is accepted as “true and genuine”.

[83] Having accepted the Defendant’s reason, the Court must now decide whether it is a good reason. Counsel for the Claimant argued that the

Defendant's counsel was aware of the hearing, and did not attend because he had to go to another court. The Claimant's counsel was of the view that this was not a satisfactory reason, and that by implication it was not accepted by Kentish J.

[84] Mr. Drakes relied on the **I.H.M.** case (supra), where the applicants had requested a rescheduling of their matter because on the adjourned date they would be out of the country. They did not appear on the adjourned date because they believed that their request for the hearing to be rescheduled had been granted. Hariprashad – Charles J refused the application, and ruled that:

“On the basis of the evidence, I am of the view that the defendants had full notice and had the opportunity of availing themselves at Court. They had contumaciously decided not to take advantage of their day in Court.”. (Para.10).

[85] Reference was also made to **Watson v. Roper** (supra), where the Jamaica Court of Appeal upheld the observations of the trial Judge that:

“...bad advice from a lawyer or assumptions by the [applicant] that the matter was at an end, based on that bad advice, are not a good reason for the failure to attend or to stay on top of what is essentially one's own business.”. (Page 12).

[86] A relevant factor in **Watson** was that the applicant had changed his home address, and then failed to inform his attorney-at-law of his new address.

The applicant was also absent on the date fixed for trial. Mr. Drakes relied on **Watson** to show that the Defendant was not sufficiently attendant to his “own business”, and so did not have a good reason for absenting himself from the hearing.

[87] Based on the evidence before this Court, the Defendant demonstrated interest in his matter by speaking to his lawyer about the progress of his defence. He explained that his conversation with his lawyer led him to believe that his defence would be filed after additional information was forthcoming from counsel for the Claimant. He was assured that his lawyer would be given an extended time to file the defence, if that became necessary.

[88] In these circumstances, it was not unreasonable for the Defendant not to attend the proceedings. Had his defence been filed, the hearing on 26 March, 2013, would have been for further case management, even if both he and Mr. Holder were absent. But it is unlikely that his presence would have been required in the early stages of case management.

[89] Although the Defendant’s counsel did not appear at the hearing, both sides agree that he was in the precincts of the Supreme Court that morning. Mr. Holder informed counsel for the Claimant about his conflicting engagements. What the evidence does not clarify is whether the two counsel

agreed to the adjournment amongst themselves; or whether there was any discussion about an extension of time to file the defence; or whether counsel for the Claimant made it abundantly clear to Mr. Holder that he would not only be resisting the request for the adjournment, but more importantly, that he would be presenting the court with a draft order seeking judgment for the Claimant.

[90] The Defendant's affidavit only speaks to an agreement, between Mr. Norris and Mr. Holder, that Mr. Norris would explain Mr. Holder's absence to the court. As the only attorney-at-law who appeared in court that morning, Mr. Norris was the individual best able to assist the Court, by affidavit evidence, with a perspective of what occurred outside and inside the court. Having declined to provide an affidavit, this Court cannot say with certainty that the Defendant was the victim of either bad legal advice, or the dereliction of duty by his counsel.

[91] What is obvious to the Court is that Mr. Holder was mindful of his obligations when he presented himself at the Supreme Court that morning, and made it his business to speak to counsel for the Claimant. This Court is satisfied that, on a balance of probabilities, Mr. Holder did not appear in the matter that morning because he was confident that the Claimant's counsel

had acceded to his request for an adjournment, and would so inform the court.

[92] The Court pondered whether any reliance could be placed on the assertion that Mr. Holder was awaiting additional information from the Claimant's lawyer before filing the defence. Having read the affidavit of Mr. McConney, and the exhibits attached thereto, this Court formed the opinion that although it was possible to file a defence within the time prescribed by the court, the affidavit required clarification in certain respects. For example, the tenor of the affidavit is that the Defendant did not pay the agreed instalments for the vehicle. However, paragraph 14 of the affidavit alleges that payments amounting to over ten thousand dollars were received.

[93] The Defendant says that he never entered into a hire-purchase agreement with the Claimant, or received a vehicle from the Claimant. A pertinent question for the defence is who made these payments? Another example is Exhibit CM1, which is a copy of the hire-purchase agreement. Under the caption HIRE RENT AND PERIOD OF HIRE on page one of that document, there is a reference to a Part Exchange Allowance of \$8,000. If this is referring to a valuation of a vehicle traded in by the hirer, who was the registered owner of that other vehicle?

