



[2022] JMSC Civ 251

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV04544

BETWEEN	WENDE SPENCE	CLAIMANT
AND	ANDRAY SPENCE	DEFENDANT

IN CHAMBERS

Mrs Tamara Francis Riley-Dunn, instructed by Nelson-Brown Guy & Francis for the Claimant

Miss Michelle Cousins, instructed by Zavia T. Mayne & Company for the Defendant

Heard: July 1, 22, 26, 2022 & October 28, 2022

Civil Procedure: Application for permission to file defence out of time- Rules 10.3 (9) and 26.1 (2) (c) of the Civil Procedure Rules, 2002, as Amended (CPR)- Application for summary judgment- Rule 15.2 of the CPR- Dealing with simultaneous applications.

JACKSON J (AG.)

Introduction

[1] On 22 June 2022, the court was asked to hear an application for summary judgment brought by Mrs Wendy Spence against her husband, Mr Andray

Spence. Mr Spence failed to file a defence to the claim against him and was therefore in breach of the 42-day time limit set out in rule 10.3(1) of the **Civil Procedure Rules, 2002** (CPR). He was served with the claim on 30 April 2019, and his defence was due on 11 June 2019. He also failed to file a response, and no submissions were made on his behalf.

- [2] On the morning of 22 June 2022, Miss Michelle Cousin, Counsel for Mr Spence, advised the Court that an application had been filed at around 10:30 a.m. seeking permission to extend the 42-day timeline for his defence, which had been filed the day before, 21 June 2022, so that it would properly stand as filed and served.
- [3] Although Mr Spence's application was filed late, it became clear to the court that both parties sought to have both applications heard together. While there are no rules, practice, or directions preventing the court from proceeding in this way, I considered the guidance of Morrison P, as he then was, in **New Falmouth Resorts Limited v National Water Commission** [2018] JMCA Civ 13, helpful in determining how to proceed. The Learned President stated that:

*"[62] A subsidiary issue which also arises is whether, as the appellant submits, the judge ought to have postponed consideration of the application for relief from sanctions until after the hearing of the appellant's application for specific disclosure, which was fixed for hearing on 24 April 2015. I accept that, in general, where there are two applications before the court, one of which will, if granted, obviate the need to pursue the other, the sensible and most efficient course for the court to adopt will usually be to postpone consideration of the latter until after the former has been heard and determined. **In this court, the paradigm instance of this is where there are applications (i) to strike out an appeal for failure to comply with a rule or court order requiring that something be done within a particular time; and (ii) to extend the time within which to comply with the said order. In such a case, good sense would usually dictate that the application to extend time should be heard before the application to strike out**" (My emphasis).*

- [4] I applied the Learned President's guidance and decided to hear Mr Spence's application. I then ordered that Mr Spence's application and all supporting

documents be served on Mrs Spence, that each party file and exchange a list of authorities and submissions, and that the application be adjourned to 1 July 2022.

The Application

[5] Mr Spence's application seeks relief from sanctions arising from non-compliance with orders made by Wong-Small J (Ag) on 28 July 2021. It also seeks an extension of time for the defence filed on 21 June 2022 to stand as properly filed, permission to serve Mrs Spence, and permission for that service to stand as served within time. The grounds relied on were made pursuant to Rule 26.8 and Part I of the CPR. On those grounds, Mr Spence asserts that he has a real prospect of success in defending the claim and would suffer substantial prejudice if the court were to deny the application.

[6] The orders made by Wong-Small J (Ag) on 28 July 2021 were as follows:

1. The default judgment entered on the 28th day of May 2019 is set aside.
2. Time is extended for the defendant to file and serve a defence within 14 days of the date hereof.
3. Mediation to be conducted within 90 days from the 12th of August, 2021.
4. Costs to be costs in the claim.
5. Claimant's Attorney-at-law to prepare, file and serve orders herein.

[7] The learned judge's orders were unambiguous, and no sanctions were imposed. I will, nonetheless, treat the application as one for an extension of time. Before addressing the substance of the application, it is necessary to outline the factual background to the claim and set out a timeline of events.

