

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN
3

18-03-11

4 Cause No. 378 of 2010
5
6

7 BETWEEN:
8

- 9 (1) NOVACELL (ST. LUCIA) LIMITED
10 (2) COMPLETEWIRELESS JAMAICA LIMITED
11 (IN RECEIVERSHIP)
12 (3) KENNETH TOMLINSON
13 (AS RECEIVER OF COMPLETEWIRELESS
14 JAMAICA LIMITED
15
16
17

18 Plaintiffs
19

20 AND:
21

- 22 (1) ISSAC RANKINE
23 (2) PAN CARIBBEAN CONSULTING LIMITED
24
25
26

27 Defendants
28

29 Appearances:

30 Mr. Neil Timms instructed by Mr. Orren Merren
31 of Merren & Company for the Defendants
32

33 Before:

34 Hon. Justice Henderson
35

36 Heard:

37 March 18, 2011
38

39 RULING
40



- 41 1. The issue presented on this application is whether a counterclaim may be
42 advanced in the absence of a statement of claim and therefore in the absence of a
43 defence.

1
2 The plaintiffs served a generally endorsed writ of summons without a statement of
3 claim on October 18, 2010. On the following day, the plaintiffs obtained a Mareva
4 injunction *ex parte* on the basis of affidavit evidence. In the same order as the
5 Mareva Injunction, the plaintiffs were granted an order requiring Isaac Rankine,
6 the first defendant, to provide certain information by affidavit. By a separate
7 action in Cause 377 of 2010, they also applied for but did not obtain a Norwich
8 Pharmacal order.

9
10 3. The time for delivery of a statement of claim expired on November 19, 2010,
11 without any pleading having been filed. The defendants offered an extension of
12 time until December 3rd, 2010. The plaintiffs rejected this offer and,
13 notwithstanding having been granted a Mareva injunction, have not filed a
14 statement of claim at all.

15
16 4. Pan Caribbean Consulting Limited, the second defendant, says it submitted an
17 invoice dated March 28, 2008 for US \$206,400 for services rendered in Jamaica
18 to Completewireless Jamaica Limited, the second plaintiff. This invoice has
19 remained unpaid. Completewireless is a telecommunication company incorporated
20 in and operating in Jamaica. Novacell St. Lucia Limited, the first plaintiff and a
21 company incorporated in St. Lucia, serves as a funding vehicle for investors in
22 Completewireless.

23

1 5. On or about 17th November 2008, Novacell appointed Kenneth Tomlinson, the
2 third plaintiff, to act as receiver for Completewireless pursuant to a debenture
3 dated August 10, 2007.

4

5 6. The defendants filed a counterclaim on December 1st, 2010 in respect of the debt
6 owed by the second plaintiff. The plaintiffs then, on December 3rd, 2010, filed a
7 notice of discontinuance.

8

9 7. The defendants filed an application for default judgment in respect of the
10 counterclaim on January 18, 2011. The Deputy Clerk of the Court referred the
11 application to Creswell J. On 19th January 2011, Justice Creswell declined to
12 enter default judgment and posed the following question:

13 "Can a counterclaim be made to a generally endorsed writ where
14 no statement of claim has been served and therefore no defence
15 has been served?"
16

17 He directed attention to O. 15, r. 2.

18

19 8. On this application, the plaintiffs have chosen not to attend but have presented a
20 brief argument in the form of a letter.

21

22 9. Grand Court Rule O. 15, r. 2 provides as follows:

23 "Subject to rule 5(2), a defendant in any action who alleges that he
24 has any claim or is entitled to any relief or remedy against a plaintiff in the
25 action in respect of any matter (whenever and however arising) may,
26 instead of bringing a separate action, make a counterclaim in respect of

1 that matter, and where he does so he must add the counterclaim to his
2 defence."
3

4 10. On its face, O. 15, r. 2 provides for a defendant in "any" action to bring a
5 counterclaim. It does not distinguish between actions begun by generally
6 endorsed writs and those endorsed with a statement of claim. The words "and
7 where he does so he must add the counterclaim to his defence" do not, on their
8 face and given their natural meaning, limit the right to make a counterclaim. The
9 words describe an unconditional right to advance a counterclaim when a
10 defendant happens to have a claim against a plaintiff. If there is a defence, the
11 counterclaim must be added to it. The quoted words do not require the existence
12 of a pleaded defence as a precondition. This much can be seen from the fact that a
13 counterclaim may also be made in an action begun by originating summons in
14 which no defence is required. In such a case, the plaintiff by counterclaim will
15 have, subject to O. 28, r. 7(2), the same rights under O. 15 as if the action had
16 begun by writ. This shows that a defence is not a precondition to a valid
17 counterclaim.
18

