

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV 2021/0127

BETWEEN:

OSWALD SITNEY
(As Personal Representative of the Estate of Thomas Bristol)
Claimant/Respondent

and

FRANCIS SITNEY
Defendant/Applicant

Before:

The Hon. Mde. Justice Agnes Actie
High Court Judge

Appearances:

Mr. Francis Paul for the Claimant/Respondent
Mr. Nigel Stewart for the Defendant/Applicant

2023: March 29
2024: February 27

RULING

- [1] **ACTIE, J.:** The applicant/defendant, Francis Sitney, acting pursuant to Rule 39.5 of the CPR 2000, as amended applies to set aside the final Judgment made in the applicant's absence on the 4th day of April 2023.

Factual background

- [2] The parties to the claim are siblings but the applicant is not a named beneficiary of the Will of his deceased father (Thomas Bristol). The claimant as personal representative of the estate of Thomas Bristol filed a claim on 26th March 2021 against the applicant seeking various reliefs inter-alia vacant possession of a parcel of land together with buildings situate on the Carenage, an injunction, an account of all monies outstanding and or received by the defendant in respect of

rental of the property; to pay such money as may be found due and owing; mesne profits; damages and costs.

- [3] It is the evidence that Thomas Bristol during his lifetime granted a power of attorney to both parties in 2012 and by a court order dated 8th July 2019, the applicant was appointed guardian of his father.
- [4] It is the defendant's pleaded case that he paid property taxes, maintenance and refurbishment fees, judgment debts and penalties on behalf of his father, all with an intention to acquire an interest in the property. The defence counterclaimed that the property is subject to a resulting trust in the applicant's favour and he is entitled to a beneficial share or interest in the property, or in the alternative that the claimant do repay such sums as found to have been paid on behalf of his deceased father's estate.
- [5] The trial of the matter was conducted on the 29th March 2023 and the court delivered its decision on April 4th 2023 in favour of the claimant in the absence of the defendant and dismissed the defendant's counterclaim.

The Application

- [6] The grounds of the defendant's application to set aside the judgment are as follows:
 - i. On the 27th day of March, 2023, at 2:53 p.m., the Applicant, through his Solicitors, caused to be filed, an Application pursuant to Rule 27.8 of the Civil Procedure Rules 2000 (as amended), requesting that the trial of this matter, the said trial having been scheduled to be held on the 29th day of March, 2023, may be postponed.
 - ii. In support of the said Application, the Affidavit of Azel Hood was filed, detailing that the Applicant had suffered a relapse of a chronic mental condition earlier in the month of March, which said relapse had caused the Applicant to be hospitalized, and

exhibiting a letter dated 23rd March 2023, from Dr. Xioping Shao, the Staff Psychiatrist at the Department of Veterans Affairs, who indicated that the Applicant's clinical condition, had deteriorated as a result of the stress attendant with the court proceedings.

- iii. The Affidavit also exhibited an urgent email to the Registrar of the Supreme Court dated the 24th day of March 2023, at 1:14 p.m., alerting the Court that the Applicant's health had deteriorated due to stress, and that a request would be made shortly requesting for the trial date to be varied so as to ascertain from the aforementioned Dr. Shao how soon the Applicant could potentially be ready for trial.
- iv. The Court refused the Applicant's application for a variation of the trial date.
- v. As a result of the Applicant's ill health, and on the advice of his medical practitioners, the Applicant was not present at the trial.
- vi. Due to the Applicant's absence, the Learned Trial Judge made the decision to admit only the Respondent's evidence, and therefore, the order the Judge made and entered in these proceedings on the 4th day of April 2023, was based only on the evidence of the Respondent.
- vii. Had the Applicant's evidence been admitted, there is a good chance that some other order might have been made, because the Applicant's evidence alludes to an understanding as between himself and his late father, that the Carenage property which had been placed in the applicant's complete control would eventually be conveyed to him, but that the said agreement was never formally committed to writing because

the Applicant's father lost the mental capacity to do so prior to his death.

- viii. This evidence would bolster an Applicant's pleading that there was a trust in favour of himself, since the Applicant's father was aware of the sums the Applicant expended on the property, and the Applicant's management of same, and intended to convey the subject property to the Applicant in recognition of same.

Law and analysis

- [7] **CPR 39.5 (Revised Edition) 2003** makes provision for the setting aside of judgments or orders given in a party's absence and reads as follows:

"39.5 (1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit.

(4) If the evidence shows that the party or legal practitioner was not notified of the date fixed for the trial at which the judgment was given or the order made, the judgment or order must be set aside.

(5) **In all other cases, the evidence must show –**

(a) that –

(i) there was a good reason for failing to attend the hearing; and

(ii) it is likely that, had the party or legal practitioner attended, some other judgment or order might have been given or made;

or

(b) exceptional reasons why the judgment or order should be set aside." [emphasis added]

- [8] An application to set aside judgment made in a party's absence is subject to the clear compendium procedural rules set out in **CPR Part 39.5(5)**. All three pre-

conditions outlined in the Rule have to be satisfied. If one or more of them was not satisfied, the application would have to be refused¹.

[9] Firstly, the **Rule** requires that an application must be filed within fourteen (14) days after the date on which the judgment or order was served on the applicant. The applicant has satisfied the first limb.

