

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF MONTSERRAT

IN THE HIGH COURT OF JUSTICE

CLAIM NO: MNIHCV2018/0024

BETWEEN:

MARY HOGAN

Claimant

and

WILTSON JOHNSON

Defendant

Appearances:

Mr. Jean Kelsick, Counsel for the Claimant

Dr. David Dorsett, Counsel for the Defendant

2021: September 23rd;
November 4th

DECISION

- [1] **GARDNER-HIPPOLYTE, M.:** This is an application filed by the Defendant to strike out the amended statement of claim, set aside a default judgment and leave to file a defence.

Background

- [2] On the 21st June, 2018 the Claimant filed a claim seeking declarations, an injunction, damages, and any other relief in relation to access of a right of way to her property. The crux of the claim is that the Claimant is landlocked and surrounded by the Defendant's two properties. To access her property, she requests from the Court a declaration of a right of way over one of the properties adjoining hers, and an injunction to prevent the Defendant from continuing to interfere with her as she uses the right of way. Both the Defendant and the Claimant received the property from a relative and he owns both properties surrounding her own parcel.
- [3] A brief chronology of the facts is instructive and are set out in a table format to put things into perspective;

Date filed	Type of document	Remarks
21 st June 2018	Statement of claim filed.	
11 th July 2018	Acknowledgement of service filed.	
28 th September 2018	1 st application to strike out by defendant filed.	

7 th December 2018	Amended statement of claim filed.	
30 th January 2019	Hearing of the application to strike out by the master.	Order main points – 1. Application to strike out dismissed, as defence counsel conceded it is otiose considering the amended statement of claim; 2. Parties referred to mediation;
17 th April 2019	Parties return from mediation for further directions as it was unsuccessful.	Order main points – 1. Defendant to file defence by 16 th May 2019
13 th May 2019	The 2 nd application to strike out filed by the defendant.	
24 th June 2019	1 st Application filed by the claimant for default Judgment.	Application is made pursuant to part 12.10 (4)
24 th October 2019	Hearing of the 2 nd application to strike out.	Order main points – 1. Application to strike out refused
29 th November 2019	Amended application for default judgment, and now includes application for wasted costs.	
2 nd December 2019	Defence filed.	No application accompanying the defence.
6 th February 2020	Hearing of the applications for default judgment and wasted costs.	Order main points 1. Judgement in default of defence entered 2. Terms of judgment to be determined during week of 30 th March 2020 3. Wasted costs order refused.
11 th June 2020	Hearing to determine terms of judgment.	However, an oral application was made on the day by wife of defendant – master asked for it to be made in writing.
29 th June 2020	Application filed by Verna Johnson – wife of the defendant.	The application is asking for all judgments/orders in relation to this case be served on her as she has a beneficial interest.
16 th July 2020	Hearing to determine the terms of the judgment.	Order main points – 1. Statement of case, 2 strike out orders and default judgment order to

		be served on Verna Johnson; 2. Directions given for assessment of damages; 3. Assessment of damages fixed for hearing week of 21 st September 2020;
14 th August 2020	Claimant files witness statement and submissions for the hearing of the assessment of damages.	
20 th August 2020	Application filed by Verna Johnson under CPR 42.12 for judgment to be discharged.	Order main points – 1. Application to discharge the default judgement refused; 2. The assessment of damages adjourned to the week of 19 th October 2020.
23 rd October 2020	Assessment of damages hearing.	Court informed of leave to appeal application by Verna Johnson
11 th December 2020	Court of Appeal hearing of the application for leave.	Order main points – 1. Application for leave granted 2. Applicant to file notice of appeal within 21 days 3. Proceedings in the court below are stayed pending the hearing and determination of the appeal.
6 th July 2021	Application by the defendant to set aside the default Judgement, striking out of amended statement of claim and leave to file defence.	

[4] On the 6th July, 2021 the Defendant filed the application currently before the Court for determination. The application is asking the Court for an order in the following terms:

- (a) The Claimant's amended statement of claim filed on the 7th December, 2018 is struck out;
- (b) The default judgment entered in this matter is set aside;
- (c) The Defendant do file his defence to the Claimant's statement of claim filed on the 21st June, 2018 within 14 days;
- (d) Costs to be paid by the Respondent/Claimant.

[5] I will now go on to substance of the application.

