IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. 65 of 2023

BETWEEN:

ASCENDANCY BELIZE

CLAIMANT/
RESPONDENT

and

SHELMADINE PATT NEE GONGORA 1ST DEFENDANT/
APPLICANT

HUMBERTO PATT

2ND DEFENDANT/
APPLICANT

Appearances:

Ms. Lochan- Dass for the Claimant
The First Defendant absent
The Second Defendant appearing unrepresented

2023: December 15th;
2024: April 16th.

JUDGMENT

APPLICATION FOR RELIEF FROM SANCTIONS

[1.] **NABIE J.**: This is the defendants' application notice for relief from sanctions made as a result of not filing a defence to the claim. I find that the application is an abuse of process for the reasons set out below.

[2.] By fixed date claim form filed 31st January 2023, the claimant claims against the defendants the sum of $206,903.95 being the principal and interest due and payable on loans made to the defendants by Scotiabank (Belize) Ltd..

[3.] The claimant is a company duly incorporated under the laws of Belize with its registered office at corner Landivar and 4th Streets, Kings Park, Belize City.

[4.] The fixed date claim form is supported by the first affidavit of Lisa Dee-Ann Salazar, Operations Supervisor of the claimant company.

[5.] Ms. Salazar deposed that the claimant is in the business of purchasing debts. The claimant purchased debts in 2017 from Scotiabank (Belize) Ltd. Two of these debts were loans No. 332650 and 334742 granted to the defendants which were secured by Charge and Memorandum Accompanying Charge dated 15th September 2003 which was duly registered in the Lands Registry and bearing registration no. 6732/2003 with the defendants as mortgagor and borrower mortgaged to Scotiabank (Belize) Ltd. the leasehold title in parcel 2427/1 Block 24 Society Hall Registration Section. On 20th October 2003, the defendants (a married couple) had borrowed the sum of $84,000.00 at a rate of 12.5% per annum (loan no. 332650). The defendants failed to make the regular payments and paid in total the sum of $62,424.75 towards the loan, the last payment being made on 23rd April 2010. Further, on 14th June 2007, the defendants borrowed the principal sum of $22,500.00 at a rate of 14% per annum (loan no. 334742) and again failed to make the regular monthly payments and paid in total the sum of $8,731.66 towards the said loan. The Charge and Memorandum Accompanying Charge were transferred by Transfer of Charge dated 9th June 2020 duly registered in the Land Registry as Instrument No. LRS-202006012 from Scotiabank (Belize) Ltd. to the Claimant. All documents have been annexed to Ms. Salazar's affidavit.

[6.] Ms. Salazar further deposed that the claimant thereafter sent demand letters dated 20th October 2020 to the defendants and these letters have been annexed. She further deposed that the defendants although acknowledged the debt. She did not however provide any documentary evidence on this. On 30th September 2022, the property that secured the loan by Charge and Memorandum Accompanying Charge was sold at public auction for $13,357.81 and monies where applied to the two loans but this was insufficient to liquidate the debt. Her evidence is that the defendants are indebted to the claimant in the sum of $206,903.95 calculated as follows:

(a) With respect to Loan No. 332650, the sum of $170,149.46 (that being the unpaid balance of $97,421.64 and interest (at a rate of 12.5%) from 20 October 2003 to 23 April 2016 of $72,727.82).

(b) With respect to Loan No. 334742, the sum of $31,654.49 (that being the unpaid balance of $20,780.16 and interest (at a rate of 14%) from 14 June 2007 to 21 October 2017 of $31,654.49).

(c) Court fees of $100.00

(d) Legal fees of $5,000.00

[7.] The defendants filed an acknowledgment of service on 9th May 2023. The defendants also filed a notice of counterclaim on 13th June 2023.

[8.] By Application Notice for Relief from Sanctions "the application" filed on 13th June 2023, pursuant to CPR 1.1, CPR 26.1 (2) (E), CPR 26.8 and CPR 26.9 and the inherent jurisdiction of the court, the defendants seek the following orders:

(1) That the applicants/defendants be granted relief from sanctions for failure to file and serve a defence to the claim on or before 10th May, 2023.

(2) That the applicant be granted leave to file and serve a defence to the claim.

(3) That costs of the application be costs in the cause.

