



[2021] JMSC Civ 161

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV04096

BETWEEN	JAMAICA ASSOCIATION OF COMPOSERS AUTHORS AND PUBLISHERS LTD	CLAIMANT
AND	JAMAICA C.V. LTD	DEFENDANT

IN CHAMBERS

Mr Chad Lawrence instructed by Samuda and Johnson for the Claimant

Mr Chukwumeka Cameron instructed by Carolyn C Reid and Co for the Defendant

Heard: June 3rd, 2021 and September 24th, 2021

Challenge to Court's jurisdiction – Correct Procedure to be followed – Copyright Act – Exclusive Licensee – Actions brought by Exclusive Licensee – Default Judgment – Effect of Notice of Inspection

HUTCHINSON, J

BACKGROUND

[1] The action before me has had an interesting history, on the 22nd of October 2018, a Claim Form and Particulars of Claim were filed herein. In the Claim Form, the Claimant sought a number of orders to include an injunction barring the Defendants from transmitting or authorising the transmission of any of the musical works within the Claimant's repertoire, restitution for unjust enrichment, an inquiry as to the damages payable for infringement of copyright for the period 2015 to date

or an account for profits during that period and an order for the payment of all sums found due upon taking such inquiries or account together with interest thereon.

- [2] In the Particulars of Claim, the Claimant laid out its standing to initiate these proceedings on the basis that they are a copyright licensing body comprised of individual members which acts as agent and/or licensee, pursuant to agreements with regional and international performance rights societies and music publishers. A total of four exhibits were attached to the particulars in this regard. These documents included powers of attorney which were stated as having been executed by those entities who the Claimant asserted are collectively entitled to almost every musical work broadcasted or transmitted by radio, television or cable throughout the world to include Jamaica. It was also stated in the pleadings that the Defendant signed the Claimant's Licensing agreement in respect of those works but failed to honour same as no payments were made neither were audited financial statements and musical logs provided.
- [3] The claim and particulars having been filed, they were served on the Defendant who filed an acknowledgement of service on the 26th of November 2018 in which it was indicated that the documents were received on the 8th of November. In that acknowledgment of service, it was indicated that the Claim was not admitted and would be defended. Two days after filing this acknowledgment of service, Counsel for the Defendant filed a Notice to Inspect Documents and Request for Information in which requests were made of the Claimant to inspect and receive copies of the 25 reciprocal agreements. Particulars of the musical works that the Defendant was said to have 're-transmitted' were also requested. These requests were made pursuant to Rule 28.17(3) and Rule 34.1 of the CPR. In the body of the request, the Claimant was advised that in respect of the request under 28.17(3) they needed to comply within 7 days of the date on which the notice was served.
- [4] There was no information provided indicating when service of this notice was effected but the Claimant has acknowledged receiving same. No further action

was taken by the Defendants in this regard and on the 25th of January 2019, the Claimants filed an application requesting the following orders;

- a. Judgment in Default of Defence be entered in favour of the Claimant against the Defendant.
- b. A date for Assessment of Damages be scheduled.
- c. The Defendant discloses to the Claimant and provides the Claimant with its audited financial statements for the years 2015 to and inclusive of 2018
- d. Costs of incidental and occasioned by this Application be costs to the Claimant to be taxed if not agreed and paid forthwith.
- e. Such further or other relief as this Honourable Court deems just.

This application was listed for hearing on the 6th of June 2019 and submissions were made by the parties in respect of same.

- [5]** The ruling was adjourned to the 22nd of July 2019 and on the 18th of July 2019, the Defendant filed a notice as well as written submissions in which they sought to challenge the jurisdiction of the Court to hear this matter. Although the submissions in which this point was raised had not been accompanied by the usual notice of application to the Court, the ruling was not delivered on the 22nd of July 2019, neither was it scheduled for another date as no additional dates were available during the period that this Tribunal was able to accommodate the matter. Additionally, it was acknowledged by Counsel for the Defendant that the notice and submissions had been short served on Counsel for the Claimant. Given the new but important issues which were raised rather belatedly by the Defendant, the Claimant was granted the opportunity to file its response and the matter adjourned.
- [6]** On the 29th of November 2019, Counsel for the Claimant filed written submissions in response. In these submissions, it was argued that the Defendant is not in a

position to dispute the Court's jurisdiction due to its non-compliance with Rule 9 of the Civil Procedure Rules (CPR), specifically rule 9.6 (5)(b). The matter was eventually re-listed before me on the 3rd of June 2021 and the parties were heard in respect of all the issues raised. Permission was granted to file additional authorities by the 25th of June 2021. I note that no further authorities or submissions were filed and I have considered the matter taking into account only the material that was before me on the 3rd of June 2021.