The Claimant's Amended Statement of Claim – To be Struck Out

[6] Counsel for the Claimant has indicated that when the first application to strike out was filed the effect was such that it stayed the proceedings, and the Defendant was not required to file a defence. Further the Defendant argues that the Claimant filed the amended claim form without the leave of the Court to cure the pleadings and proposes that the amended claim was a nullity. The Defendant relies primarily on the case of the **Attorney General of Saint Lucia v Darrell Montrope**¹ and the learning from this case is a well-established principle that the filing of an application to strike out essentially prohibits a party whose pleadings are under attack from amending its pleadings without the court's leave. It is agreed that to amend the pleadings to circumvent the striking out application would be effectively "shooting a moving target".²

[7] The Claimant has submitted that the strike out application against the amended statement of claim ought to be dismissed and while he has listed several reasons, I note that at the hearing of the first strike out application on the 30th January, 2019 the Court's order reflects the following:

"UPON THIS MATTER coming up for hearing of an application to strike out the statement of claim;
AND UPON READING the submissions filed by the parties
AND CONSIDERING the concession of the applicant/defendant that in light of the amended statement of claim that the application to strike out is rendered otiose;
AND the parties consenting to undergo a process of mediation;"

[8] Thereafter the Court's order indicates the application to strike out is dismissed. Therefore, whilst I agree with the submissions of Counsel for the Applicant I reference the dicta from **Montrope**, the fact that there was a concession by the Defendant on this point in January of 2019, makes this in my mind a non-issue. Further, if Counsel disagreed with the decision stemming from the concession, then the appropriate recourse would have been to appeal the said decision.³ Therefore, it is inappropriate to raise it at this stage of the proceedings some two and half years later. Accordingly, the application to strike out the amended statement of claim is dismissed.

Application to set aside the Default Judgment under CPR 13.2

[9] CPR 13.2 requires the Court to set aside a default judgment "in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied."⁴

¹ SLUHCVP 2019/0021

² Ibid at paragraph 36 and 37

³ Strachan v Gleaner Company Limited and another [2005] UKPC 33 at paragraph 32 where the PC indicated that a judge who makes a decision that exceeds his jurisdiction - whether in law or in fact it can be corrected by a Court of Appeal, further a judge who made an error, the error cannot be corrected by a judge of coordinate jurisdiction.

⁴ Civil Procedure Rules 13.2(1)(b)

- [10] Counsel for the Applicant/Defendant has argued that the criteria in rule 12.5 was not met at the time judgment was entered, since the time for filing a defence stops running when an application to strike out is filed. While I agree with the arguments it is important to refer to the chronology in the table at paragraph 3 above. The Defendant filed the 2nd application to strike out on the 13th May, 2019 three days prior to when the Master had ordered him to file his defence. Therefore, it is agreed that the time to file his defence stops running.⁵ On the 24th June, 2019 an application to enter default judgment was filed. On the 24th October, 2019 the strike out application filed on the 13th May, 2019 was heard and adjudicated by the Master. The strike out application was refused, and costs were awarded to the Claimant.
- [11] Subsequently an amended application for default judgment was filed on the 29th November, 2019 when there was no existing striking out application before the Court. Therefore, when the Court considered this amended application filed 29th November, 2019 on the 6th February, 2020 it was not barred from deliberating on it by any striking out application.
- [12] However, the recent decision of **Lux Locations Ltd v Yida Zhang**⁶ indicates that there are several steps to grant a default judgment. Firstly; under CPR 12.7 where the procedure is outlined; "A claimant applies for default judgment by filing a request in Form 7." The Claimant in this instant case filed an application for judgment to be entered when this would have been the next step under CPR 12.10(4) and (5) for the terms to be determined once judgment was entered. The failure to file the request in Form 7 as required by the Rules means that the conditions in 12.5 were not satisfied and therefore, I am required to set aside the decision of the Master who made an administrative order and not a judicial one.⁷
- [13] The application to set aside the default judgment is granted; and the Defendant is granted 14 days from today's date to file and serve his defence. Thereafter the Claimant is at liberty to file and serve a reply within 14 days of the date of service of the defence. The Court office will then relist the matter for case management conference.

Conclusion

- [14] For the above mentioned reasons the Order of the Court is as follows:

1. The Defendant's application:
 - (a) To strike out the amended statement of claim is dismissed;
 - (b) To set aside the judgment in default is granted;
 - (c) Leave to file and serve a defence, 14 days from the date of this order is granted;

⁵ St Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd SKN HCVAP 2002/0002 as per Barrow JA at para 37 and M Group Resorts SA v Lascaris SLUHCVAP 2015/0014 as per Webster JA at para 8

⁶ ANUHCVAP 2020/0025

⁷ Lux Locations Ltd v Yida Zhang ANUHCVAP 2020/0025 at paragraphs 32-35

- (d) The Claimant is at liberty to file and serve a reply within 14 days of the service of the defence;
- (e) There shall be no order as to costs;
- (f) The Defendant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

By the Court

Registrar