

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 480 OF 2023

BETWEEN:

R & A CONSTRUCTION COMPANY LTD

Claimant/Respondent

and

GEORGE PASTOR

Defendant/Applicant

Appearances:

Mr. Ian Gray for the Claimant/Respondent

Ms. Kristy P. Lopez for the Defendant/Applicant

2024: May 21;

August 9;

Catchwords:

APPLICATION TO STRIKE OUT CLAIM

JUDGMENT

[1] **Nabie J.:** This is an application to strike out the claimant's claim and for judgment on the Defendant/Applicant's counterclaim.

Background

- [2] By claim form and statement of claim filed on 25th July 2023, the claimant is seeking damages in the sum of **Twenty-Two Thousand Three Hundred and Fifty-One Dollars and Ten Cents (\$22,351.10)** for breach of contract. The claimant alleges that the defendant refused to pay the balance owed to the claimant for labour works done to the defendant's three (3) story apartment building situated at Lemon Street, Dangriga Town, Stann Creek District, Belize (hereinafter referred to as "the property").
- [3] The claimant's case is that on 15th November 2022, after pre-contractual dealings between the defendant and the claimant (who was represented by the director and shareholder of the company) Mr. Rodrigo Rodriguez, parties entered into a written labour contract to fully remodel and upgrade the property for an agreed sum.
- [4] The claimant began work on the property. The defendant made a down payment to the claimant on 23rd September 2022 and the claimant started renovations on the property. The claimant states that it was agreed that the defendant would make periodic payments to the claimant based on the invoices sent to the defendant. When the claimant gave the last known invoice to the defendant, the defendant refused to pay the claimant for works done to the property.
- [5] The defendant's case is that both parties entered into a verbal construction contract for labour on the renovation works on the defendant's property in or about September 2022. This verbal agreement provided in part that the claimant would supervise and direct renovations of the property that should be free of defects. The defendant disputed that the document exhibited to the claimant's statement of claim was a contract but rather it was a progress report.
- [6] The defendant states that both parties agreed the total cost of the renovation should not exceed **One Hundred Fifty-Six Thousand Dollars (\$156,000.00)** and the defendant made a down payment of **Twenty Thousand Dollars (\$20,000.00)**.

- [7] The defendant states in his defence that he made periodic payments to the claimant based on the invoices given to him by the claimant which totalled **Forty-Six Thousand Dollars (\$46,000.00)**. The defendant averred he paid the claimant **Five Thousand Dollars (\$5,000.00)** for the building plans and the payment for the building plans would be subtracted from the contract sum. Thus, the total sum paid by the defendant to the claimant was **Seventy-One Thousand Dollars (\$71,000.00)**.
- [8] The defendant stated in his defence that he requested a progress report and accounting of money paid to the claimant. On the 15th of November 2022, the claimant sent an invoice for labour cost estimated at **Two Hundred and Twelve Thousand Nine Hundred and Twenty-Five Dollars and Eleven Cents (\$212,925.11)** which exceeded the agreed budget of **One Hundred Fifty-Six Thousand Dollars (\$156,000.00)**. The defendant was willing to agree to the increased budget but asked to have it in writing, there would be no further increase and the budget would not exceed the new budget of **Two Hundred and Twelve Thousand Nine Hundred and Twenty-Five Dollars and Eleven Cents (\$212,925.11)**. The defendant claims the claimant refused this request.
- [9] The defendant stated that he disputed several of the claimant's charges and his application of monies paid for works not completed on the property. The defendant refused to pay the additional sum without justification from the claimant and the claimant ceased work on the property and left the renovation unfinished. The defendant counterclaimed for **Twenty Six Thousand Five Hundred and Sixty One dollars and Ninety-Six Cents (\$26,561.96)** in special damages, general damages and damages for the tort of deceit.
- [10] The claim form and statement of claim were served on the defendant on the 28th of August 2023 by Police Constable Deone Garcia and his affidavit of service was filed on the 31st of August 2023.

