

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2009/388

BETWEEN:

CURTIS ZIMMERMAN
Db/a THE ZIMMERMAN AGENCY

Claimant

and

BRITISH VIRGIN ISLANDS TOURIST BOARD

Defendant

Appearances: Ms Tana'ania Small for the Applicant/Defendant
Mr John Carrington for the Respondent/Claimant

JUDGMENT

[2010; 16 June; 21, 30 July]

(Application to set aside judgment in default of defence – whether judgment ‘for a specified sum of money’ – whether judgment irregular – whether application made as soon as reasonably practicable – whether good explanation for not having filed defence within time – whether real prospect of defending the claim – whether judgment to be varied – CPR Parts 2.4, 12.8, 12.10, 13.3 and 13.6 considered)

- [1] **Bannister J [ag]:** This is an application by the defendant British Virgin Islands Tourist Board (‘the Board’) to set aside a judgment entered on 24 December 2009 in default of defence by the claimant, The Zimmerman Agency, Inc (‘Zimmerman’).
- [2] Zimmerman entered into two agreements with the Board, each dated 1 July 2008. One was for the provision by Zimmerman to the Board of public relations services (‘the public relations agreement’) and the other was for the provision of advertising agency services (‘the advertising agreement’). The agreements are similar but not identical. Clause II of the public relations agreement is as follows:

'11. Compensation

CLIENT agrees to pay FIRM in the following manner:

- (a) CLIENT shall pay FIRM a fee (retainer) of \$25,000 per month to cover time of FIRM personnel related to the planning and execution of public relations programs.
- (b) Should the FIRM be required to create materials required for the execution of public relations the FIRM shall bill the CLIENT at an hourly rate commensurate with the task for creative development, art direction, design, copywriting and photo or broadcast supervision.
- (c) Should the FIRM be required to produce materials required for the execution of public relations and promotions the FIRM will bill the CLIENT at the net cost for production of materials related to public relations, plus an amount that will yield the agency 15% of the gross cost of production.
- (d) For the execution of promotions and special events, the CLIENT shall pay the FIRM a blended hourly rate of \$125 per hour for the FIRM's time related to the execution of said promotion and/or event.
- (e) Should the CLIENT require the services of the FIRM to perform programming or design required for interactive initiatives, the CLIENT shall be billed at the published hourly rate for interactive design and interactive programming.
- (f) CLIENT shall pay the FIRM the net cost of all reasonable out-of-pocket expenses including, but not limited to the cost of travel, shipping, long distance, tax, copies, postage, delivery and supplies.'

[3] Clause II of the advertising agreement is in the following terms:

II. Compensation

CLIENT agrees to pay AGENCY in the following manner:

- (a) CLIENT shall pay AGENCY a fee (retainer) of \$50,000 per month to cover time of agency personnel required to perform services related to the planning, creation, and execution of advertising including:
 - 1. Design and development of the identity of the client
 - 2. Planning of marketing and communications related activities
 - 3. Daily management of advertising related activities

4. Creative development and execution of advertising related materials
 5. Preparation of final materials for the production of advertising related materials
 6. Management and supervision of the production of advertising related materials
 7. Planning, negotiating and purchasing media related to promoting the CLIENT as detailed in an annual media plan to be approved by CLIENT in advance of any media placement.
- (b) For all interactive initiatives, including, but not limited to website development and e-mail marketing, CLIENT shall pay AGENCY the published hourly rate for programming, design and project management. All such activities shall be estimated and approved in advance by CLIENT.
 - (c) For space or time in magazines, newspapers, outdoor broadcast included in the annual plan, AGENCY will bill CLIENT the net cost of media. All media placements shall be approved in advance by CLIENT.
 - (d) For interactive media including banners, paid search and other purchased media in any online space, AGENCY will bill CLIENT such an amount as will make the net cost to the AGENCY 92.5% of the gross cost of media thereby affording the AGENCY a 7.5% commission.
 - (e) CLIENT will be billed for the total cost of all materials and services purchased on behalf of CLIENT at the net cost.
 - (f) For any assignments (projects) that are not specifically included in the scope of work outlined in the annual marketing and communications plan, the AGENCY shall bill the CLIENT at a blended hourly rate of \$125 for creative development and account management.
 - (g) CLIENT shall pay the AGENCY the net cost of all reasonable out-of-pocket expenses including, but not limited to the cost of travel, shipping, long distance, fax, copies, postage, delivery and supplies.'

