

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2023/CLE/gen/00223

IN THE MATTER OF Lot Number 33, Block Number One in the Nassau East North Subdivision situate in the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas

B E T W E E N:

HAZEL LADY BUTLER

Claimant

AND

RUTH LAVAUGHAN BLAND

Defendant

Before: The Honorable Madam Justice Carla D. Card-Stubbs

Appearances: Geoffrey W. Farquharson for the Claimant

Quinton Percentie for the Defendant

Civil Practice and Procedure- Part 8 Supreme Court Civil Procedure Rules, 2022, as amended ('CPR 2022') – Commencement of Proceedings – Requirement to file and serve statement of claim or affidavit with claim form - Practice Direction No. 3 of 2023 re Fixed Date Claim Forms - Civil Practice and Procedure- Rule 26.9 CPR – Court's power to rectify mistakes -Civil Practice and Procedure- Rule 10.2 CPR 2022 – Defence by way of affidavit -Civil Practice and Procedure- CPR Overriding Objective – Part 1. 1 – Duty of parties to help the Court to further the overriding objective.

If a filed claim form is not accompanied by a statement of claim or an affidavit (as required or ordered) and if the claim form does not fall under the exceptions provided for in Rule 8.2 CPR 2022, then proceedings have not properly commenced.

The rules of Part 8 mandate how proceedings must be commenced. Those sections set out the general provisions and the exceptions to those provisions. Unless Part 8 is complied with, and in the absence of the exercise of a power in the court to rectify the default, proceedings have not been properly instituted.

RULING

CARD-STUBBS J.

Introduction

[1.] This is the Claimant's application for a first hearing of the filed Fixed Date Claim form and for a judgment against the Defendant. In response, the Defendant made an application for extension of time within which to file a Defence and Counterclaim.

[2.] For the reasons set out below, the Claimant's application is dismissed and it is not necessary to treat with the merits of the Defendant's application, which application is also dismissed.

Background

[3.] The current action was brought by way of a Fixed Date Claim form for, inter alia, an eviction order, vacant possession, arrears of rent and damages. The Fixed Date Claim was filed on March 22, 2023. The Fixed Date Claim form was supported by affidavit of the Claimant filed on the same day.

[4.] On April 25, 2023, the Defendant filed an acknowledgement of service.

[5.] On May 17, 2023, the Claimant filed the current application, supported by affidavit filed May 18, 2023. The application read in part:

1. The Claimant makes application for:
 - (i) A first Hearing of her Fixed Date Claim herein,

- (ii) Judgement against the Defendant in the terms set out in her said Claim,
- (iii) Alternatively, such directions as the Court may see fit including directions, that the matter be treated as an urgent application.

2. The grounds of the application are:

- (i) The Defendant has no defence to the Claim.
- (ii) The Defendant has filed no defence to the Claim within the period prescribed by Rule 10 (3) of the Supreme Court Civil Procedure Rules 2022.

[6.] On May 17, 2023, the Defendant filed an affidavit (“Affidavit in Reply”) in answer to the Claimant’s suit.

[7.] When the Fixed Date Claim form first came on for hearing, the Defendant sought to rely on its filed affidavit as its Defence and in answer to the Claimant’s application for judgment sought on the ground that no defence had been filed.

[8.] The matter was adjourned for the Defendant to make an application for leave to file a Defence and Counterclaim out of time. The Defendant filed an application for leave for extension of time to file a Defence and Counterclaim on November 24, 2023.

[9.] It is on the adjourned occasion, on the Defendant’s application for leave to file a Defence and Counterclaim out of time, that the following issues were crystallized. In explaining the delayed nature of the application and the steps that the Defendant had already taken, the Defendant raised the issue of the nature of the Claimant’s pleadings and the Defendant’s right to reply by affidavit.

Issues

[10.] The issues before court are:

- 1. Whether the filed Fixed Date Claim is compliant with the CPR and, if not, whether the defect may be cured.
- 2. Whether the Defendant is entitled to answer the Claimant’s suit by way of affidavit.
- 3. Whether the court should exercise its discretion in favour of the Defendant and grant an extension of time within which to file its Defence and Counter Claim.

Issue 1(a)

Whether the filed Fixed Date Claim is compliant with the CPR

[11.] The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR 2022') took effect on March 1, 2023. Those rules served to repeal and replace the Rules of the Supreme Court, 1978 ('RSC').