[11] The defendant filed his acknowledgement of service on the 18th of September 2023 and the defence and counterclaim were filed on the 26th of September 2023. The defence and counterclaim were served on the claimant by Wilburt Staine on the 28th of September 2023 and his affidavit of service was filed on the 6th of November 2023.

[12] On the 6th of November 2023, the defendant filed the notice of application along with the first affidavit of the defendant, George Pastor. The notice of application seeks the judgment on the defendant's counterclaim and for a summary judgment to the defendant on the claimant's claim or alternatively, to strike out the claimant's claim.

[13] On the 6th of November 2023, the claimant filed a reply to defence and counterclaim. An affidavit of service for the process server, Carlos Valencia was filed on the 7th of November 2023 which states the reply to defence and counterclaim was served on the defendant on the 7th of November 2023. The claimant states in his written submissions that they "... experienced a slight delay of 7 days in instructing its legal representative which caused the Reply to Defence and Counterclaim to be filed late".¹ He stated in paragraph 30 of his submissions to oppose the strikeout that the delay was caused by:

- a) "... the accountant and the director (Rodrigo Rodriguez) were working on a short-term construction contract in Guatemala City;
- b) They (the accountant and Mr. Rodriguez) had to consult with the contractor and engineers in order quantify the figures needed to reply to the Defence and Counterclaim;
- c) That the calculation and quantification took longer than expected;
.....
- f) that the files were sent electronically by the claimant to his lawyer and there were difficulties opening the files;
- g) The claimant has several virtual meetings with his lawyer in an effort to try and gain clarity on the facts and figures contained in the reply to defence and counterclaim."

¹ Claimant's written submissions filed 21st May 2024, paragraph 4

[14] On the 21st of May 2024, the claimant filed a reply to the notice of application to strike out the claimant's claim in which they opposed the said notice of application.

Issues

[15] The court will look at the following issues:

1. Whether the defence to the counterclaim was filed in time?
2. What are the consequences of not filing a defence to counterclaim?
3. Whether the counter claimant is entitled to judgment?
4. Is the application to strike out the claimant's claim premature?
5. Is there a connection between the claim and counterclaim
6. Should the claim be struck out?

Law and discussion

Time to file Defence to Counterclaim

[16] The claimant filed a reply to the defence and counterclaim, which I will treat as a reply and defence to counterclaim and refer to it as 'reply and defence to counterclaim'. While the 'reply and defence to the counterclaim' was filed, it was on 6th November 2023, ironically on the same date that the defendant filed the notice of application herein. The defence to the counterclaim was due on or before the 27th October 2023, the defence and counterclaim having been filed and served on 28th September 2023.

[17] CPR 18.1 of the CPR defines the meaning of an ancillary claim as follows:

- "(1) An "**Ancillary Claim**" is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes –
- a) a counterclaim by a defendant against the claimant or against the claimant and some other person;
-

[18] CPR 18.9(2) states “the period for filing a defence is the period of 28 days after the date of the ancillary claim.” The defendant stated in their notice of application that the claimant failed to file a defence to the counterclaim within the 28 days after the date of the ancillary claim was served on them; “namely on or before the 27th of October 2023.”² However, the claimant did file their ‘reply and defence to the counterclaim’ on the 6th of November 2023, ten (10) days after the period stated in CPR 18.9(2).

[19] The claimant submitted in his written submissions opposing the strike out application of the claim that the defendant’s “counterclaim is a sham³” and “is of [the] opinion that there is or was no counterclaim to reply to⁴.” This is not good excuse by the claimant for not filing their reply to the defence and counterclaim of the defendant.

[20] There is no application by the claimant for an extension of time to file the ‘defence to the counterclaim’ or an application for relief from sanctions. In fact in the claimant’s submissions they explain the reasons for the delay in filing. I am not satisfied with that approach. The claimant having instituted the claim ought to have been more vigilant and make a proper application for an extension of time to file its ‘reply and defence to counterclaim’. There is no evidence before me to consider. I must consider the overriding objective and treat with parties justly and ensure parties are on equal footing, this must apply to both parties.

[21] I find that the ‘reply and defence to the counterclaim’ is not properly before me and is struck out.