Challenge to the Court's jurisdiction

- [7] Although the challenge to the Courts jurisdiction was raised later in time, it is my intention to address this issue first given the fact that the application, if successful, would bring these proceedings to an end. In outlining his argument on this point, Counsel for the Defendant submitted that the Court has no jurisdiction to adjudicate on the matter as the Claimant's pleadings failed to disclose specific/individual instances of infringement pursuant to the Copyright Act. Reference was made to sections 5(1) and 32 of the Act in support of this position.
- [8] Mr Cameron posited that the matter should also not be allowed to proceed as Rule 8.9 makes it clear that a Claimant has a duty to set out his case and the consequences of failing to do so are outlined at Rule 8.9A. He asserted that by failing to specify individuals works the consequences of this rule would impact the Claimant's ability to lead evidence at trial. Mr Cameron also submitted that by failing to cite any protected work, the Claimant had failed to invoke the protection and remedies available under the Copyright Act and there is no presumption in this Act of the subsistence of protection or copyright.
- [9] The Defendant also sought to persuade the Court that the matter should not proceed as the Claimants had failed to join the copyright owners as a party to the action. He relied on the provisions of Section 35 (3) of the Act as well as the English authority of *Performing Rights Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, [1923] All ER Rep Est 794 which Counsel contended found that the

absence from the suit of the legal owner of the rights was fatal. Counsel also questioned the standing of the Claimant to bring the action and asserted that they were not given any rights under Section 87 of the Act to initiate proceedings. Counsel also contended that the Claimant is an illegal body and a creature 'not known' to the Act.

- [10]** It was also submitted that the action could not proceed as the Court had no jurisdiction to determine the quantum of remuneration that a copyright owner may be entitled to where an infringement was proved. Counsel argued that the provisions of Section 83 (c) of the Act make it clear that the Court has no such jurisdiction and all power to make such a determination resides in a Tribunal as recognised by the Act.
- [11]** In his submissions in response, Mr Lawrence argued that the points raised by the Defendant were technical matters which went to the question whether the Claimant would be able to prove its case. He stated that the submissions did not address the question of whether the Court possessed the requisite jurisdiction to hear this matter but was akin to a defence which they had the opportunity to file but failed to do so.
- [12]** Counsel submitted that he did not agree with the position that the Court's jurisdiction was not invoked by the pleadings before it and argued that Counsel for the Defendant had misinterpreted Section 5 of the Act, which he asserted speaks to protection and not jurisdiction. In respect of the argument citing the Claimant's alleged non-compliance with Rule 8.9, Mr Lawrence argued that disclosure is in fact an ongoing process, but in any event the sufficiency of the pleadings in that regard was a triable issue. In further submissions on this point he asserted that it was for the Tribunal of Fact to determine if the Claimant's failure to provide a list of the works infringed was fatal or whether they were even entitled to the works claimed. Counsel rebutted the suggestion that the absence of the words Copyright Act from the Particulars was in any way fatal to the claim and submitted that a

reading of same provides a clear indication that the application is grounded in this Act.

- [13] In addressing the Claimant's standing to bring this action, Counsel invited the Court to consider paragraph 10 of the POC which he submitted clearly shows that the Claimant possesses the exclusive rights in respect of all the musical works which had been trespassed on by the Defendant. He also asked that consideration be given to the decision of ***TVJ Ltd v CVM [2017] JMCC COMM 1*** which he contended provides useful guidance on the status of the exclusive licensee. Counsel submitted that the exclusivity of these licences was further alluded to in paragraphs 14 and 16 of the particulars and as a result of the defendant infringing on the works in the Claimants repertoire they do possess the requisite standing and the absence of the words 'pursuant to the Copyright Act' should not be viewed as fatal. On the question of the Court's ability to award damages Mr Lawrence submitted that this issue was also addressed by the Court in the above decision.
- [14] Counsel also submitted that it is where no set amount exists for license fees or the Defendant does not agree with the fees cited by the Claimant that the Tribunal referred to at Section 83(c) of the Act becomes relevant. He also argued that the onus rests on the Defendant to bring this matter to the Tribunal and not the Claimant. He made reference to ***JACAP v Grove Broadcasting [2017] JMSC Civ 14*** where it was recognised by the Court that actions such as this can and have been heard by Courts of concurrent jurisdictions. Reference was also made to ***Harbour View Cinema Co Ltd v Performing Rights Society Ltd (1991) 28 JLR 302***.
- [15] Mr Lawrence also argued that in any event the Defendants submissions were doomed to failure as they had not complied with the provisions of Part 9 of the CPR specifically Rule 9.6(5)(b) which specifically required that a challenge to the Courts jurisdiction be made within the time allowed for the filing of a defence. Counsel also made reference to the decision of ***Roger Hunter v Alma Leahy and Another [2015] JMCC Comm 20*** in which Sykes J, as he then was considered