[12.] Part 8, CPR 2022 sets out the various ways that a matter may be commenced, as well as the requirements of such pleadings, now called 'statements of case'. Rule 8.1 makes provisions for how to start proceedings and for when a fixed date claim form is to be used.

[13.] Rule 8.1 provides:

8.1 How to start proceedings.

- (1) Depending upon the nature of the proceedings and the provisions of any statutory provision or rule or practice direction, there are three methods by which a claimant may start proceedings namely, by --
 - (a) Standard claim form in Form G3;
 - (b) Fixed date claim form in Form G4; or
 - (c) Originating application form using Form G5 or Form G6.
- (2) A claimant starts proceedings by filing in the court office the original and not less than two copies of --
 - (a) The claim form; and
 - (b) Subject to rule 8.2, the statement of claim, or
 - (c) An affidavit or other document, where any rule or practice direction so required.
- (3) A claim form is issued on the date when it is stamped by or on behalf of the court office.
- (4) For the purpose of any enactment relating to limitation periods, an action is brought on the day on which the claim form is stamped as received in by or on behalf of the court office.
- (5) A standard claim form is to be used except where --
 - (a) Rule 8.1(6) requires that the claim must be started using a fixed date claim form; or
 - (b) Where an originating application form under this Part is the more appropriate method of starting and thereafter conducting the claim.
- (6) A fixed date claim form must be used --
 - (a) In claims arising out of hire-purchase or credit sale agreements;
 - (b) In money lending actions under Part 62;
 - (c) In proceedings for possession of land; and
 - (d) Whenever its use is required by a rule or practice direction.

- (7) A person who seeks a remedy --
- (a) Before proceedings have been started; or
 - (b) In relation to proceedings which are taking place, or will take place, in another jurisdiction must seek that remedy by an application under Part 11.

[14.] Therefore, there are 3 methods of commencing proceedings under Part 8 and all are captured in the forms to the rules. A claim form, unless the court otherwise orders, must be accompanied by a statement of claim [unless exempted under rule 8(2)] *or* an affidavit or other document where any rule or practice direction requires that: rule 8.1(2).

[15.] Rule 8. 2 sets out the requirement to issue and serve a statement of claim with a claim form. It also sets out the circumstances in which that requirement may be dispensed with. Rule 8.2 provides as follows:

8.2 Statement of claim, etc. to be issued and served with claim form

(1) A claim form may be issued and served without the statement of claim, affidavit or other document required by rule 8.1 (2) (b) or (c) only if the –

- (a) claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8 and 8.9; or
- (b) the Court gives permission.

(2) In a case of emergency when it is not practicable to include in the claim form all the information required by rules 8.6, 8.7, 8.8 and 8.9 or first to obtain the permission of the court a claimant may issue and serve the claim form without a statement of claim or affidavit or other document required by rule 8.1(1) (b) or (c) provided that the claimant –

- (a) certifies in writing that the issue and service of the claim form is a matter of emergency, stating why; and
- (b) serves a copy of the –
 - i. certificate; and
 - ii. application for permission; with the claim form.

(3) If a claim form is issued under paragraph (2), unless the Court otherwise orders, pending the granting of permission by the Court, the claimant may take no further steps except to serve the claim form, together with the certificate and application for permission, and to take such steps as are necessary to pursue the application for permission.

(4) The court may give permission under paragraph (1) (b) only if it is satisfied that –

(a) a relevant limitation period is about to expire, and the claimant has obtained legal advice relating to the claim for the first time within the twenty-eight days prior to the date that the claimant wishes to file the claim; or

(b) the claim form must be issued as a matter of urgency and it is not practicable for the claimant to prepare a statement of claim or affidavit.

(5) An application for permission may be made without notice but must be supported by evidence on affidavit.

(6) Any order giving permission for the claim form to be served without a statement of claim or affidavit or other document required by rule 8.2 (1) (b) or (c) must state a date by which the statement of claim or other document must be filed and served.

(7) Such date must in no case be more than twenty-eight days from the date of the order giving permission.

(8) A copy of the order or the certificate and application under paragraph (2), must be served with the claim form.

(9) The claimant must file a copy of the statement of claim, or affidavit or other document required by rule 8.1(1) (b) or (c), served in accordance with paragraph (6), endorsed with a certificate stating the date of service and the address at which and the manner in which it was served.