² Skeleton Arguments on behalf of the Defendant/Applicant filed 30th April 2024 paragraph 10 page 4

³ Submissions of the claimant paragraph 30(d)

⁴ Submissions of the claimant paragraph 30(j)

No Defence to Counterclaim

[22] CPR 18.12 (1) and (2) provide:

18.12(1) This Rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.

18.12 (2) The party against whom the ancillary claim is made-

- (a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter in the arising in the ancillary claim;
- (b) subject to paragraph 5, if judgment under Part 12 is given against the ancillary claimant, he or she may apply to enter judgment in respect of the ancillary claim”.

[23] Therefore, when there is no defence to the counterclaim the claimant / counter defendant is deemed to have admitted the claim (the counterclaim). There is no default judgment available on a counterclaim (see CPR 18.9⁵). The authorities suggest that there is a lacuna in the rules. By virtue of the CPR, a claimant and a counterclaimant do not have the same options when there is a failure to file a defence. In the present case in accordance with CPR 18.12(2) the claimant is deemed to admit the counter claim. The defendant has the right to judgment in a valid claim in the event the claimant did not file their defence to the counterclaim. It is therefore the conclusion of the court that the application to strike out the claimant’s claim is not premature or an abuse of process.

[24] The defendant/applicant has argued that “there is no express procedure for a counterclaimant to realise an undefended counterclaim”. He has relied on a matter from the Eastern Caribbean Court of Appeal. The following extract was relied on by the applicant in **Haynes Browne v Neil Sargeant et al** ⁶. The C.A. in **Browne** stated that the court must start with the overriding objective and the court’s role in giving effect to it. The Court of Appeal held in **Browne** that:

⁵ CPR 18.9(3) The Rules relating to a defence to a claim apply to a defence to an ancillary claim except Part 12 (Default Judgment)

⁶ [2020] ANUHCVAP2019/0038

“1. Where the language of a rule admits of only one interpretation, the court must give effect to that interpretation. However, in cases where the rules are not clear, the overriding objective, is a useful tool, in addition to the general context and purpose of the rules, when the court deals with questions of procedure and interpretation of the rules in cases that are not clear. Though rules 18.2(4) (b) and 18.9(3), on a literal interpretation, prohibit a counterclaimant from obtaining a default judgment under Part 12, these rules do not ‘admit of only one interpretation’. Instead on a proper interpretation of rules 18.2(4)(b) and 18.9(3), in light of the broader context of Part 18 and the overriding objective, a counterclaimant is permitted to obtain judgement in default of a defence under Part 12...

2. Rule 18.1 broadly defines ancillary claims as any other than a claim by a claimant against a defendant or a claim for a set off contained in a defence including a counterclaim by a defendant against a claimant. In light of this broad definition, the court must be careful to ensure that each of the provision in Part 18 is intended to apply to the particular type of ancillary claim in play in the proceedings. While there is clear and good reason for the strict and literal application of rules 18.2(4) (b) and 18.9(3) to ancillary claims by a defendant against a third party for contribution or indemnity, there is no rational reason for interpreting the rules in a manner that would create an entitlement in one claimant (the primary claimant) to default judgement under Part 12, and disentitle another claimant (the counterclaimant) from pursuing the same course. Such unequal treatment has no justifiable basis and does not accord with the overriding objective in a case such as this where the status of the claimant and counterclaimant and the remedies sought by the primary claim and the counterclaimant are similar. In these premises, the learned master erred in concluding that a counterclaimant is precluded from obtaining judgment in default of defence under Part 18”.

[25] To award judgment at this juncture would be in effect a summary judgment. CPR 15.2 provides:

“The Court may give summary judgment on the claim or on a particular issue if it considers that –

- a) The claimant has no real prospect of succeeding on the claim or the issue; or
- b) The defendant has no real prospect of successfully defending the claim or the issue.”

[26] In the circumstances I grant judgment to the defendant/counterclaimant/ applicant on the counterclaim, there being no defence filed.

Is there a connection between the main claim and the counterclaim?