The Grounds of the Application are:

(1) That the application is being made promptly within the meaning of CPR 26.8 (1).
(2) The failure to comply was unintentional as the defendants had no legal advice and were unaware of the CPR.
(3) Relief from Sanctions would be in the best interest of the administration of justice as the defendants have a tenable defence to the claim and would further the overriding objective.
(4) That there would be no prejudice to the claimant.

[9.] The claimants filed the second affidavit of Lisa Dee-Ann Salazar on 28th June 2023, (the second Salazar affidavit) in response to the defendants' application.

[10.] On 7th July 2023, the claimant pursuant to CPR 26 filed a notice of application to inter alia:

(1) To strike out the document which purports to be a "Notice of Counterclaim".

(2) Costs of the application:

The grounds of the application are as follows:

(1) The document discloses no cause of action against the applicant and reasonable grounds for bringing the claim.
(2) The "Notice of Counterclaim" does not contain any prayer for relief as against the applicant.

[11.] It was agreed that the defendant's application would be heard as it was first in time and the claimant would await the outcome.

DEFENDANTS' CASE

[12.] The defendants filed this application because they had not filed a defence in the time prescribed in the CPR. They argue that they were not aware of the procedures under the CPR, this was stipulated in the application. The Court was asked to consider the overriding objective, in particular that the Court has to ensure that the parties should be on equal footing and that matters are to be dealt with justly. The defendants asked for relief form sanctions to file their defence as stated in the application and informed the Court that the document filed on the said 13th June 2023 and labelled "Notice of Counterclaim" was in fact the defence.

[13.] The second defendant who presented the application on behalf of both defendants, highlighted that he was not a legal practitioner and was unaware of the requirements of the CPR.

[14.] The defendants argued that the property was undervalued when put up for auction. The defendants submitted that they had a viable defence to the claim.

CLAIMANT'S CASE

[15.] The claimant argues that the application has not been brought properly before the Court and should be struck out. The Claimant objects to the application on the basis that it has been brought pursuant to CPR 26(8) and the said rule has not been complied with. It was highlighted that the application was not supported by affidavit evidence and it was submitted that it was not made promptly that being four (4) weeks after the defence was required to be filed.

[16.] The claimant relied on the following cases: **Fuller v Fort Street Tourism Village, Henry Young and Belize Marine & Sand Co. Ltd**.[1] , **The Attorney General of Belize v Florencio Marin and Jose Coye**[2]and **John Palacio v Football Federation of Belize**[3]. It was submitted that those cases established that CPR 26(8)(1) needs to be complied with before the Court can address the other limbs of the CPR 26(8). It was submitted that once sub rule (1) had not been complied with that the application was not proper and that the court could not give further consideration to the application.

[17.] Alternatively it was argued that even if sub rule (1) had been complied with the Court ought still not to grant the relief from sanctions. The claimant argues that the defendants have generally not complied with the rules (see CPR 26(8)(2)) and relied on paragraph 7 of the second Salazar affidavit where it was deposed that the defendants did not file an acknowledgment of service when it was due on 27th April 2023, but rather at a later date on 9th May 2023.

[18.] The claimant further highlighted that the defendants would have been aware of their requirements as the form attached to the fixed date claim form has directions to follow. They ought to have known that they had 28 days to file a defence. The claimant further submitted that there are no special rules in the CPR for circumstances where parties are unrepresented , that the overriding objective would be better served if the application was not granted and that it was a waste of judicial time as there was no defence to the claim.

[19.] The claimant went on further to argue that at the hearing of the application was the first time that the defendants indicated that the document labelled "Notice of Counterclaim" is in fact the defence. It was also argued that the notice of counterclaim does not comply with the CPR for such reasons as there is no certificate of truth and the averments do not provide a defence to the claim. The notice of counterclaim as indicated by the claimant seems to suggest that the property was sold at an undervalued price, whereas the claimant has set out the many occasions in which there were offers but there was no closing. The claimant's position is that nevertheless the debt remains unpaid.

[1] Claim No. 661 of 2012
[2] Claim No. 41 of 2009
[3] Claim No. 546 0f 2017

ISSUES

i. Whether the application for relief from sanctions is in compliance with the CPR ?
ii. Whether the defendant should be granted relief from sanctions ?
iii. Whether an application for relief from sanctions was necessary ?
iv. Whether the notice of counterclaim constitutes a defence ?