the application of this provision. He asked the Court to adopt the reasoning of the Learned Judge and find that the Defendant having failed to observe this rule, its application should be dismissed and the matter proceed to default judgment as the Defendants have failed to file a defence.

ANALYSIS/DISCUSSIONS

Challenge to Court's jurisdiction

[16] It is the defendant's position that the Claimant 'failure' to identify specific works is sufficient to bring these proceedings to a halt. In coming to my decision on this matter, I gave careful consideration to the full submissions of the respective parties. I also formed the view that it would be extremely prudent to carefully examine the relevant provisions, rules and authorities which have been cited herein. Sections 5 and 32 of the Act reads as follows;

5.-(1) Unless otherwise specifically provided in this Act, copyright shall not subsist in any work unless it satisfies the requirements specified in this Part as respects-

(a) the category of work; and

(b) either-

(i) the qualification of the author; or

(ii) the country or place of first publication, or

in the case of a broadcast or cable programme,

*the country or place where it is made or from which it is sent, as **the** case may be.*

(2) If the requirements of this Part or of section 146 are once satisfied in respect of a work, copyright does not cease to subsist by reason of any subsequent event.

32.-(1) An infringement of copyright shall be actionable at the suit of the copyright owner; and, subject to the provisions of this section, in any action for such an infringement all such relief by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in respect of the infringement of other proprietary rights.

(2) Where in an action under this section an infringement of copyright is proved or admitted the court, having regard to any benefit accruing to the defendant by reason of the infringement, to the flagrancy of the infringement and to all other material considerations, shall have power to award such additional damages as the court may consider appropriate in the circumstances.

- [17]** On a careful reading of section 5, it is clear that the language contained therein does not address the issue of jurisdiction or any matter which would prevent the Court from adjudicating on this claim. I am inclined to agree with the submission of Mr Lawrence that the effect of same was simply to address what would be required to constitute protected works. This would then be a question for the Court which is tasked with determining the substantive matter as to whether or not the Claimant has satisfied the threshold to show that the work was protected and copyright had in fact been breached by the Defendant.
- [18]** Section 32 of the Act was also examined, as well as its implications, if any, for the Claimant. On reviewing this provision, I was struck by the fact that it specifically focuses on the right of a copyright owner to bring an action and the fact that damages and additional damages can be awarded where an infringement has been proved. It was the contention of Mr Cameron however that the effect of this section goes further and makes it clear that in order to invoke the jurisdiction of the Court which is derived from the Act itself, the Claimant has to aver that copyright subsists in one/specific work(s) which would be protected by the Act and has been infringed by the Defendant.
- [19]** Although I'm not persuaded that this provision is capable of this interpretation, this argument fails to take into account the contents of the particulars of claim filed herein. While I do not intend to review the entire document, I note that at paragraph 1 of the particulars of claim, it was stated by the Claimant that it is a copyright licensing body within the meaning of Section 87 of the Act. Paragraph 2 outlines that it is a party to Reciprocal Agreements with regional and international

performance rights societies in particular associations such as Performing Rights Society (PRS), American Society of Composers Authors and Publishers (ASCAP) and Broadcast Music Inc (BMI) which are international societies entitled to almost every musical work broadcasted or transmitted by radio, television or cable throughout the world including Jamaica.