The Background

- [8]** The parties married on 3 June 2007, separated on 1 May 2014, filed for dissolution on 1 October 2015, and received a Decree Absolute on 7 December 2017.
- [9]** In 2014, prior to filing the Petition for the Dissolution of the Marriage but during their formal separation, the parties discussed two jointly owned properties that they had mortgaged, both carrying substantial debt due to elevated interest rates, with their equity significantly eroded.
- [10]** During the discussions, which were led by Mr Spence, it was proposed that each party take responsibility for one property and its associated debts. He further requested that Mrs Spence pay the monthly mortgage for his property by salary deduction, given that she was employed by the bank. He undertook to reimburse her each month. He also agreed to pay her a one-off sum of one million dollars (USD \$1,000,000.00) in spousal support, recognising that she would bear the greater share of the debt payments.
- [11]** Mrs Spence agreed to the proposals, and Mr Spence drafted and emailed her the agreed terms, set out in a deed of settlement. The deed was formally executed on 16 August 2014.
- [12]** Mr Spence failed to honour his obligations under the agreement and proposed a second agreement. As with the first, he set out the terms and drafted the second agreement. The new agreement required Mrs Spence to assume full responsibility for the mortgages on both properties to avert imminent foreclosure.
- [13]** Under the new terms, Mr Spence agreed to pay \$1,500,000.00 in spousal support by 31 December 2017. He also attached a penalty clause providing that, if he failed to pay this amount by 31 December 2017, he would pay Mrs Spence interest at 12% per year, commencing on 1 January 2018. The parties signed on

18 December 2015. Again, Mr Spence failed to honour the agreement. Mrs Spence commenced these proceedings.

The Timeline of Events

- (i) On 16 November 2018, the claim was filed.
- (ii) On 30 April 2019, Mr Spence was served with the claim form and the originating documents.
- (iii) On 10 May 2019, Mr Spence filed an acknowledgement of service.
- (iv) On 28 May 2019, a judgment in default of defence was applied for and successfully entered.
- (v) On 21 October 2020, seventeen months later, Mr Spence filed an application to set aside the judgment, arguing the default judgment was irregular because the defence had not become due at the time of entry.
- (vi) On 28 July 2021, nine months later, Wong-Small J (Ag) heard the application, granted it, ordered Mr Spence to file and serve his defence within 14 days of the Order, and directed the parties to proceed to mandatory mediation.
- (vii) On 12 August 2021, the defence was due to be filed in accordance with Wong-Small J's Order, but it was not filed.
- (viii) On 5 October 2021, the parties attended mediation in accordance with Wong-Small J's order. No defence was filed up to that time.

- (ix) On 28 October 2021, during a mediation session, Mr Spence agreed to pay \$200,000.00 under the agreement towards the debt.
- (x) On 9 December 2021, he paid a further \$300,000.00. The parties agreed to return to finalise the settlement terms.
- (xi) Mr Spence failed to attend and took no further steps to finalise the settlement reached on 9 December 2021. No defence was filed up to that point.
- (xii) On 22 February 2022, Miss Spence filed an application for summary judgment.
- (xiii) On 21 June 2022, at around 3 p.m., Mr Spence filed a defence.
- (xiv) On 22 June 2022 at 10 a.m., the application for summary judgment was scheduled to be heard.
- (xv) On 22 June 2022 at 10:30 a.m., Mr Spence filed an application for relief from sanctions, seeking permission for the draft defence filed on 21 June 2022 to be treated as properly filed and served within time.

The Applicable Law

[14] The regime governing a court's approach to compliance with timelines and to applications for an extension of time to file a defence is set out in rules 10.3(9) and 26.1(2)(c) of the CPR.

[15] Rule 10 (9) provides that:

"a defendant may apply for an Order extending the time to file a Defence".

[16] Rule 26. 1(2) (c) provides that:

“Except where these rules provide otherwise, the court may-

(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court, even if the application is made after the time for compliance has passed.” (My emphasis)

[17] Rule 26.1(2) (c) provides for a distinct discretionary regime; however, it does not set out a discrete set of factors for the exercise of that discretion. The court must therefore rely on case law for guidance.

[18] Within and beyond this jurisdiction, seminal cases include: **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23; **Feista Jamaica Limited v National Water Commission** [2010] JMCA Civ 4; **Leymon Strachan v Gleaner Company Ltd** [1999] SCCA 12; **Dudley Strokes v Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and Ors** [All England Official Transcripts (1997-2008), delivered 19 January 2000]; **Peter Haddad v Donald Silvera**, SCCA No. 31/2003, Motion 1/2007, delivered 31 July 2007; and **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6.