[4] The termination provisions are identical in each agreement:

'The term of the Agreement shall be twenty-four (24) months commencing upon the execution of the Agreement. Thereafter it shall automatically renew and remain in force until terminated by either party pursuant to written notice of termination given to the other party at least ninety (90) days prior to termination, days notice in writing to the other Party, or forthwith if there is a flagrant breach of any of the terms of the Agreement by the other Party and notice in writing of such breach is served upon the

Party in default and such breach continues for thirty (30) days after written notice.'

The words 'days notice in writing to the other party' in line 5 above have clearly been included by mistake and are to be ignored.

- [5] On 27 February 2009 the Board wrote to Zimmerman stating that it could no longer afford to pay Zimmerman under the two agreements and purporting to give three months notice under clause VIa. This was a clear repudiation of the agreement. Whether that repudiation was accepted at any time prior to the issue of the claim form on 19 November 2009 is not entirely clear, but there is no doubt and it is common ground that it was certainly accepted then. The claim form was accompanied by a statement of claim, which pleaded that the agreements were executed on 18 June 2008 and that they accordingly ran for a minimum period of 24 months from that date. The wrongful termination is pleaded and it is further pleaded that as a result of that breach Zimmerman has suffered loss and damage. The particulars loss and damage under the public relations agreement is expressed as a specified sum of US\$400,000, described as 'loss of monthly fees for the balance of the agreement including any required period for termination'. Since the 'monthly fee' under the public relations agreement was US\$25,000, it can be seen that the amount covers sixteen months worth of fees. It became clear at the hearing that in addition to thirteen months claimed for the period prior to 18 June (or 1 July) 2010, the amount claimed included three months after 18 June (or 1 July) 2010, Zimmerman's contention being that the three months notice envisaged by clause VIa cannot be given until, at the earliest, the expiration of the original two year term. The claim thus covers the period from June 2009 until September 2010. The claim under the advertising agreement is similarly calculated (16xUS\$50,000). Thus, the total of the amount claimed under the particulars of loss and damage is US\$1.2m. In addition to that sum, the prayer also claims damages for breach of the agreements.
- [6] The judgment entered on 24 December 2009 was in the sum of US\$1,202,856.85 'inclusive of costs with interest to be assessed'.
- [7] The Board was notified of the entry of the default judgment on 5 January 2010, but took no steps to have it set aside until this application was issued on 16 February 2010, an interval of some six weeks.

[8] CPR Rule 13.3 is in the following terms:

‘Cases where court may set aside or vary default judgment

13.3(1) If rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

- (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
- (c) has a real prospect of successfully defending the claim.

(2) if this rule gives the court power to set aside a judgment, the court may instead vary it.

- Rule 26.1(3) enables the court to attach conditions to any order.’

[9] It is not suggested that CPR Rule 13.2 applies in the present case. The first condition to be satisfied by the Board under CPR Rule 13.3 is that it applied to set aside the judgment as soon as reasonably practicable after 6 January 2010. An affidavit sworn on behalf of the Board on 16 February 2010 explains, first, that the claim form and statement of claim had been sent to the Board’s lawyers and an acknowledgment of service filed. Unfortunately, however, the wrong contract was forwarded and the lawyers had to chase the correct documentation, which they did on 14 December 2009. The Board sent those documents on 17 December 2009. Time for defence had expired (after an agreed extension) on 14 December 2009 and Zimmerman’s lawyers refused to grant any further time. A signed defence was delivered to the Board’s lawyers offices on 4 January 2010 and as I have said the Board was notified of the judgment on the following day. The reason for the delay between then and 16 February 2010, when the application to set aside was made, is said to be the need to ensure that the material to be submitted in support of the application was accurate and the difficulty of co-ordinating the signature of the affidavit in support by the three extremely busy board members. Why that affidavit needed to be signed by all three is not explained.