[20] Paragraphs 5 through to 8 outline that these entities have assigned these performance rights in Jamaica to the Claimant and also executed a power of attorney to the Claimant giving them the authority to bring copyright infringement proceedings against broadcasters for unauthorised use of their musical works. These documents were attached to the particulars as B, C and D and their contents speak for themselves. There are a number of other paragraphs which were reviewed where the language clearly speaks to this being an action for breach of copyright and while the words 'breach of the copyright act' do not appear, the fact that the cause of action was brought pursuant to this Act is evident. Additionally, the question of whether the Claimant is required to specify the actual works which were broadcasted does not seem to be a factor which goes to the jurisdiction of the Court but one that would again be considered when a determination comes to be made whether they have proved their case. I was struck by the fact however that although Counsel for the Defendant has sought to raise these points, the contents of paragraph 14 of the particulars state that the Defendant signed the Claimants licensing agreement in respect of their rights to this works and this has not been disputed.

[21] In respect of the complaint that the Claimant has failed to comply with Rule 8.9 and would face challenges as a result of Rule 8.9A, it is my considered view that the consequences of a Claimant failing to set out in the pleadings specific details/particulars which they may wish to rely on, is not a factor that would call into question the jurisdiction of the Court to treat with this issue. The consequences of such a failure is clearly outlined in Rule 8.9A which reads;

The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.

Additionally, although a Claimant can be barred from introducing information or particulars which had previously been omitted/overlooked it is evident that the Court has a discretion to permit the inclusion of same.

[22] In respect of the Defendants contention that the Claimant was required by Section 35(3) to join the actual copyright owners to this suit; the full provision states as follows;

35.-(1) *The rights and remedies of an exclusive licensee are concurrent with those of the copyright owner and references in the relevant provisions of this Act to the copyright owner shall be construed accordingly.*

(2) In an action brought by an exclusive licensee by virtue of this section, a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner.

(3) *Where an action for infringement of copyright is brought by the copyright owner or by an exclusive licensee, and the action relates (wholly or partly) to an infringement in respect of which they have concurrent rights of action, the copyright owner or the exclusive licensee, as the case may be, shall not be entitled, except with the leave of the Court, to proceed with action, unless the other party is either joined as a plaintiff in the action or added as a defendant; but this subsection shall not affect the granting of an interlocutory injunction on the application of either of them.*

4) A copyright owner or exclusive licensee who is added as a defendant in pursuance of subsection (2) is not liable for any costs in the action unless he takes part in the proceedings.

(5) Where an action for infringement of copyright is brought which relates (wholly or partly) to an infringement

in respect of which the copyright owner and an exclusive licensee have or had concurrent rights of action, then, whether or not the copyright owner and the exclusive licensee are both parties to the action, the court-

(a) shall, in assessing damages take into account the terms of the licence and any pecuniary remedy - already awarded or available to either of them in respect of the infringement;

(b) shall not direct an account of profits if an award of damages has been made or an account of profits has been directed in favour of the other of them in respect of the infringement; and

(c) shall, if an account of profits is directed, apportion the profits between them as the court considers just, subject to any agreement between them.(emphasis added)

[23] Although subsection (3) states that actions for infringement brought by an exclusive licensee or copyright owner should have the holder of the concurrent rights joined as a party to the action, the section goes on to provide that in the absence of the holder of concurrent rights as a party, the action can proceed nonetheless with the leave of the Court. Additionally, the rights of the exclusive licensee to bring an action for infringement of copyright are established at subsection (1). The institution of proceedings by an exclusive licensee was judicially considered in **TVJ v CVM**. This was a matter in which TVJ had been granted an exclusive licence to broadcast the World Athletics Championships and brought an action against CVM for infringement of these rights. The fact that an exclusive licensee could institute proceedings on its own was affirmed by Sykes J, as he then was, in the course of delivering his judgment, specifically at paragraphs 17 and 18 where he stated;

[17] In the present case, TVJ was the exclusive licensee of the right to broadcast the 2015 WAC in Jamaica. Section 34 of the Copyright Act states that the exclusive licensee has the same rights and remedies after the grant of the licence as if there were an assignment. These remedies are good against everyone except the copyright owner. Section 32 (1) states that where there is an infringement the

copyright owner is entitled to 'all such relief by way of damages, injunction, accounts or otherwise, shall be available to the [claimant] as is available in respect of the infringement of other proprietary rights.' Section 32 (2) enables the copyright holder to receive an additional award of damages from the court 'having regard to any benefit accruing to the defendant by reason of the infringement, to the flagrancy of the infringement and to all other material considerations.' Section 32 (3) provides that in a copyright infringement action, if it is shown that the defendant did not know or had no reason to believe that copyright subsisted in the work to which the action relates, then, the [claimant] is not entitled to damages against him, but without prejudice to any other remedy.;