[27] The applicants relied on **Satnarine Maharaj v. The Great Northern Insurance Company Ltd.**⁷ and **John Palacio v Football Federation of Belize**⁸. I have found these authorities provide guidance in treating with a claim when there is an admission on the counterclaim.

[28] In **John Palacio v Football Federation of Belize**, Griffith J. determined whether a judgment on the counterclaim due to the deemed admission under Rule 18.12(2) (a) would effectively dispose of the main claim. She stated as follows:

“11. Where an ancillary defendant fails to file a defence, the right afforded an ancillary claimant is by no means considered to be automatic. The Court has to determine effect of the deemed admissions on the counterclaim *Vis-à-vis* the main claim. The approach in **Satnarine Maharaj** which Counsel for the Defendant herself relied on is found to be most instructive. At paragraph 21 of the judgement, the Court of Appeal firstly acknowledge the plain wording of the rule in Trinidad to mean that the deemed admissions applied to the averments contained in the counterclaim in addition to the relief claimed. The Court therein described the question of the effect of the admissions, as the crux of the dispute and lying at heart of determining the appeal.

12. As accurately identified by Counsel for the Defendant, the Court of Appeal approached its determination of the effect of the deemed admissions of the counterclaim on the claim in the following terms (emphasis mine):-

‘It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim.’

Additionally at paras 23-24 of the judgment

“There of course need be no connection between the claim and the counterclaim ... in such case it is unlikely that the failure to defend the counterclaim will have any significant impact on the claim. Where however the counterclaim is wrapped up on the claim and intimately connected to it the position can be expected to be different...

⁷ Civ. App. No.P198 of 2015

⁸ Claim no. 546 of 2017

We think it must be right that there would be cases where the deemed admission arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim, if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process...”

[29] The statement of claim provides at paragraphs 3 to 6:

“3. That after pre-contractual dealings the Claimant entered into a labour contract with the Defendant to re-model and refurbish a three-story dwelling house located at Lemon Street, Dangriga Town, Stann reek District for an agreed sum. A copy of the labour contract is attached and exhibited as RR-2.

4. The Defendant only made part payment and has refused to pay the outstanding balance of \$22,351.10 to the Claimant.

5. The Claimant claims interest at the Statutory Rate on the sums found owing to the Claimant from the date of breach of contract until judgment or sooner settlement.

6. The Claimant has made many efforts to collect from the Defendant but the defendant has refused to pay any or pay of the outstanding sums. The Defendant spends considerable time living and working in Los Angeles, California, USA. The defendant is liable for the breach of contract.”

[30] The counterclaim provides at paragraphs 8 and 9:

“8. The Defendant says that the Claimant breached the agreement and was negligent in carrying out the renovations and engaged in tortious deceit.

Particulars of breach of contract

- (1) The Claimant abandoned the renovations and had no intention of making good the shortfall in the value of works and carrying out the remedial works and the renovations remained substantially incomplete.

Particulars of negligence

- (2) The Claimant failed to complete the renovations at all and to the proper standard required of the Claimant in accordance with the terms of the agreement.
- (3) The Claimant performed electrical work on the 2nd floor of the Defendant’s building in a defective manner and to a poor standard of quality. As a result the Defendant

had to engage a contractor to re-do the electrical on the 2nd floor of the apartment building.

- (4) The Claimant constructed the floor to an unsuitable standard and raised to a height that did not allow for the proper installation of the doors. The Defendant had to engage other contractors to elevate the doors so that they could close to protect the Defendant's Property.
- (5) The Claimant presented a series of quotations and requests to the Defendant for work purportedly completed by the Claimant, related to the renovations of the Defendant's apartment building. These invoices contained detailed descriptions of the work allegedly performed, along with corresponding amounts due.
- (6) Replying on the accuracy and completeness of these invoices, the Defendant made payments totalling BZ\$66,059.12 to the Claimant. These payments were made in good faith and were based on the belief that the works described in the invoices had indeed been completed.
- (7) At the time the Claimant presented these invoices and received payment, the Claimant was fully aware that the work described therein had not been performed or had not been performed at the percentage stated.
- (8) The Claimant's action in presenting these invoices and accepting payment while knowing the work was incomplete demonstrate a clear intent to deceive the Defendant and induce the Defendant into making that the Defendant otherwise would not have made.
- (9) As a result of the Claimant's deceitful actions, the Defendant has suffered financial harm amounting to BZ\$23,061.96, which includes the amounts paid for incomplete work.