- [10] This seems to me to be an unacceptable explanation for the delay. I find accordingly that this application was not made as soon as reasonably practicable after 5 January 2010.
- [11] The next condition imposed by CPR Rule 13.3 is that there must be a good explanation for the failure to file a defence in time. The draft defence that has been proffered is, in fact, no defence at all. This is no criticism of the Board's lawyers, it is simply that the Board has no defence on liability. There can be no good explanation for the failure to have served this document in time.
- [12] The final condition in CPR Rule 13.3 is that the defendant has a real prospect of defending the claim. It follows from what I have just said, that at any rate so far as liability is concerned the Board has no prospect at all of defending the claim.
- [13] The Board thus fails, in my judgment, to bring itself within the terms of CPR Rule 13.3.
- [14] By an amendment to its application to set aside the judgment, however, the Board takes the point that the judgment is irregular as claiming a single liquidated sum. Any judgment should, accordingly, have been at least in part (as to which, see below) for damages to be assessed, or, as CPR Rule 12.10(1)(b) puts it, 'a judgment for the payment of an amount to be decided by the Court'.
- [15] The CPR do not use the term 'liquidated sum'. Instead, they use the expression 'claim for a specified sum of money', which is defined by CPR Rule 2.4 as follows:
- '(a) a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract; and
 - (b) for the purposes of Parts 12 (default judgments) and 14 (judgment on admissions), a claim for –
 - i. the cost of repairs executed to a vehicle;
 - ii. the cost of repairs executed to any property in, on or abutting a road; or
 - iii. any other actual financial loss other than loss of wages or other income;claimed as a result of damage which is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and

copies of receipted bills for the amounts claimed are attached to the claim form or statement of claim.'

It is only a sum satisfying one or other of these definitions which will found the entry of a default judgment in accordance with CPR Rule 12.8 – i.e. a judgment for payment of a particular sum of money together with interest.

- [16] The question is whether Zimmerman's claim is for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic *and* is recoverable under a contract. The second limb of the definition, dealing with judgments in cases arising out of road accidents is exclusively concerned with damages for the tort of negligence and throws no light on the first limb. In my judgment Zimmerman must be entitled to judgment for the monthly fees/retainers for the three months following the Board's repudiation of 27 February 2009, since even on the Board's erroneous construction of the agreements it admits that the contracts ran until that time had expired. Those sums are both ascertained and admittedly due under the contracts. I also think that Zimmerman must be entitled to the monthly fees/retainers which accrued during the period (if any) which may have elapsed between the expiry of the Board's three months 'notice' on 31 May 2009 and the date when Zimmerman accepted the Board's repudiation, as being ascertained sums and due under the contracts. It is far from clear to me from the evidence which has been put in on this application when Zimmerman accepted the Board's repudiation. That is something which would need to be ascertained with the benefit of oral evidence and cross examination. But it can be said here and now that, if such a period can be identified, it would not lie in the Board's mouth to put in issue the question whether as a matter of fact Zimmerman had, while this second period was running, actually suffered the expense of retaining personnel for the purposes set out in clause 11a of each of the agreements. That flows from the fact that until the repudiation was accepted by Zimmerman, the agreements remained on foot. Zimmerman remained liable to provide the services which it had contracted to provide and the Board remained entitled to demand their performance. Zimmerman was entitled to be paid its monthly fees/retainers during this period. Those are ascertained sums due under the contracts.