[18] The combined effect of these provisions is that TVJ, as the exclusive licensee can bring an action for breach of its exclusive licence as if it were the copyright holder and there is no legal necessity for there to be an assignment, and crucially, there is no need to join the copyright holder as a nominal claimant. TVJ is entitled to all the reliefs to which the copyright holder is entitled. Finally, if the infringer did not know that the work was copyrighted and had no reason to believe that copyright subsisted in the work then damages cannot be awarded against him (emphasis added).

[24] In light of this pronouncement, it is evident that the Defendant's submissions in this regard are without merit. In the course of this judgment, it was also noted by the Learned Judge that Section 32 of the Act would entitle the copyright owner and by extension the exclusive licensee to all such relief which could be granted by a Court by way of damages, injunction, accounts or otherwise. He also recognised that it was open to such a claimant to seek additional damages from the Court and stated as much at paragraph 51 of this decision where he said;

[51] Section 32 (2) of the Copyright Act permits an award of additional damages having regard to (a) the benefit accruing to the defendant; (b) the flagrancy of the infringement and (c) all other material considerations. It is this court's considered opinion that additional damages are in order.....

[25] The language used in this provision as well as the conclusion of the learned judge undermines the submission of Mr Cameron that the Court also lacks the requisite jurisdiction to determine the quantum of remuneration. Section 83 of the Act on which this argument is founded states;

83. Where a literary, dramatic or musical work or film is broadcast with the licence of the copyright owner from a place in Jamaica or a specified country, any person may, without obtaining the licence of the copyright owner, incorporate the work (by means of the reception broadcast) in a cable programme service:

Provided that-

(a) the transmission by the cable programme service takes place simultaneously with the reception of the broadcast; and

(b) the programme in which the literary, dramatic or musical work or film is incorporated is transmitted without alteration of any kind; and

*(c) the copyright owner shall be entitled to receive from the person providing the cable programme service, equitable remuneration in respect of the transmission, to be fixed in default of agreement by the Tribunal, and for the purposes of this subsection, an alteration to a programme includes the addition thereto of **new** material not contained in the programme as broadcast, or the omission from the transmission of any material contained in the programme as broadcast; and the term "material" includes a commercial advertisement.*

[26] On a careful review of this provision, it is my opinion that the section does not have the interpretation which Counsel has sought to ascribe to it. The Act clearly recognises that actions for such an infringement can be brought before the Court and an award be made in their favour for damages. The situation envisioned at Section 83 is entirely different as it addresses a reception broadcast of the copyright material in a cable programme service in specific circumstances none of which have been stated to exist in the instant claim.

[27] It was also noted that the language used in sections 32 and 35 of the Act confers the Claimant with the requisite standing to bring this action, a factor which was also recognised by the Court in *TVJ v CVM*. In light of the foregoing conclusions, I was not persuaded that the Defendant's application was on firm footing, as while a number of the issues raised were matters which fell to be determined by a trial court, the authorities on the point have clearly shown that the Claimant was a proper party to institute these proceedings and the Court possesses the relevant jurisdiction to treat with this matter even at an assessment level. There were a number of other minor points raised by the Defendant which I have not outlined. These were also considered and had no impact on my conclusion.

[28] Having arrived at this finding, I then considered the further submissions of Mr Lawrence, specifically his contention that the application was also on shaky ground as a result of the Defendant's failure to comply with Rule 9 of the CPR. The relevant provisions of which state;

9.6 (1) A defendant who-

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.

(3) An application under this rule must be made within the period for filing a defence

(4) An application under this rule must be supported by evidence on affidavit.