[19] In **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery**, Harris JA, as she then was, emphasised the court's discretionary powers under the rules. The learned judge held that:

“[17] The Court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing.”

[20] It therefore stands to reason that an applicant, such as Mr Spence, must submit something of value to the court for critical assessment, so that the court may render an informed decision when exercising that discretion.

- [21] Harris JA went on to rely on Panton JA (as she then was) in the oft-cited case **Leymon Strachan v Gleaner Company Ltd**, which concerns an extension of time for an appeal. Harris JA articulated the following statement:

*“[17] In **Strachan v The Gleaner Company** Motion No 12/1999 delivered 6 December 1999, Panton JA (as he then was) outlined the following factors which a court takes into consideration in the exercise of its discretion on an application for an extension of time: ‘(i) the length of the delay; (ii) the reasons for the delay; (iii) whether there is an arguable case for an appeal and; (iv) the degree of prejudice to the other parties if time is extended.’*

He further said that:

‘Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.’”

- [22] I might add that these principles apply to this case. However, I will replace an arguable case for an appeal with a defence on the merits.

- [23] In **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and Ors** [All England Official Transcripts], Lightman J also outlined other factors. These were endorsed and adopted by Harris JA in **Fiesta Jamaica Limited v National Water Commission**. The learned judge of appeal helpfully opined that:

“In deciding whether an application for extension of time was to succeed under rule 3.1(2), it was no longer sufficient to apply a rigid formula in deciding whether an extension of time has to be granted. Each application has to be viewed by reference to the criterion of justice.

Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits, bearing in mind that they were to be observed, and the resources of the parties, which might, in particular, be relevant to the question of prejudice” (My emphasis)

- [24] I find that these additional factors are relevant to this case and will accordingly be taken into account.

The Length of the Delay

[25] The delay is substantial. The defence was due on 11 June 2019. It was filed three years later, on 21 June 2022, more than 1,000 days after the CPR's stipulated 42 days. The delay includes disobedience of a court order. Most notably, it was over 350 days beyond the 14 days granted by Wong-Small J.

[26] Our courts have consistently disapproved of delay, regarding it as detrimental to the efficient administration of justice. In **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6, Harrison JA observed:

[25] We are of the view that time requirements laid down by the rules are not mere targets to be attempted but rules to be observed. In achieving the overriding objective, litigants are entitled to have their cases resolved with reasonable expedition; otherwise, such delay as has been shown to have taken place in the instant case will indeed cause prejudice to the other party involved in the litigation (see Mortgage Corporation Ltd..."

[27] Miss Cousins, in her submissions to this court, candidly conceded the significant delay. Counsel, nonetheless, urged the court to consider the core principles set out in Rule 1.2 of the CPR and the need to ensure that all cases are heard on their merits. Counsel also asked the court to have regard to the Learned Author, Stuart Sime, in his oft-cited book, '**A Practical Approach to Civil Procedure**', 10th edn., para 3.28, where he stated:

"... shutting out a litigant for a technical breach of the rules will not often be consistent with this objective, because the primary purpose of the civil courts is to decide cases on their merits."

[28] Mrs Tamara Francis Riley Dunn, in strong disagreement with those submissions, submits that promptness and adherence to procedural timelines are key features of the CPR, that compliance is essential to the good administration of justice, and that the delay in this case was not only significant but also inexcusable and unjustified.

Analysis

- [29] The court agrees with both Counsel that the delay in this case is significant. The cases have settled the approach a court should take to delay when exercising its discretion to grant an extension. In **Peter Haddad v. Donald Silvera**, SCCA No. 3/2003, at pages 11-12, paragraphs 4 and 3, respectively, the Court held that:

The overriding objective principle of Part 1 of the Civil Procedure Rules(CPR) applies to the rules of this Court- see Rule 1.1(10) (a) of the Rules. Generally speaking, the rules of the Court must be obeyed. The authorities show that in order to justify a court in extending the time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If that were not so, then a party in breach would have an unqualified right for an extension of time, and this would seriously defeat the overriding objective of the rules. (My emphasis)

- [30] Excluding a litigant from the seat of justice, as Miss Cousin submits, is rarely the most effective way to resolve litigation, nor does it align with the overriding objective of the Civil Procedure Rules (CPR). McDonald-Bishop JA (Ag), as she then was, states in **The Commissioner of Lands v Home Way Foods Limited and Stephanie Muir** [2016] JMCA Civ 21:

“[69] The length of the delay is a consideration that strongly militates against the appellant’s application for extension of time and variation of the case management order. However, this finding, while being accorded significant weight, is not taken as being determinative of the ultimate question whether the appeal should be allowed to proceed. Another important issue for consideration is whether the appellant has a good explanation or excuse for the delay.”