DISCUSSION

[20.] With regard to relief from sanctions, the Privy Council decision in the matter of the **Attorney General v Kieron Matthews**[4] (a case from Trinidad and Tobago (T&T)) is instructive. I have quoted from **Matthews** extensively and I will also make reference to the equivalent rule in the Belize CPR where necessary.

[21.] In **Matthews** at paragraph 5 it is stated as follows:

> "5. Rule 1.1 defines the "overriding objective" of the rules as being to enable the court to deal with cases justly. Rule 1.1(2) provides that this includes ensuring that a case is dealt with expeditiously. Rule 12(2) provides that the court must seek to give effect to the overriding objective when it "interprets the meaning of any rule". Part 10 contains rules in relation to defences and provides that a defendant may apply for an order extending the time for filing a defence (rule 10.3(5)). The general rule is that the period for filing a defence is 28 days after the date of service of the claim form and statement of case (rule 10.3(1))……. Part 12 contains rules in relation to default judgments. It provides that, if requested by the claimant to do so, the court office must enter judgment if the defendant fails to enter an appearance where the time for doing so has expired (rule 12.3) and the defendant fails to file a defence where the time for doing so has expired (rule 12.4)."

[22.] The relevant parts of the Belize CPR are 10.3(4), the parties may agree to extend the period for filing a defence, that the general rule is that the period to file a defence is 28 days after the service of the claim form and CPR 12.5, the court office must enter judgment if the defendant fails to enter a defence. It is noteworthy that in this matter there can be no default judgment as it commenced by fixed date claim form.

[23.] In **Matthews** at paragraphs 6 and 7 it was also stated as follows:

> "6. Part 26 sets out the court's powers of case management. It has the power to extend the time for compliance with any rule, practice direction or order or direction of the court (rule 26.1(1)(d)). Rule 26.6 provides:

[4] [2011] UKPC 38

"(1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.

(2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply."

7. Rule 26.7 provides:

"(1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.

…….

(3) 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 breach; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders, and directions.

(4) 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 attorney;

(c) whether the failure to comply has been or can be remedied within a reasonable time; and

(d) whether the trial date or any likely trial date can still be met if relief is granted."

[24.] The procedure for applications for relief from sanction is set out in Belize CPR 26.7 and is similarly worded to the T&T version.

[25.] Regarding the High Court decision in **Matthews**, the PC commented as follows at paragraph 8:

"8. In summary, the judge's reasoning was as follows. The court has a discretion to extend the time for compliance with any rule or practice direction (rule 26.1.1(d)) and to extend the time for serving a defence (rule 10.3(5)). In granting an extension of time pursuant to these rules, she placed significant weight on the fact that the extension would cause no prejudice to the claimant, whereas refusal of an extension would deprive the defendant of the opportunity to defend the claim. The defendant's failure to file a defence within the 42 day period fixed by the rules (rule 10.3(3)) did not automatically attract any sanction. Rather, it left the defendant exposed to the possibility of an

application for judgment in default. That is not a sanction within the contemplation of the rules. Rule 26.7 has no application where no sanction has been imposed by a court order or by a rule.

[26.] Again here, there is also no sanction for not filing a defence in matters begun by a fixed date claim form. There was no application for an extension of time by the defendants.

[27.] Then at paragraph 12 in **Matthews** it was stated:

"12. As regards (d), rule 9.3(3) is an example of a rule which expressly otherwise states. Rule 9.3(1) provides for a general rule that the period for entering an appearance is 8 days after the date of service of the claim form. But rule 9.3(3) provides that a defendant may enter an appearance "at any time before a default judgment is entered."

[28.] The PC held at paragraphs 14 to 16:

"14. …….A defence can be filed without the permission of the court after the time for filing has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises…."

"15. Secondly, rules 26.6 and 26.7 must be read together. Rule 26.7 provides for applications for relief from any sanction imposed for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, "any sanction for non-compliance imposed by the rule....has effect unless the party in default applied for and obtains relief from the sanction" (emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. Examples of such rules are to be found in rule 29.13(1) (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits); rule 28.13(1) (consequence of failure to disclose documents under an order for disclosure); and rule 33.12(1) (consequence of failure to comply with a direction to disclose an expert's report."