(5) A defendant who –

(a) files an acknowledgment of service; and

*(b) **does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim (emphasis added)***

[29] The chronology of events which have been outlined above disclose that not only did the Defendant fail to file this application within the period for filing a defence,

they filed instead a document in which they sought inspection and requested information. The Defendant then did nothing else even after being served with the Claimant's application for default judgment. Contrary to the observations of Mr Cameron that the provision at Rule 9.6(5)(b) is purely procedural and should be waived by the Court, the decision of **Roger Hunter v Alma Leahy** shows that the approach of the Court to this rule has been far more serious. At paragraph 21 of his judgment, His Lordship reviewed the provisions of Rule 9 of the CPR. He then stated the relevant principles extracted from these rules at paragraphs 22 and 23 of his judgment as follows;

“[22] From these rules it is clear then that any defendant who wishes to dispute the claim or contest jurisdiction must begin with the filing of an acknowledgment of service unless he files and serves a defence within the time laid down either by the general rule (if the general rule applies) or the time set by the order permitting service out of Jamaica (which is the case here). Bupa has failed to (a) file the acknowledgment of service within the time laid down by the order; (b) failed to file a defence within the time specified in the order for filing a defence and (c) failed to make the challenge to jurisdiction within the time laid

[23] Based on these provisions in the CPR the following is not in doubt: a. the general rule is that a defendant must file an acknowledgment of service before he can take any further part in the proceedings;

b. if the defendant files and serves the defence on the claimant or his attorney at law then within the specified time for filing an acknowledgment of service then he need not file an acknowledgment of service. The logic here is that if the defendant files a defence contesting the merits of the claim he is not challenging the jurisdiction of the court;

c. if the defendant wishes to contest the jurisdiction of the court he must file an acknowledgment of service;

d. the failure to file an acknowledgment of service does not deprive the court of jurisdiction over the matter. If that were the case then there would be no such thing as judgment in default of acknowledgment of service. Since there is such a thing as judgment in default of acknowledgment of service then it necessarily means that the court has jurisdiction over claim where no acknowledgment of service has been filed. Not only can judgment be granted in default of the acknowledgment of service but the judgment can be enforced through the enforcement processes of the court;

e. if the defendant makes some challenge or raises issues on the merit of the case the court may order him to file his acknowledgment of service before he is heard any further. What is clear is that the acknowledgment of service must be filed when a challenge to the jurisdiction of the court is being made or the court is being asked not to exercise its jurisdiction over the claim;

f. it is entirely possible that the conduct of the defendant may be seen to be one of submitting to the jurisdiction of the court which means that he cannot make that an issue after such an act of submission as occurred.”

[30] Although the Learned Judge allowed that matter to proceed by exercising case management powers which are provided for at Rule 26.9(3), this was in circumstances where the Defendant had filed an application for an extension of time to raise this challenge, a situation which I note does not exist herein. The timing of this application was even more egregious as it was not raised at the point where substantive submissions had been made in respect of the request for a default judgment, but was filed on the eve of the ruling on that application being handed down. As such, although I have already determined that there is no merit to these submissions, I am satisfied that they would also fail on the basis that the Defendant had failed to comply with Rule 9 of the CPR.

Application for default judgment

[31] It then remains for the Court to consider the Claimant's outstanding application for default judgment. The application was made on the basis that the Defendant had failed to file a defence or to take any further action in this matter apart from the service of the notice of inspection. It was noted by this Court that although the notice gave the Claimant 7 days to comply, no applications were made to the Court by the Defendant after this time had passed. Unlike Rule 28.17 which does not contain an expressed provision for a party to apply to the Court to compel the other side to comply with its notice, Rule 34.2 makes it clear that it is open to the requesting party to seek the intervention of the Court if there has been no compliance with this request within a reasonable time.

[32] In considering the submissions made on behalf of the Defendant as to the reason that a defence was not filed as required by Rule 10.2(1), I have examined whether the notice to inspect and the request for information could have operated as a stay in respect of a Defence. In Part 59.2 which deals with actions involving the Crown, there is a specific provision that such a notice could be filed before an

acknowledgment of service which then acts as a delay to the filing of a defence. A review of rules 9.6, 10.2, 28.14 and 34.1 and 2 did not reveal a similar provision in respect of matters which do not involve the Crown. The answer to this question then would seem to be in the negative and as such a defence would have to be filed failing which the party would find himself exposed under Part 10.2(5) which provides thus;

Where a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered against that defendant if Part 12 allows it.

[33] In light of the foregoing, I am satisfied that the Claimant has met the threshold for the Court to grant the orders sought in the notice of application filed on the 25th of January 2019. Accordingly, my orders are as follows;

- a. Defendants application challenging the Courts jurisdiction is denied.
- b. Order granted in terms of paragraphs 1 to 4 of the Claimant's Notice of application of the above stated date.