[16.] The new rules aim for clarity in the commencement of proceedings. They provide with specificity what must be set out in the claim form and in the statement of claim. Between the two documents, there must be set out the nature of the claim, the remedies sought, the address for service of the claimant and the documents to be relied, *inter alia*.

[17.] Rules 8.6 and 8.7 provide as follows.

8.6 What must be included in claim form

(1) The claimant must in the claim form –

(a) include a short description of the nature of the claim;

(b) specify any remedy that the claimant seeks; and

(c) give an address for service in accordance with rule 3.7.

(2) Notwithstanding paragraph (1) (b) the court may grant any other remedy to which the claimant may be entitled.

(3) A claimant who seeks aggravated damages or exemplary damages must say so in the claim form.

(4) A claimant who is seeking interest must –

(a) say so expressly in the claim form; and

(b) include, in the claim form or statement of claim, details of the –

i.basis of entitlement;

ii.rate; and

iii.period for which it is claimed.

(5) If the claim is for a specified sum of money, the total amount of interest claimed to the date of the claim and the daily rate at which interest will accrue after the date of the claim must be expressly stated in the claim form.

(6) A claimant who claims in a representative capacity under Part 21 must state what that capacity is.

(7) A claimant suing a defendant in a representative capacity under Part 21 must state what that capacity is.

8.7 Claimant's duty to set out case

(1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.

(2) The statement must be as short as practicable.

(3) The claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case.

(4) If the claimant seeks recovery of any property, the claimant's estimate of the value of that property must be stated.

(5) The statement of claim must include a statement of truth in accordance with rule 3.8.

[18.] If a claimant fails to plead an allegation or fact, they may not rely on it unless the other party consents or the court grants leave: rule 8.8, CPR 2022.

[19.] Each document must bear a statement of truth: rule 3.8 CPR 2022. A court may strike out a document for not bearing a statement of truth: rule 3.9, CPR 2022.

[20.] Practice Direction No. 3 of 2023 provides that in proceedings begun by a fixed date claim form, a judge may direct that an affidavit or a statement of claim be filed and served in addition to the claim form. The Practice Direction provides in substance:

This Practice Direction is made pursuant to rule 4.2(1) of the Supreme Court Civil Rules, 2022 and supplements Part 8 of the Rules.

1. Introduction

1.1 This practice direction clarifies the scope and application of Part 8 of the Rules.

2. Circumstances in which an affidavit or a statement of claim must be filed

2.1 This paragraph clarifies rule 8.2(1).

2. 2 The judge may direct that an affidavit or a statement of claim be filed and served in addition to the claim form.

3. First hearing

3.1 The first hearing of a fixed date claim shall take place in open court unless-

- (a) all parties agree *otherwise*; or
- (b) the court directs otherwise of its own initiative or on the application of one or more of the parties.

4. Effective date

- 1. This practice direction will come into effect on the 1st March, 2023 and will be applicable to all claims where the claim form is filed after that date or the court otherwise directs

[21.] Having reviewed the foregoing, the following is the position under the rules:

1. Proceedings are commenced with a claim form and a statement of claim *or* affidavit *or* other document.

2. Proceedings may be commenced with a claim form and an affidavit in lieu of a statement of claim where such an affidavit is required or permitted.

3. Proceedings may be commenced with a claim form without a statement of claim, affidavit or other document only if the claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8 and 8.9 *or* where the court gives permission for the service of the claim form without a statement of claim. A court can give permission only in those circumstances set out in rule 8.2(4).

4. If the filed claim form is not accompanied by a statement of claim or an affidavit or other document (as required or ordered) and if the claim form does not fall under the exceptions provided for in Rule 8.2 (including a court order), then proceedings have not properly commenced.

[22.] The cases of **Capital Bank v David Holukoff et al HCVAP 2008/007** and **Jermaine Browne v The Attorney General of St. Kitts and Nevis et al Claim No. SKBHCV2016/0074**, and **Niguel Streete v Caricom Management Services et al Claim No. AXA HCV 20090014** and **Fidel Rampersad et al v Medical Professional Association of Trinidad and Tobago Claim No. CV 2014-01330** are cited in the guidance notes to the Rule 8.1 and Rule 8.2, CPR 2022, viz, The Civil Procedure Rules 2022 Practice Guide, January 2024. Those cases shed light on the interpretation and application of the rules.