[10] Secondly the evidence in support of an application must satisfy the other conjunctive requirements namely:

“(a) that –
(i) there was a good reason for failing to attend the hearing; and
(ii) it is likely that, had the party or legal practitioner attended, some other judgment or order might have been given”

[11] The applicant’s affidavit in support of the application states that he travelled to the USA on the 25th February 2023 to be examined by his doctors because he has a chronic medical condition which he acquired during his period of service in the USA. He further states that while in the USA his health significantly worsened and that he was taken to emergency rooms on two separate occasions. The applicant did not give any details of the dates of admission to the hospital neither did he provide any evidence in support of his assertions. The applicant states that his period of hospitalization significantly impacted his ability to communicate with and instruct his former counsel. He said furthermore the stress of the impending court proceedings was causing a worsening of his symptoms, and that he was unable at the material time to mentally treat with the matter sufficiently to instruct his attorney for fear of death or sever disability. He said he did not appear because of his ill health and, on the advice of his doctors.

[12] Further, the applicant states that had he been present, there is a good chance that a different order would have been made because his evidence would strengthen his claim of a trust having existed in his favour in respect to the

¹ [2011] 1 WLR 2391 Bank of Scotland plc v Pereira

property forming the subject of these proceedings. The applicant did not furnish any evidence to support his averments.

[13] The affidavit evidence of the applicant consists of bare statements devoid of any information to satisfy the conjunctive requirements. Where there is an application to set aside a judgment there must be a real argument made, usually by reference to material unavailable to the judge at the first hearing. The evidence must indicate that the judge's decision was erroneous to prove a reasonable prospect of success. There must be pointed evidence in the affidavit to satisfy the real prospect of success or a strong arguable case.

[14] Counsel for the respondent relies on the decision of **In Bank of Scotland v Pereira**², where the applicant therein made an application to set aside an order made in her absence, she after having notice of the proceedings and failing to appear. It was held that:

“... .. An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in *Regency Rolls Ltd v. Carnall* [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3 (5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.”

[15] The claim before the trial date had a chequered history with satellite applications which are reflected in the several orders on file along with several adjournments. On the 27th day of March 2023, the applicant/defendant made an application to the court requesting the trial date be vacated and rescheduled on the grounds of the applicant's ill health. Reliance was placed on a letter dated the 23rd day of March 2023, signed by Dr. Xiaoping Shao, MD., Staff Psychiatrist, head of the Department of Veterans Affairs in the United States of America. The letter stated that the defendant suffered from a chronic mental health condition and that the defendant's clinical condition has been deteriorating, a large part of which was caused by the prospect of appearing in court and facing court.

² [2011] 1 WLR 2391

- [16] The matter came on for trial on the 29th day of March 2023. The court then proceeded to hear the applicant's application to vacate the trial date. Time was given to Ms. Johanan L. Lafeuillee, legal practitioner for the applicant, to contact the said Xiaoping Shao M.D. based on the letter which specifically stated that contact should be made with the said Dr. if further clarification was required. The court stood down the matter to allow counsel to make contact with the MD, but she returned to state that she was unable to contact Xiaoping Shao M.D.
- [17] The court did not grant the application having regard to the nature of the claim and all the evidence already been filed. The court noted that the report did not state when the applicant would recover. The court also stated that the defendant's alleged to appear at the trial as an excuse not to attend court. The court was also of the view that the application was another attempt to frustrate the trial having regards to the previous conduct of the defendant prior to the trial date.
- [18] The court gave the legal practitioner another opportunity to contact the applicant to appear virtually, however the said counsel stated that she had to obtain permission from Xiaoping Shao MD. before she contacted the defendant, because she did not want to exacerbate his mental health condition. Further, the court at the trial, gave the applicant's legal practitioner an opportunity to cross examine the claimant and the witnesses but she refused to do so.
- [19] The applicant submits that a different decision/judgment would have been given had he been present at the trial. The applicant relies on the principle of resulting trust/constructive trust. The claimant/respondent contends that the applicant was acting in a fiduciary position and cannot claim a beneficial interest in the property at the Carenage which is the subject matter of the claim, a point conceded by the court.
- [20] The court ruled that the applicant who acting in a fiduciary capacity as agent under a power of attorney and as a guardian appointed by the court was required to keep proper accounts of his dealings with his father's affairs.
- [21] The applicant alleges that he spent money for maintenance, taxes and judgment debts etc. but failed to substantiate his averments. The court in its ruling directed

the applicant to give an account of all his dealings as agent and trustee which will include any personal funds that he used as alleged in his defence. It is for the applicant to substantiate with palpable evidence all the personal funds used for benefit of the estate.

[22] The respondent contends and the court agrees that once the applicant is able to prove the amounts that he allegedly spent on the property for repairs, payment of judgment debts etc then the said sums would be a debt on the estate for which the claimant as personal representative would have to settle prior to the distribution of the estate under the Will. The defendant also as an alternative relief in his counterclaim requested a reimbursement of his personal funds spent for the estate.

[23] The court is of the view that the decision would have been the exact same outcome had the applicant been present at the trial. The applicant has failed to satisfy the three conjunctive requirements of Part 39.5(5). Also, the applicant has not raised any exceptional circumstances. Accordingly, the application is dismissed.

Order

[24] For the forgoing reasons, it is ordered and directed as follows:

(1) The application to set aside the judgment made in the absence of the defendant is dismissed.

(2) The applicant /defendant shall pay the claimant respondent costs in the sum of \$1200.00 within fourteen (14) days of today's date.

Agnes Actie
High Court Judge

By the Court

Registrar