It is therefore imperative that I consider the reasons advanced.

The Reason for the Delay

- [31] The affidavit of Miss Shantel Jarrett, at paragraphs 4 and 6, delineates the reasons as follows:

“[4] That the office inadvertently erred in not filing the defence as ordered by the Court in time

[5] ...

[6] The Counsel, with the conduct of the matter, unexpectedly left the firm, resulting in an administrative oversight, and the Orders were not complied with.

.....”

- [32] Miss Cousins submits that the failure was neither intentional nor contumelious, and that the explanation shows the firm was solely at fault. Counsel urges this court not to allow such inadvertence to prejudice Mr Spence's right to have his case heard on its merits.
- [33] Mrs Francis Riley–Dunn, in contrast, urged the court to reject Counsel's submissions. Mrs Francis Riley-Dunn urged the court to carefully examine the reasons provided and to note that, ultimately, the sole justification amounted to administrative oversight, despite the period under review being characterised by a series of delays. Counsel contended that numerous other delays overshadowed Mr Spence's actions and extended beyond the one-year delay following Wong-Small J.'s order that the defence be filed within fourteen days.
- [34] Counsel further submitted that administrative oversight or inefficiency has long been considered an insufficient basis under prevailing case law. Counsel further submitted that the court should consider the applicant's conduct throughout the case, including the many occasions on which the court's rules and orders were disobeyed and the lack of any explanation in those instances.
- [35] Mrs Francis Riley-Dunn further asked the court to have regard to the fact that, although Mrs Spence had obtained a default judgment, Mr Spence applied to have it set aside on the ground that it had been obtained prematurely. Counsel further submitted that, despite having advanced such an application, which he had a right to do, as the judgment was obtained prematurely, he failed to file a defence at that time.

- [36] Counsel further submitted that even after the judgment was set aside and he was ordered by the court to file a defence within 14 days, he failed to do so, and by then his defence had been long overdue.
- [37] In her submissions, Counsel outlined Mr Spence's conduct, stating that his defence was filed more than two years after he was served and that, during that period, he had attended formal mediation and made payments towards an agreed settlement. This, she submitted, demonstrated a blatant disregard by Mr Spence for the rules and orders of the court and ought not to be countenanced by this court.
- [38] In her final submission on the reasons for the delay, Counsel argued that Miss Jarrett's affidavit was terse and failed to provide a satisfactory explanation, and invited the court to find the explanation unsatisfactory and to deny the application. She further submitted, on careful assessment of the reasons provided, that none addressed the periods of non-compliance.
- [39] Counsel asked the court to have regard to two decisions. Firstly, the decision of Fraser J, as he then was, in **HB Ramsay & Associates Limited et al v Jamaica Redevelopment Foundation Inc.** [2008] HCV01405, where the meaning of a good explanation, as analysed by the Privy Council in the **Attorney General of Trinidad and Tobago v Universal Projects Limited**, was cited at paragraph 23, that:
- "[23] To describe a good explanation as one which properly explains how the breach came about simply begs the question of what is the proper explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."*
- [40] Secondly, **Rick's Café (No 2) and Lenard Reid and Others v Nany Pinchas and Other** CL 2002 R/031 (February 27, 2009), in which it was held that a heavy workload and the fact that the file had to change several hands between counsel were not a satisfactory explanation, resulting in the application being denied.

Analysis

- [41] I have considered the submissions from both counsel. I also bear in mind the case of **Salter Rex and Co v Ghosh** [1971] 2 All ER 865, in which Lord Denning MR addressed counsel's mistake and stated that:

“...We never like a litigant to suffer by the mistake of his lawyers...”