[23.] A live issue in this case is whether proceedings were properly commenced. In **Capital Bank v David Holukoff et al HCVAP 2008/007**, the Court of Appeal of Grenada found that the learned judge at first instance was correct that the rules required that

proceedings be commenced with the filing of a claim form and a statement of claim or affidavit; and that in a case where no statement of claim had been filed with the claim form, proceedings had not commenced. However, the judgment at first instance was overturned because the appellate judge found that the Claimant was in fact acting ahead of the commencement of proceedings as it was entitled to do pursuant to another rule. As it concerns the commencement of proceedings, *Acting Justice of Appeal Michael Gordon, QC* pronounced at paragraph 17 of that ruling:

[17] As stated at paragraph 9 above, CPR 8.1 requires proceedings to be commenced by filing a claim form and statement of claim or affidavit if any rule so requires (for example, applications for administrative orders under CPR 56.7(3)). The Bank did not file a statement of claim with the claim form and CPR 8.1(c) does not apply. Proceedings accordingly had not been commenced.

[24.] Similarly in **Jermaine Browne v The Attorney General of St. Kitts and Nevis et al**, the claimant commenced an action by filing a Fixed Date Claim Form, a Statement of Claim and an Affidavit in Support of Originating Motion. In that case, the court found that the action ought to have commenced by fixed date claim form and an affidavit. The court struck out the statement of claim but considered the affidavit filed. The affidavit was to be filed in compliance with another rule for which no sanction for non-compliance was set out. In that instance, the court considered the affidavit filed and treated the procedural misstep as “curable” by the filing of a supplemental affidavit.

[25.] The case of **Niguel Streete v Caricom Management Services et al Claim No. AXA HCV 20090014**, from the jurisdiction of Anguilla, Eastern Caribbean, considered provisions of Rules 8.1 and 8.2 of the Eastern Caribbean Civil Procedure Rules which provisions are similar to Rule 8.1 and Rule 8.2 of our CPR 2022, as amended. In that case, the learned judge struck out the case for non-compliance with the rules. Michael , J (Ag.), reasoned and determined:

Ground (2) of the application by the Defendants/Applicants is that the statement of case does not comply with Rules 8.1 and 8.2 of the CPR.

Rule 8.1 of the CPR provides that, subject to Rule 8.2, a claimant must file, together with his claim form, either a statement of claim or an affidavit or other document required by a rule or practice direction. Rule 8.2 indicates the circumstances in which a claim form can be issued and served without a statement of claim or affidavit or other document as provided for in Rule 8.1.

There is no statement of claim or affidavit or other document issued with the claim form filed in this matter on January 27th 2009, as required by Rule 8.1. ...

In light of the clear words of Rule 8.1 of the CPR that a statement of claim or affidavit or other document is to be filed in the court office together with the claim form, and in the absence of any such document being filed with the claim form and in the absence of any order or note by Ross J. giving permission, in accordance with Rule 8.2, for the claim form to be filed without this....

.....the Court will strike out the claim form, in accordance with Rule 26.3(1) of the CPR, for non compliance with Rule 8.1 of the CPR.

[26.] In **Fidel Rampersad et al v Medical Professional Association of Trinidad and Tobago Claim No. CV 2014-01330** the learned judge refrained from striking out the claim given the special circumstances of that case. In that case, the parties had appeared on an application for an injunction and the judge found that the Claimant could have made the requisite application to file and serve a claim form without a statement of case in a case of urgency. The learned judge also found that the defendant had adequate notice of the claim it was to meet, and bearing in mind the overriding objective, refused to strike out the claim. Instead the learned judge granted leave to the claimant to make a belated application for permission to file the amended claim form without a statement of case.

[27.] On review, the case law makes it clear that that unless the initiating documents are compliant with Part 8 of the CPR, then the proceedings have not properly issued. In other words, proceedings have not commenced. In such a case, the action cannot continue against a defendant unless the procedural defect can be cured on the documents already filed or on the procedure already undertaken. In an appropriate case, a court will strike out the claim form.

[28.] The case before me is whether proceedings have been initiated in compliance with Part 8, CPR 2022, as amended. The rules of Part 8 mandate how proceedings must be commenced. Those sections set out the general provisions and the exceptions to those provisions. Unless Part 8 is complied with, and in the absence of the exercise of a power in the court to rectify the default, proceedings have not been properly instituted.