- [17] From the time when the Board's repudiation was accepted, however, which on the material before me appears likely to have been no later than 17 August 2009, when Zimmerman's lawyers wrote their letter before action, the parties' primary obligations under the agreement ceased. The Board

thereafter became liable to Zimmerman for damages for breach of contract, damages which it would be for Zimmerman to prove. It is true that the Board's liability to pay damages sprung from the contract¹, but it would be a misuse of language to describe that liability as consisting of a sum that was 'ascertained or capable of being ascertained as a matter of arithmetic and due under a contract' within the definition of a claim for a specified sum of money set out in CPR Rule 2.4. Such damages are an unspecified sum of money and the only default judgment which could lawfully be entered in respect of them is a judgment under CPR Rule 12.10(1)(b) for payment of an amount to be decided by the court.

[18] In these circumstances, the judgment of 24 December 2009 is irregular and is liable to be set aside. Mr Carrington helpfully referred me to CPR Rule 13.3(2), which provides that if Rule 13.3 gives the Court power to set aside a default judgment, the court may instead vary it. The reason why this judgment must be set aside is not because the Board has brought itself within Rule 13.3(1) (I have already held that it has not), but because it was irregularly entered. I have, however, no doubt that in such a case the Court always has an inherent power to do justice by entering such judgment in substitution as it considers the claimant entitled to and I propose to take that course.

[19] There is, however, one other matter which I need to mention before I deal with the terms of the judgment to which Zimmerman is entitled. As I said earlier, the judgment which is to be set aside assumes that clause VIa of each of the agreements is to be read as disentitling the Board to give notice of termination until after the initial 24 month period has elapsed – in effect substituting a 27 month period for the 24 month minimum stipulated for by the agreements. This is a clear misconstruction of the agreement. All that clause VIa requires is that there should have been three months notice of termination, expiring no earlier than 24 months after the date of the commencement of each agreement. There is nothing in the language of the clause to suggest that the notice may not be given until after the initial 24 months has expired.

[20] It is a general principle familiar from the field, in particular, of employment law, that it will be assumed in favour of the contract breaker that he would, had the contract not have been

¹ Mr Carrington, for Zimmerman, referred me to **Photo Productions Ltd v Securicor Transport Ltd** [1980] AC 827, 848, 849

repudiated, so have arranged his affairs as to have minimized his liability for his breach. It will therefore be assumed, when the damages are assessed, that both agreements would have been brought to an end on 1 July 2010.

[21] Finally, there being no statutory provisions within this jurisdiction allowing the court to make such an award, there will be no provision for pre-judgment interest².

[22] I will therefore set aside the judgment of 24 December 2009 and instead permit the Claimant to enter judgment in the following terms:

‘(1) The Defendant must pay to the Claimant

(a) US\$225,000;

(b) US\$75,000 per month for the period (if any) between 31 May 2009 and the date upon which the Claimant accepted the Defendant’s repudiation (by its letter of 27 February 2009) of the agreements pleaded in the statement of claim herein (or an apportioned part of that sum for the part of any month);

(c) damages for breach of contract, to be assessed;

(d) costs in the sum of US\$2,856.85;

(2) there will be an inquiry to determine (unless agreed) the date upon which the Claimant accepted the Defendant’s repudiation;

(3) the Claimant has permission to apply for directions as to the conduct of such inquiry and as to the assessment of damages.’

[23] Although CPR 13.6 requires the Court to hold or fix a case management conference where a default judgment has been set aside, in the circumstance where, although I have set aside the judgment of 24 December 2009, I have given leave to enter judgment in different terms, it seems to me that that Rule can have no application. In the absence of any specific provision in the CPR

² **Ocean Conversion (BVI) Limited v A.G. of the Virgin Islands** BVIHCV 2008/0192 (1 December 2009)

dealing with irregular judgments, it seems to me that I have an inherent power to make such orders as fit the justice of the case.

[24] The Board must pay the costs of this application, to be assessed if not agreed.

Commercial Court Judge

30 July 2010