- [42] The court notes that non-compliance occurred at two levels: failing to follow this court's rules and failing to adhere to Wong-Small J's orders.
- [43] The rule provides that a defence must be filed within 42 days of service of the claim form; see rule 10.3(1). The parties may, in accordance with rule 10.5(5), agree to extend the time to file a defence. Mr Spence failed to comply with these rules and failed to communicate with Mrs Spence to agree to an extension of time.
- [44] Mrs Spence obtained a default judgment, which was set aside. The application to set aside the judgment was heard a year later, but no defence was filed. The affidavit relied on in support of the application provided no evidence to explain that failure.
- [45] A defence must be filed before mediation. This was the order of Wong-Small J. No defence was filed, and the order was not complied with. At mediation, the parties reached a settlement, and Mr Spence made two payments before breaching the agreement. No explanation was given for failing to file a defence up to that point. Nor was there any explanation for filing the application a day after the draft defence was filed.
- [46] The explanation provides no indication of when the inadvertence occurred, what caused it, when counsel left the firm, or when the firm first became aware that the defence had not been filed. The record shows that throughout mediation, he was

represented by the same counsel. The court is left unsure which counsel is being referred to.

[47] To say that the office inadvertently failed to file the defence as ordered by the Court is not a sufficient and proper explanation in this court's view. The court must be provided with explanations of value and substance, not mere bald assertions. This court cannot accept that the explanation is adequate without greater particularity as to the circumstances prevailing when the defence was due to be filed. The orders of a judge and the rules of the court are to be obeyed. Both the application and the defence were filed on the eve of the hearing. This court therefore agrees with Mrs Riley-Dunn.

[48] The cases have established that, even in the absence of a good reason, an arguable defence is sufficient. In **Peter Haddad v. Donald Silvera**, SCCA No. 3/2003, at pages 11-12, paragraphs 3 and 4, respectively, the Court held that:

*".... As has already been stated, the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered. The Court in **Hancock's**(supra) did not think it prudent to produce a checklist of relevant factors in relation to applications for extension of time. The guiding principle which can be extracted from that case is that the Court, in exercising its discretion, should do so in accordance with the overriding objective, and the reason for the failure to act within the prescribed period is a highly material factor. "*

[49] Even though I do not consider the reasons outlined to be good, I must nonetheless consider whether there is an arguable defence.

Is there an Arguable Defence?

[50] The settled law is that a good arguable defence may open the door to a favourable exercise of discretion and permit an extension of time to file a defence. In this regard, an arguable defence must be disclosed in an affidavit of merit. This is the defence's sworn testimony. It is therefore not enough merely to attach or exhibit such a defence to an affidavit in support of the application for an

extension of time. The defence must be clearly set out in the affidavit as the defence to be relied on. See **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1 and **B& J Equipment Rental v Joseph Nanco** [2013] JMCA Civ. 2 and **Ramkissoo v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73.

- [51] Mr Spence's affidavit of merit was provided by Miss Shantell Jarrett, counsel for Mr Spence. The relevant portion of her affidavit, as it relates to the defence relied on, was set out in paragraph 7, as follows:

"[7] The Defendant further maintains that he is fully able to defend his claim successfully."

- [52] The affidavit did not set out evidence demonstrating how Mr Spence would successfully defend the claim. The defence was attached to the affidavit of merit. An attached defence is of no value to the court, as it is not sworn testimony and ought to have been clearly set out in the affidavit. Based on the cases, the failure to do so renders the defence of no value, and the court need not consider the matter any further. See **The Attorney General of Jamaica v John McKay**, paras 5-7, 8, 17-23.

- [53] For completeness, however, I will review the Draft Defence in this case. The nub of the defence is set out in Paragraphs 4-9 of that defence, which state as follows:

The defendant disputes the claim on the following grounds:

1.....

2.....

3.....

4. Save that it is admitted that the Claimant and the Defendant signed a Deed of Settlement and an Addendum Deed of Settlement on the said dates as averred in paragraphs 4 & 5; the Defendant finds issue with the following:

(i)The Defendant did not have the means to afford legal advice before signing the said documents.

(ii) The Defendant provided an alternative to the terms of the settlement that would have proven financially beneficial to both parties, but the Claimant, her agent at the bank, and her Attorney rejected it.

(iii) The Defendant was coerced into signing the documents, particularly the Deed of Settlement's addendum.

(iv) The Defendant was led to believe that he had to agree to pay spousal support to the Claimant by virtue of him being the male in the relationship.