Analysis

[29.] In this case, the Claimant filed a Fixed Date Claim form on March 22, 2023. It was not accompanied by a statement of claim. Instead, an affidavit was filed on March 22,

2023. There was no rule relied on (or cited) that required, or permitted, the Claimant to file an affidavit in lieu of a statement of claim. Nor is there any court order giving the Claimant permission to file and serve a claim form without a statement of claim or to file an affidavit in lieu of a statement of claim.

[30.] In those circumstances, is important to review the contents of the filed Fixed Date Claim Form to see whether it complies with any of the exceptions of Rule 8.2, viz, the inclusion in the claim form of all the information required by Rule 8.6. and Rule 8.7., as set out above.

[31.] The filed Fixed Date Claim Form reads:

THE CLAIMANT CLAIMS:

1. Eviction of the Defendant and her co-habitant(s) from property known as lot number 33, in the Nassau East North Subdivision situate in the Eastern District of New Providence, Aforesaid (“the property”).
2. Vacant possession of the property.
3. Damages in the amount of \$255,000.00 for unauthorized alteration of the property resulting in the diminution of its value.
4. Arrears of rent in the sum of \$285,200.00
5. Damages for trespass at \$1000.00 a month and accruing from August of 2022 to the present being \$7,000.00 and accruing.
6. Mesne Profits.
7. Damages
8. Aggravated Damages
9. Exemplary Damages.
10. Interest pursuant to section 3 of the Civil Procedure (Award of Interest Act) 1992 and section of the Civil Procedure (Rate of Interest Rules, 2008 at a rate of the prime rate of the Central Bank of the Bahamas plus 2 percent per annum on any sum found due.
11. Costs; and
12. Such further or other relief as the Court deems just.

[32.] Nowhere in the Fixed Date Claim form is “a short description of the nature of the claim”. Counsel for the Claimant pointed to the fact that the claim is for an eviction and vacant possession of the property. It is this court’s determination that such references as are contained in paragraphs 1 and 2 of the claim are references to remedies and the relief that the Claimant seeks. The basis for those remedies is absent. When one asks “why is the Claimant requesting such relief” or “how does the Claimant become entitled to the relief sought” or “what fact is the Claimant relying on to show its entitlement to the remedies sought”, it becomes clear that the answer to those questions is missing from the claim form. In another dispensation, the nature of the claim is captured in the term “cause of action”. In the new dispensation, the question may be posed: “on what ground does the Claimant bring this claim”? Remedies of “arrear of rent” as well as damages for “trespass” and “mesne profits” are other reliefs being sought without any foundation being given for such claims. Notably, in law, such reliefs are distinctly different in nature and can flow from different circumstances. Must a defendant be put to guess work as to the nature of the claim against him/her? I think not. It ought to be clear from a reading of the statement of case as to the nature of the case that the Defendant is called upon to answer.

[33.] A claimant must clearly state its case. By rule 8.7 CPR 2022, the claimant has a duty to set out its case. The claimant must provide a statement of all of the relevant facts on which it relies. Notably, by Rule 8.8, a claimant will not be able to rely on any fact or allegation not set out unless a court otherwise orders. In this case before me, save for the identification of a property and a broad allegation of trespass which is said to “be accruing from August 2022”, there is no statement of fact which could inform a Defendant of what case it is to answer or to respond to.

[34.] I find that the filed Fixed Date Claim form does not comply with Rules 8.6 and 8.7.

[35.] In these circumstances, in the absence of any Court order providing otherwise, the Claimant ought to have complied with Part 8 by filing a Fixed Date Claim form together with a Statement of Claim in order to commence proceedings. Both statements of case ought to comply with the rules of Part 8.

[36.] **Issue 1(b)**
Whether the defect may be, and ought to be, cured.

Power of the Court to cure a defect and the discretion to do so

[37.] The Claimant in his quest for a summary judgment noted the failure of the defendant to file a Defence. The Defendant had filed an affidavit in answer to the affidavit filed by the Claimant. Counsel for the Defendant explained that they were of the mistaken

belief that the Claimant had received an order from the court to file an affidavit instead of the statement of claim.

[38.] By Rule 10.2 CPR 2022, a defendant “may file an affidavit in answer instead of a defence” where a fixed date claim form is served with an affidavit instead of a statement of claim.

[39.] In its thrust for summary judgment, the Claimant relied on the cases of **Mitchell v News Group Newspaper Ltd. [2013] EWCA Civ 1537** and **Graham Denton et al v TH White Ltd. and another [2014] EWCA Civ 906** to persuade this court to uphold compliance with the rules and to make a requisite order in the face of the failure of the Defendant to file a Defence. This was also an answer to the Defendant’s application for an extension of time within which to file a Defence and CounterClaim.