9. As a result of the Claimant's breaches, negligence and deceit the Defendant suffered loss.

Particulars of special damage

(1) The Defendant engaged Lisa Rawlins to redo the electrical wiring.	BZ\$2,000.00
(2) The Defendant paid to elevate the doors so that they close.	BZ\$1,500.00
(3) The Defendant paid the Claimant for works not completed.	BZ\$23,061.96
TOTAL	BZ\$26,561.96"

[31] From the facts pleaded, I find that the claim and counterclaim are inextricably bound and the admissions (on the counterclaim) have a detrimental effect on the claim. The claim and the counterclaim are both concerned with the contract between the parties to renovate the property.

Should the Claim be Struck Out

[32] Under **Part 26** of the CPR the courts have case management powers which include striking out a statement of case.

[33] **CPR 26.3 (1)(a) – (c)** states:

“26.3 In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

- a) 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;
- b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
- c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or ...”

[34] In **Belina Francisco Young v Dinesh Advani et al**⁹ and **Micheal Bogaert v The Commissioner of Lands and Surveys et al**¹⁰, the general principle is “judges are frequently cautioned to sparingly exercise this “nuclear” option and only in the clearest of cases.”¹¹ Therefore, the court must proceed with caution when considering whether or not to strike out a claim.

⁹ Belinda Francisco Young v Dinesh Advani, Registrar of Lands, Commissioner of Lands and Attorney General of Belize Claim No. 28 of 2022 paragraph 7

¹⁰ Micheal Bogaert v The Commissioner of Lands and Surveys, the Attorney General of Belize, Victor Balan Jr. and Carlos Itza Claim No. 317 of 2019 paragraph 4 page 2

¹¹ Belinda Francisco Young v Dinesh Advani et al Claim No. 28 of 2022 paragraph 7 page 3

[35] In **Belinda Francisco Young v Dinesh Advani et al**¹², Justice Farnese stated that:

“striking out is not appropriate where an arguable case is presented or where complex facts or legal issues are raised by the case. The burden of proof is on the Applicants to establish on a balance of probabilities that the claim ought to be struck.”

[36] This principle was also stated by James J. (ag) in **Micheal Bogaert v The Commissioner of Lands and Surveys**¹³ et al stated:

“Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate and the burden of proof in this regards is on the applicant. The Defendants, as applicants, must satisfy the Court that no further investigation will assist it in its tasks of arriving at the correct outcome”.

[37] Based on the authorities, I need to now consider whether the facts presented by the claimant and the defendant are indeed complex or whether the claimant has no reasonable prospect of succeeding at a trial.

[38] In **Three Rivers District Council v Governor and Company of the Bank of England (No. 3)**¹⁴, Lord Hutton stated as follows:

“The important words are “no real prospect of succeeding.” It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give summary judgment. It is a ‘discretionary’ power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is “no real prospect,” he may decide the case accordingly.”

[39] Based on my reasoning and the authorities above, the claim is hereby struck out as there is no basis for maintaining the claim against the defendant/applicant. The claim

¹² Ibid paragraph 7 page 3

¹³ Micheal Bogaert v The Commissioner of Lands and Survey, The Attorney General of Belize, Victor Balan Jr and Carlos Itza Claim No 317 of 2019 paragraph 4 page 3

¹⁴ Three Rivers District Council v Governor and Company of the Bank of England (No.3) [2001] 2 All ER 513

in my view has no reasonable prospect of success due to the judgment granted to the defendant/applicant.

Disposition:

[40] I hereby order as follows:

1. The reply to the defence and counterclaim is struck out.
2. Judgment is awarded to the defendant on the counterclaim.
3. The claim is struck out.
4. No order as to costs.

**Nadine Nabie
High Court Judge**