5. The Defendant contends that having been coerced to sign the said documents, he is not bound to sign to make payments for spousal support and as such denies paragraph 6 of the Claimant's Particulars of Claim.

6. Accordingly, the Defendant denies paragraph 7 and the Claimant's averment of having breached the express terms of the Deed of Settlements and Addendum thereto; and requires the Claimant to provide strict proof of the same.

7. Paragraph 8 of the Claimant's Particulars of Claim is denied as the truth of these allegations is unknown to the Defendant, who avers that he has not received any correspondence from the Claimant's attorney and requires the Claimant to provide strict proof of the same.

8. Further, the defendant makes no admission as to the claim for \$1,500,000.00, interest and costs made in the particulars of claim.

9. The Defendant says that the said agreement was unreasonable in all the circumstances and he felt pressure to sign the same.

10....."

[54] With regard to the defence, Mrs Francis Riley-Dunn submitted that the defence has no real prospect of success. Counsel contended that it lacks critical details that should have been more fully particularised. Counsel further submitted that Mr Spence has a duty to set out his case in accordance with the rules of this court, especially where he alleges fraud and coercion.

[55] Counsel further submitted that there is insufficient detail about the circumstances in which he was pressured to sign the document, and, more importantly, that the exact terms of the alternative agreement were not disclosed. She further

submitted that the agreement was entered into over six years ago and that raising a defence on the basis of these bald assertions is unacceptable. She went on to submit that, to date, Mrs Spence is left to pay all the debts.

- [56] She contended that Mr Spence is now, some six years later, seeking to hide behind an ill-fated defence of coercion that does not even set out the mode of coercion. What is more, Counsel further submitted that he attended mediation and made payments under the said agreement, which she urged the Court to find constituted tacit acceptance of the terms of the agreement, as he was in the presence of his Counsel. Yet, she argued, he now wishes to set aside.

Analysis

- [57] I am in full agreement with the submission of Mrs Francis Riley- Dunn. Serious allegations have been made; a mere bald statement can be fatal to a defence of this nature. The court is not to engage in a mini-trial. However, a detailed defence will address the matters pertinent to the court's determination of whether the defendant has an arguable case on the merits.
- [58] Rule 10 (9) of the CPR is instructive. It states that a defendant must outline his defence in clear terms. It provides that:

Defendant's duty to set out case

10.5

The defence must set out all the facts on which the defendant relies to dispute the claim.

Such statement must be as short as practicable.

In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –

are admitted;

are denied;

are neither admitted nor denied, because the defendant does not know whether they are true; and

the defendant wishes the claimant to prove.

If the defendant denies any of the allegations in the claim form or statement of claim –

the defendant must state the reasons for doing so; and

if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

If, in relation to any allegation in the claim form or statement of claim, the defendant does not –

admit it; or

deny it and put forward a different version of events; the defendant must state the reasons for resisting the allegation.

The defendant must identify in or annex to the defence any document which is considered to be necessary to the defence.

- [59] This court also takes guidance from the learned author Stuart Sime in his book, **A Practical Approach to Civil Procedure** (23rd Edition) at paragraph 14.30, which states:

*“Any denial of an allegation in the particulars of claim must be backed up by reasons in the defence. A defendant who intends to put forward a different version of events from the one advanced by the claimant has to state the alternative version in the defence (r 16.5(2)). A denial must go to the root of the allegation in the particulars of claim and must not be evasive. An equivocal denial may be taken by the court to be an admission. For example, stating that ‘the terms of the arrangement were never definitely agreed upon as alleged’ was held to be evasive and to be an admission that an arrangement was made in **Thorp v Holdsworth** (1876) 3 ChD 637. A denial that follows the wording of the particulars of claim too closely may result in a pregnant negative – a denial pregnant with an unstated affirmative case. For example, in **Pinson v Lloyds and National Provincial Foreign Bank Ltd** [1941] 2 KB 72, the claimant stated that the defendants had ‘effected purchases and sales without having been authorized by the [claimant] to do so’. The defendants denied that they effected purchases or sales without having been authorised by the [the Claimant] to do so.’ This was embarrassing because it could have been a denial that the defendants entered into the transactions at all, or it could have been a denial of lack of authority pregnant with an affirmative case that they had the claimant’s authority.*