[40.] Both cases dealt with the matter of relief of sanctions and, in both cases, the appellate bodies considered the importance of courts fostering a culture of compliance with the rules. The courts also addressed counsel’s duty to cooperate in this culture.

[41.] In **Mitchell v News Group Newspaper Ltd.**, Lord Dyson MR in handing down the judgment of the court said,

40 We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle “de minimis non curat lex” (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.

41 If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although

the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked on more favourably than applications for relief from sanction made after the event.

[42.] In **Graham Denton et al v TH White Ltd. and another [2014] EWCA Civ 906**, the court considered the ruling in **Mitchell v News Group Newspaper Ltd.** Lord Dyson, Master of the Rolls, and Lord Justice Vos went on to make the following pronouncements in a joint judgment:

40. Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR rule 1.3 provides that “the parties are required to help the court to further the overriding objective”. Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.

41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).

42. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

43. The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient. The court can, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR rule 44.11 when costs are dealt with at the end of the case. If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery on grounds of conduct under rule 44.11. If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget.

44. We should also make clear that the culture of compliance that the new rules are intended to promote requires that judges ensure that the directions that they give are realistic and achievable. It is no use imposing a tight timetable that can be seen at the outset to be unattainable. The court must have regard to the realities of litigation in making orders in the first place. Judges should also have in mind, when making directions, where the Rules provide for automatic sanctions in the case of default. Likewise, the parties should be aware of these consequences when they are agreeing directions. “Unless” orders should be reserved for situations in which they are truly required: these are usually so as to enable the litigation to proceed efficiently and at proportionate cost.

[43.] Both cases advocate the fostering of a culture of compliance with the new rules. If Counsel for the Claimant is successful in his submission to enforce strict compliance in this instance then it should also mean, given my findings above, that this court ought to penalize the Claimant as a result of the failure to comply with Part 8. A technical enforcement would result in the striking out of the Claimant’s claim. However, in this instance, I do not think that that is the correct approach.

[44.] I bear in mind the overriding objective and the Court’s power to rectify matters.

[45.] The overriding objective of the CPR 2022 is to enable the Court to deal with cases justly and at proportionate cost. Part 1.1 provides:

1.1 The Overriding Objective.

(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.

- (2) Dealing justly with a case includes, so far as is practicable:
- (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate to —
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly;
 - (e) allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other cases; and
 - (f) enforcing compliance with rules, practice directions and orders.

1.2 Application of overriding objective by the Court.

- (1) The Court must seek to give effect to the overriding objective when —
- (a) exercising any powers under these Rules;
 - (b) exercising any discretion given to it by the Rules; or
 - (c) interpreting these Rules.

(2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

1.3 Duty of parties.

- (1) It is the duty of the parties to help the Court to further the overriding objective.
- (2) In applying the Rules to give effect to the overriding objective the Court may take into account a party’s failure keep his duty under paragraph (1).

[46.] The Court’s general powers to rectify matters is found in Rule 26.9, CPR 2022. That rule provides:

26.9 General power of the Court to rectify matters.

- (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction.
- (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders.
- (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the Court may make an order to put matters right.
- (4) The Court may make such an order on or without an application by a

party.

[47.] In this case, there seems to be no purpose in driving a litigant away from this action by striking out the claim for failure to comply with Part 8 CPR 2022. From a perusal of the affidavit filed by the Claimant, it appears to set out facts and allegations in an attempt to set out the Claimant's case. This is not a finding of sufficiency of the statement of case but a recognition that it was done. It is this affidavit that the Defendant answered at length, setting out its own case by way of affidavit filed May 17, 2023. The Claimant ought to have sought, and could have sought, an order to file an affidavit instead of a statement of claim. The Defendant has already appeared before this court on the Claimant's application for judgment, is aware of the proceedings and has filed an answer to same.

[48.] I think that it would be a draconian step, in these circumstances, to strike out the Claimant's case. Even in a culture of robust compliance, it is often recognized that the discretion to strike out ought to be exercised sparingly.

[49.] The Claimant made a procedural misstep, which in my opinion, can be cured. I do not think that such a determination offends a culture of compliance. It is a recognition that given the recency of these rules, missteps will happen. In my view, the procedural rules are to be recognized as servants to the end of justice as expressed in the overriding objective and not as the substance of justice themselves.