"16.It is striking that there is no similar provision in relation to a failure to file a defence within the time prescribed by the rules. There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the defendant fails to file a defence with the prescribed period: rule 10.3(5) provides that the defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose."

[29.] The guidance in **Matthews** must be read in the context that this matter was commenced by a fixed date claim form. As aforesaid there can be no default judgment (see CPR 12.2) the court may however treat with the matter as it deems fit under CPR 27.3. **Matthews** clearly illustrates that the CPR does not provide a sanction for failure to file a defence but rather provides for an extension of time to file a defence. The Board in **Matthews**, as aforesaid, a case from the jurisdiction of Trinidad and Tobago sets out examples from the CPR (T&T) as to rules which require an application for relief from sanction if not complied with. The examples are also applicable to the relevant rules it the Belize CPR, that being CPR 28.13 (failure to disclose documents under an order for disclosure), CPR 29.11 (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits) and CPR 32.5 (failure to comply with a direction to disclose an expert's report). The claimant argues that the time for filing a defence had expired but could not make an application for default judgment. Quite rightly, the claimant applied to strike out the 'notice of counterclaim'/ the purported defence. The defendants' arguments do not assist the court in making a determination. Consequently, I am of the view that the application is misguided and/or inappropriate.

[30.] The claimant argues that the application was not proper and not in compliance with the CPR. I will now also consider that position.

[31.] In **Marin and Coye**, the then Chief Justice Benjamin commented at paras 8 and 9:

"The Court can look for guidance as to the interpretation and application of Rule 26.8 to the dicta of Barrow, JA in **Nevis Island Administration v La Coppreprete du Navire** - Civil Appeal No. 7 of 2005 (St. Christopher and Nevis. His Lordship stated as follows (at para. 17):

> "There are mandatory conditions imposed by this rule. It is stated in sub-rule (1) that the application must be made promptly and it must be supported by an affidavit. ... In sub-rule (2) a strict fetter is imposed upon the court's discretion - the court may grant relief only if it is satisfied that the failure to comply was not intentioned, that there is a great explanation for the failure and the party in default has generally been complaint. This means that the court must conduct an examination of the evidence before it (normally the applicant's affidavit) to decide if that evidence satisfied the court that the failure to comply was not intentional that there is a good explanation for the failure and the applicant has been generally compliant ..."
>
> In the present case, the application is supported by affidavit evidence. The application, having been made some eight days after the expiration of the date of the filing of witness statements, there is no challenge to Mr. Hawke's assertion that the application was made with promptitude.
>
> The Respondents' opposition to the application was directed at the conditions precedent set out in sub-rule (2), all of which must be satisfied before the court can exercise its discretion to grant relief.

[32.] Griffith J. noted in the **John Palacio** (supra) at para15

"With respect to the Court's view on the appropriateness of the Claimant's application for extension of time, reference is made to **the Attorney-General of Belize v Florencio Marin & Jose Coye**.

The learned Chief Justice in this case remarked that Rule 26.1(2)(c) was, in addition to all other powers of the court listed under Rule 26.1(2), qualified by the opening words of the Rule which state 'except as otherwise provided by these Rules'. This position was restated by the learned Chief Justice in **Steve Fuller v Fort Street Tourism Village** et al. 4in the following terms (emphasis mine):-

> "The Court is empowered by Rule 26.1(2)(c) to extend the time for compliance with an order of the Court whether before or after the time for compliance has passed. However, before exercising the discretion so to do it is circumscribed by the mandatory requirement of Rule 26.8(1) and (2) visited upon any application for failure to comply with any Rule, order or direction of the Court."
>
> ……..
>
> What is evident therefore is that the requirements of Rule 26.8(1) must first be satisfied and thereafter those of Rule 26.8(2) in order for the application for relief to be granted. The Court will also be required to consider the factors listed in Rule 26.8(3) if the application gets beyond the stages of sub-rules (1) and (2). This decision was cited with approval by the learned Chief Justice here in Belize in **Attorney-General v Florencio Marin & Jose Coye** and will be applied by the Court in the instant case."

[33.] I accept the submissions of the claimant on the interpretation of the CPR regarding relief from sanctions based on the above. It is clear that Rule 26.8(1) must be complied with before any further consideration of the application. I agree that the defendants have not complied with the rule. However, it is the court's view that it was not necessary for the defendants to file an application for relief from sanctions for failure to file a defence as discussed in **Matthews**. The court notes that this submission was not made by the claimant.