*Any affirmative case and any defence must be expressly set out. Each defence should be set out in a separate paragraph. The defence must specifically set out any matter, such as performance, release, expiry of limitation, fraud or illegality, which is a defence to the claim or which might take the claimant by surprise or which raises issues of facts not included in the particulars of claim. Failing to set out such matters may debar the defendant from raising them at trial (**Shell Chemicals UK Ltd v Vinamul Ltd** (1991) *The Times*. 7 March 1991, CA)*

- [60] Without going into a mini-trial, which I am not obliged to do and must not do, Mr Spence, while admitting that he signed the agreement, has also stated that he was coerced and that his signature was induced by fraud. This is a bald statement. Where a claim of fraud, undue influence, and coercion is made, the party seeking to advance such a claim must set out full particulars of the conduct. There can be no departure from this well-accepted position in law. Broad and bare allegations are insufficient.
- [61] I do not find that Mr Spence has set out an arguable defence with a real prospect of successfully defending the claim. I do not find that the defence relied on is arguable or carries any degree of conviction. This, I might add, should be the end of the matter.
- [62] Even if I am wrong on this point, I considered it prudent to borrow the sage words of McDonald Bishop JA (Ag) as she was in **The Commissioner of Lands v Home Way Foods Limited and Stephanie Muir**, where she held that:

“[94] The merits of the appeal, to my mind, while an important and weighty consideration, cannot be the pivotal or the determining one. It is but one of the important considerations to be weighed in the equation in determining what justice dictates at this time. As Professor Adrian Zuckerman noted in a rather instructive article entitled, “The revised CPR 3.9: a coded message demanding articulation” (2013) 32 C.J.Q. Issue 2, 123-138 at 128-129:

“The overriding objective introduced into English civil procedure the idea that justice involves not just rendering judgments that are correct in fact and in law but also doing so by proportionate use of court and litigant resources and within reasonable time. Justice is therefore a three dimensional concept in which time and resources play a

part alongside the imperative of reaching correct results. The court was not slow to articulate the ideas behind the overriding objective. Laws L.J. brought out this point when he wrote, extra judicially, that the CPR: 'involve a conceptual shift in the idea of justice, so that economy and proportionality are not merely desirable aims but are defining features of justice itself. And it is not merely aspiration; it is law.' (Emphasis added)

[95] So, once it is accepted that the ultimate aim of the court is to do justice, other factors, thrown up on the facts of the particular case, must be weighed in the equation because all the circumstances of the case must be taken into account in determining what is just. One such consideration would be, of course, the question of whether any unfairness or prejudice is caused or likely to be caused to the innocent party. The question of prejudice or unfairness to either party, therefore, looms large as an equally important consideration as the merits of the case."

The Prejudice

[63] For completeness, I will address the issue of prejudice. In her affidavit, Miss Jarrett stated at paragraphs 8 and 9:

"[8] That I verily believe that the Defendant will suffer great prejudice in making the Orders sought herein as he has no further redress".

[9] The Claimant will not be prejudiced."

[64] In her submission to this court, Miss Cousin submitted that the prejudice to Mrs Spence would be nugatory compared to that to Mr Spence. She charged that the prejudice to Mr Spence would be significant, as he would be denied the ability to argue, organise, and present his case to the relevant authorities.

[65] Miss Francis Riley-Dunn argues in stark opposition. She contends that, on the factual circumstances of the case, it is reasonable to conclude that Mrs Spence would be further severely prejudiced if the application were granted. She again emphasised that the matter has been before the court for approximately four years, while Mrs Spence has had to shoulder the mortgage payments on the disputed properties alone for almost eight years, the dispute having arisen before the decree absolute was granted. Counsel further submits that it was the result of

Mr Spence's own inaction in honouring his obligations under the agreements he initiated, not once but twice.

- [66] Counsel further contended that if the application is granted, Mrs Spence would be required to wait a further 2 years or more before a trial date is set. The defence, she further submitted, that Mr Spence has raised is no more than a fanciful one, and the affidavit of merit contains only a broad statement that he would be prejudiced, which is insufficient.

Analysis

- [67] In this court's view, when all circumstances are taken into account, it is clear that Mrs Spence acted with alacrity and has consistently sought to progress her matter. The agreement between them was entered into in 2014, and Mr Spence was given until December 2017 to honour it. The claim was filed in November 2018. Mr Spence, though served in April 2019, filed a draft defence in June 2022, some three years later, despite a court order in July 2021 to file it within 14 days. Mrs Spence has had this matter hanging over her head while repaying the debts.