[50.] Indeed, this Court must seek to give effect to the overriding objective in interpreting and applying the procedural rules and in exercising any discretion under these rules.

[51.] One such discretion is the discretion given to the court to rectify matters under rule 26.9, as set out above.

[52.] The consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction in this case. In this case, the Claimant ought to have sought an order from the court for leave to serve an affidavit with the claim form. The Claimant did not do so. There is no consequence specified by any rule, practice direction, court order or direction for the Claimant's failure to do so. The Defendant could have applied for the matter to be struck out as a failure to commence proceedings. However, the Defendant did not do so. I think that that was the right course. I think that this case is different from a case where a Claimant, intending to commence proceedings, files only a claim form and does not fall within one of the exceptions of Part 8. In that instance, a court would be hard-pressed to hold that proceedings had in fact commenced. In this case, the Claimant did not fail to serve a

document with the Claim form. Instead, the Claimant filed a document that it could have filed had it had the court's leave.

[53.] On the documents already filed, the parties have joined issues in this matter. To drive the litigant away to refile and return to the judgment seat would not meet with the objective of an expeditious hearing at proportionate cost. The court has already allotted resources to the hearing of this matter which resources need not have been expended in vain if the matter can be rectified in a way that does justice to both parties.

[54.] In my view, such a rectification is possible. This Court, pursuant to Practice Direction 3 of 2023, can order that the Claimant file an affidavit in lieu of a statement of claim. I will make that order with regularizing effect of the affidavit filed March 22, 2023.

[55.] I will also give leave to the Defendant to file and serve the affidavit in response pursuant to rule 10.2 CPR 2022, with regularizing effect of the affidavit filed May 17, 2023.

Issues 2 and 3

[56.] 2. Whether the Defendant is entitled to answer the Claimant's suit by way of affidavit
3. Whether the court should exercise its discretion in favour of the Defendant and grant an extension of time within which to file its Defence and Counter Claim

[57.] Given this court's reasoning and resolution of Issue 1, it is not necessary to address the remaining issues.

Costs

[58.] The general rule for the award of costs is that the successful party is entitled to costs. Rule 71.6 (1) provides as follows:

71.6 Successful party generally entitled to costs.

(1) Where the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

[59.] I find no reason to depart from that default position in this case. The Claimant was unsuccessful in its application for judgment in the absence of a filed Defence. Here the Defence referred to was a Form G10 Defence. The Claimant made such an application in circumstances where there was no filed statement of case (i.e. a statement of claim) for which an appropriate response was an answer by way of a "Defence". At the time of its

application, the Claimant had been in receipt of the affidavit in reply and yet persisted in its application.

[60.] In **Graham Denton et al v TH White Ltd. and another**, a case relied on by the Claimant, the court frowned on “opportunism” and reminded counsel of their duty to cooperate in furthering the overriding objective. This includes cooperating in cases of minor infractions and on requests for extension of time. *Lord Dyson MR and Vos LJ* in their joint judgment wrote:

[41] We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new r 3.8(4).

[42] It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

[43] The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions...

[61.] In this case, the Claimant shall pay the costs of the application of the Defendant.

[62.] I also wish to record this court’s disapproval of the route persisted in by the Claimant in an instance where a conversation with the Defendant could have pre-empted this challenge and could have afforded the Claimant the opportunity to put her own house in order. Such cooperation would have saved court time and costs to the litigants. Such communication would have helped the Court to further the overriding objective.

ORDER

[63.] The order and direction of this Court are as follows:

1. The Claimant’s application filed May 17, 2023 is dismissed.
2. The Claimant is given leave to file an affidavit along with the claim form in order to commence these proceedings.
3. The Claimant’s affidavit filed March 22, 2023 shall stand as the affidavit filed along with the claim form in order to commence these proceedings.
4. The Defendant is given leave to file a defence by way of affidavit in response to the Claimant’s affidavit.
5. The Defendant’s affidavit filed May 17, 2023 shall stand as the filed Defence in these proceedings.
6. The notice of application of the Defendant filed November 24, 2023 is dismissed.
7. Either party is at liberty, within 28 days of this ruling, to file a notice of application for a case management hearing.
8. The Claimant shall pay the costs of the Defendant of this hearing.

Dated the 24th day of September 2024



Carla D. Card-Stubbs

Justice