[94] This Court believes that there was good reason, based on the documents filed by the Claimant, for the Defendant's previous counsel to seek further information from counsel for the Claimant. But, even if counsel for the Defendant was pursuing additional pertinent information, there is no denying that a defence could have been filed within the time frame set by the court. If the additional information required further refinement of the defence as filed, then an application to amend the defence could have been considered. However, the Court is cognisant of the fact that Rule 11.15 (3) does not require the Defendant to give the Court a reason for his failure to file a defence.

[95] In accordance with the **Brazil** guidelines, this Court has examined "all the evidence relevant to the defendant's non-attendance". The Defendant was present at the previous hearing. He knew the adjourned date for the next hearing, but he chose not to attend because he believed his counsel was "handling everything", and that there was no need for him to attend. No trial date was set by the Judge, and he could not have anticipated that his matter would be concluded so suddenly, and in the absence of himself and his counsel.

[96] The Court does not believe that this was an unreasonable decision on the part of the Defendant. He had consulted his attorney on the progress of the

case, and in particular about the filing of his defence. His understanding was that an extension of time would be granted to file the defence if it was required. He expected that his counsel would be appearing in court on his behalf at the hearing on 26 March, 2013. His counsel did go to the Supreme Court, but with conflicting court appointments. Counsel for the Claimant was so informed, and requested to explain Mr. Holder's absence to the court.

[97] The overriding objective directs this Court that as far as practicable it should deal with a case justly by “ensuring that it is dealt with expeditiously and fairly”. (Rule 1.1 (2) (d)). It would not be fair, given the circumstances surrounding the Defendant's absence, and his reason for his absence, to penalise him so severely as a result of his own absence, or the absence of his counsel.

[98] The Court is also reminded that too strict an interpretation of the phrase “good reason” runs the risk of denying the Defendant his constitutional right to a fair hearing. (See *Wiltshire*, supra, and *M4 Investments Inc. v. CLICO Holdings (Barbados) Ltd.*, (2006) 68 WIR 65, at 83 h-j, where Peter Williams JA balanced the right to a fair hearing against the court's power to strike out an action). After due consideration, this Court finds that the Defendant had a good reason for his non-attendance at court on 26 March, 2013.

**(iv) Likelihood of Some Other Order Being Made**

[99] Had the Defendant or his counsel appeared in court, the burning question would have been why he was in breach of the order to file his defence. As a result of that breach, counsel for the Claimant was in possession of a draft order in favour of the Claimant. Therefore, the Defendant would have been required to persuade the court why judgment should not be granted to the Claimant in the absence of a defence.

[100] Assuming the Defendant appeared without his counsel, his plea would have been for an extension of time to file the defence. He would most likely have apprised Kentish J about the basis of his defence, with the serious implications of fraud. The court would have been cautious to proceed in the absence of the Defendant's counsel, especially if told that Mr. Holder was requesting an adjournment. Both acknowledgments of service alerted the Judge that the claim was being resisted. The Claimant was made aware, before the filing of its claim, that the Defendant was alleging that there was no agreement between himself and the Claimant, and that he never took possession of the vehicle. (See Exhibit DDD4, to the proposed Affidavit in Answer, which is a copy of a letter from Mr. Holder to the Claimant dated 01 March, 2012). And nothing in the Claimant's documents contained a response to the Defendant's allegations.

[101] This Court is of the view that, given these probable scenarios, there was a likelihood that Kentish J would have granted an adjournment, or given an extended time to file the Defence. In neither scenario would the court have given an order for judgment in favour of the Claimant, especially in the absence of counsel for the Defendant. Therefore, the Court finds that the Defendant has satisfied Rule 11.5 (3) (b).

### **Disposal**

[102] Rule 11.15 of the CPR is the appropriate procedural rule for the hearing of this application. Consequently, the Court grants the following orders:

- (1) an order under Rule 26.1 (2) (b) of the CPR, permitting the Defendant to extend the time specified in Rule 11.15 (2) of the CPR for the filing of his application to 14 November, 2013.
- (2) the Court being satisfied that the Defendant has met the requirements of Rules 11.15 (2) (a) and (b) of the CPR, orders that:
  - (i) the judgment entered against the Defendant on 15 July, 2013, is hereby set aside;
  - (ii) the judgment note registered by the Claimant on 12 August, 2013, is also set aside;
  - (iii) the Defendant is at liberty to file and serve an Affidavit in Answer on or before 27 June, 2014; and

(iv) costs are awarded to the Claimant in the sum of \$2,500.

*Sonia L. Richards*

**Dr. Sonia Richards**  
**Judge of the High Court**