- [68] Further, it was not disputed that both parties reached a consent agreement at mediation. The court must regard this as an important part of Mrs Spence's expectation that the proceedings were coming to an end and that she would be entitled to judgment. I find that Mrs Spence is likely to suffer greater prejudice if the application is allowed.

The Defendant's History of Non-Compliance

- [69] The history of this matter is marked by a series of instances of non-compliance, evident at every stage of the proceedings. The defence was not filed within the time prescribed by the rules; he failed to obey the court's direct order; he failed to file an application after filing a defence; he failed to reply to the application for summary judgment; and he failed to file written submissions and a list of

authorities after being ordered by the court. I agree with Mrs Francis Riley–Dunn that Mr Spence’s conduct is not in keeping with the spirit and tenor of the rules as formulated.

- [70] When considered as a whole, this court finds that Mr Spence’s actions were deliberate, contumelious, and tantamount to an abuse of the court's process. In these circumstances, I adopt the pronouncements of McDonald Bishop JA (Ag.) (as she then was) in **The Commissioner of Lands v Home Way Foods Limited and of Stephanie Muir**:

“[115]. In my view, when all the circumstances of this case are considered, the appellant’s poor (or, at best, checkered) history of compliance assumes marked significance and serves to tip the scale away from a favourable consideration of the application for extension of time and variation of the case management order.”

The Effect of the Delay on the Public Administration.

- [71] The delay in this matter is significant, and the repeated breaches of the court's rules and orders must be called out and given serious consideration, particularly regarding their effect on the administration of justice. In doing so, regard must be had to the impact of an extension of time on this and other listed matters. Equally, due consideration must be given to the effect on the court’s resources and other litigants. In **Arbuthnot Latham Bank v Trafalgar Holdings Ltd** [1988] **1 W.LR 1426 at page 1436**, before the new rules came into effect, Lord Woolf MR, one of the pioneers in the formation of the rules, sitting in the English Court of Appeal, had this to say:

“Litigants and their legal advisors must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of prejudice caused to the particular litigants whose case it is but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits designed to dispose of litigation within a reasonable timescale. Those rules should be observed.

[72] Regard must also be had to those litigants who would have done all they could to comply with the court's rules and orders in anticipation of an early resolution or a hearing of their matters, only to have their matters pushed further away because another litigant has given a further date, notwithstanding repeated non-compliance. Litigation must have finality. Mr Spence made two payments and was to return to sign the agreement. He did not. Mrs Spence was led to believe the claim would be settled.

[73] This court cannot be a party to this clear disregard for the rules, as stated by McDonald-Bishop JA (Ag), as she then was, at paragraph [119] of **The Commissioner of Lands v Home Way Foods Limited and Stephanie Muir**:

'the court should also be concerned with challenges posed to its authority, by the failure of litigants to comply with its rules, directives and orders. There is a live and dangerous threat to the rule of law when the court's authority is undermined by the inexcusable and persistent disregard for its rules and orders. The court is also concerned with what is fair and just to the parties to the proceedings as well as to other litigants who are standing in line to access the limited resources of the court, the most scarce of which is its time.

[74] Having regard to this court's findings, the application for an extension of time to file a defence is refused.

The Application for Summary Judgment

[75] An application for summary judgment may be made at any time after a defence to a claim has been filed. In light of my decision in paragraph 74, there is no defence before the court. The absence of a defence means there is no basis in law to entertain or grant an application for summary judgment. Accordingly, the application for summary judgment is refused.

The Final Order of the Court

[76] In the final disposition of this matter, these are my orders:

- (i) The defendant's Notice of Application for Court Orders seeking an extension of time to file and serve a defence is refused.
- (ii) The claimant's application for summary judgment is refused; there is no defence before the court.
- (iii) Judgment is entered in default of a defence against the defendant in the sum of \$1,917.146.48, plus interest at 12% per annum, commencing on 15 February 2022, until the debt is paid, in favour of the claimant.
- (iv) The costs of this application to the claimant to be taxed if not agreed.
- (v) Application for leave to appeal is refused.
- (vi) The claimant's Attorney-at-Law is to prepare, file and serve this Order.