[34.] The claimant has opposed the defendants' application on the basis that the application fails to comply with the CPR. I am in agreement that the application is not in compliance with the CPR. As I have indicated above however, this application was not necessary as according to **Matthews** there is no sanction for failure to file a defence. In the circumstances, this application is not properly before the Court as it is not well grounded, furthermore it is not in compliance with the requirements of the CPR. I find that the defendants' application is an abuse of process and it is dismissed.

NOTICE OF COUNTERCLAIM

[35.] The defendants have filed a document "notice of counterclaim" and has submitted that it is in fact a defence to the claim. This document is not a defence.

[36.] The CPR 10.2(1) (2) and (3) provide:

(1) "A defendant who wishes to defend all or part of a claim must file a defence (which may be in Form 5).

(2) However, where-

(a) a claim is commenced by a fixed date claim form in Form 2 and there is served with that claim form an affidavit instead of a statement of claim; or

(b) where any Rule requires the service of an affidavit; the defendant may file an affidavit instead of a defence.

(3) In this Part, the expression **"defence"** includes an affidavit filed under paragraph (2).

[37.] I have reviewed the 'Notice of Counterclaim' and I find that quite apart from the labelling the document 'Notice of Counterclaim' instead of 'Defence', the defendants have not complied with the requirements of the CPR namely 10.5 (Defendant's duty to set out case). CPR 10.5 provides as follows:

(1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) Such statement, must be as short as practicable.

(3) In the defence, the defendant must say –

(a) which (if any) allegations in the claim form or statement of claim are admitted;

(b) which (if any) are denied; and

(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or statement of claim-

(a) the defendant must state the reasons for doing so; and

(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) If, in relation to any allegation in the claim form or statement of claim the defendant does not-

(a) admit it; or

(b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.

(6) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with Rule 3.12.

[38.] Quite apart from a counterclaim being a separate pleading from a defence, there is a severe lack of compliance with CPR 10.5 on the part of the defendants. The document 'notice of counterclaim seems to be making a claim against the claimant. In that document the defendants allege that they had no transactions with the claimant, but Scotiabank (Belize Ltd.) and they allege that the claimant sold the property for far less than it was worth. However, at the hearing it was submitted that the notice of counterclaim was the defence and I am of the view that it is defective in many ways for example:

- There is no real response to the fixed date claim form and supporting affidavit as such there are no admissions, denials or facts for the claimant to prove
- The defendants set out their case as it related to their transactions with Scotiabank (Belize) Ltd., an entity that is not a party to this matter
- There is no certificate of truth

[39.] At this juncture, it is necessary to discuss the defendants as being self representing. In dealing with litigants in person it is necessary that a court exercise heightened care and caution. Self-represented litigants deserve special attention in our legal system. The Supreme Court (Civil Procedure) Rules 2005 (CPR) was designed to make civil litigation less complicated and less costly than prevailed under the previous regime.

[40.] This Court is convinced that the proceedings should come to an end. In examining the defendants' purported defence, I find that there is no prospect of success for the defendants. I can see no basis why this document should be allowed. It will be unfair to the claimant, therefore, to allow the defendants to defend this claim in its present form. To do so will be a misuse of the parties' and Court's resources and contrary to the overriding objective of the CPR.

CONCLUSION

[41.] This court considers that the document notice of counterclaim which the defendants purport to be the defence is an abuse of process, the defendants have failed to comply with the rules. Accordingly, the notice of counterclaim is struck out.

[42.] In the circumstances, there being no defence to the claim, in accordance with the court's case management powers under part 26, there shall be judgment for the claimant. There would therefore be no need to hear the claimant's application.

COSTS

[43.] Having considered the facts of the matter which have led up to this point, the application before me, the position of both parties and the defendants representing themselves, I am of the view that each party shall bear its own costs.

DISPOSITION:

[44.] It is hereby ordered as follows:

1. The application for relief from sanctions is dismissed.
2. The notice of counterclaim is struck out.
3. Judgment is granted to the claimant in the sum of $206,903.95.
4. Each party is to bear their own costs.

NADINE NABIE
High Court Judge