19 11. Any requirement that there must be a statement of claim before a counterclaim
20 may be pleaded would fail to recognise that a counterclaim is simply a cross-
21 action. A counterclaim is to be treated as an independent claim. For example, for
22 the purposes of the *Limitation Law* (1996 Revision), a counterclaim is a new
23 claim and deemed to be a different action commenced on the same date as the
24 original action. Order 15, r. 2(3) also illustrates the independent standing of a

1 counterclaim as it provides that a counterclaim may be proceeded with even
2 where the original claim is stayed, discontinued, dismissed or subsumed in a
3 judgment.
4

5 12. The purpose of the words "and where he does so he must add the counterclaim to
6 his defence" in O. 15, r. 2 are procedural and not substantive. These words do not
7 limit the right to counterclaim but serve only to emphasise that a counterclaim
8 must be made with the requisite degree of formality in a pleading and that it is
9 subject to the rules of pleading. In any case where there is a defence, the
10 counterclaim must be added to it.
11

12 13. The plaintiffs have relied heavily upon what was said by Brandon, J. in the
13 *Gniezno* [1967] 2 All E.R. 738 to this effect:

14 "It is, however, right to say that, under the rule, the mode by
15 which the counterclaim is to be made is by the service of a
16 counterclaim added to the defence. It follows from that that a
17 defendant cannot, under that rule, make a counterclaim until a
18 statement of claim has been served on him because it is not until
19 then that he can serve a defence."
20

21 14. The rule to which his lordship was referring was the English equivalent of Grand
22 Court Rule O. 15, r. 2.
23

24 15. The point actually decided in the *Gniezno* was that a notice of counterclaim of the
25 sort sometimes filed in the Admiralty Division was not of itself a counterclaim
26 because it was not a process sanctioned by the Rules of Court. The passage

1 quoted above was not necessary to His Lordship's decision. He did not have to
2 decide whether it was necessary for a defence to have preceded a counterclaim to
3 render the latter a valid pleading. The point turns solely upon the nature of a
4 conventional notice of counterclaim so the last sentence quoted above is *obiter*
5 *dicta*. It is unclear from the decision whether any argument at all was presented to
6 His Lordship on the point before me now.

7
8 16. The overriding objective of the Grand Court Rules is to enable this court to deal
9 with every cause or matter in a just, expeditious and economical way: see the
10 preamble to the Rules, section 1.1. Ordinarily the processing of an application for
11 default judgment is an administrative matter. In this instance, the court on its own
12 motion intervened to prevent entry of judgment and to raise a question relating to
13 the entitlement to bring a counterclaim, a question not raised by the plaintiffs. The
14 plaintiffs, having been successful in obtaining a Mareva injunction, failed in their
15 obligation to file a statement of claim and by so doing denied the defendants an
16 opportunity to file a defence. The plaintiffs are now seeking, on the basis of O. 15
17 r. 2, to rely on this unavoidable absence of a defence to deny the defendants the
18 opportunity of having their counterclaim determined in this jurisdiction. Since the
19 plaintiffs elected to invoke the jurisdiction of this court, there can be no unfairness
20 in requiring them now to litigate the counterclaim here. I am satisfied that our
21 Rules of Court do contemplate that a counterclaim may be advanced even where
22 no defence has been or can be filed.

23

1 17. For these reasons, default judgment may be entered on this counterclaim. The
2 defendants may have default judgment in the amount of US \$206,400 plus interest
3 in the amount of US \$28,601.94.
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5 18. The defendants, plaintiffs by counterclaim, may also have their costs against
6 Comletwireless. I am not persuaded that this is one of those exceptional cases
7 where they should have their costs also against Novacell, which is not a party to
8 this counterclaim.
9

10 Dated this 18th day of March, 2011
11

12 *Henderson, J.*

13 Henderson, J.
14 Judge of the Grand Court
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