

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

Claim No: NEVHCV2022/0161
BETWEEN:

SELECTA INSURANCE AND REINSURANCE
COMPANY (CARIBBEAN) LIMITED

Claimant

-and-

BANK OF NEVIS INTERNATIONAL LIMITED

Defendant

Before Master Alvin Pariagsingh

Appearances: Ms. Edisha Greene for the Claimant.
Mr. Yuri Saunders instructed by Mr. Carlyle Rogers for the Defendant.

2023: October 23
November 13.

JUDGMENT
Defendant's application to set aside default judgment

[1] **PARIAGSINGH, M:** - Before the Court is the Defendant's application to set aside the judgment in default entered on May 02, 2023¹. The application is made pursuant to Rule 13.1 (1) of the Civil Procedure Rules 2000 (as amended)².

¹ Filed on May 02, 2023 and May 05, 2023. Mr. Agbeyegbe also relies on an affidavit filed on May 30, 2023 in response to the Claimant's witness statement for the assessment of damages. Save for paragraph 11 of that affidavit, which repeats the contents of his previous affidavits, the contents of this affidavit are not relevant to this application. Similarly, his affidavit of October 18, 2023 is not relevant to this application.

² Referred to "CPR" then in force until July 31, 2023

EVIDENCE IN SUPPORT:

- [2] In support of the application are the affidavits of Mr. Stephen Agbeyegbe³. Mr. Agbeyegbe deposes that he is the Chief Operations Officer and Corporate Secretary of the Defendant (the Bank). His evidence is that the Bank was under the mistaken impression that this claim was halted pending a report that was made to the Bank following service of this claim.
- [3] It is admitted that the Bank was served on November 18, 2022. This means that the defense was due on December 16, 2022. Mr. Agbeyegbe's evidence is that in December 2022, the Bank sought a legal opinion from Mr. Michael Fay KC regarding the Claimant's account. The Bank became aware of the application for default judgment when it saw the matter listed before this Court for a hearing.
- [4] On April 26, 2023, the Defendant was permitted to attend the ex-parte application for judgment. Following this hearing, the Defendant filed an application on May 02, 2023, the date fixed for the delivery of its decision, for an extension of time.
- [5] Mr. Agbeyegbe's evidence is that the Bank has a good explanation for its failure to file its defense, which was not intentional. He also asserts that the delay in filing the application was not intentional, and he believes that the Bank has a realistic prospect of defending the claim.

EVIDENCE IN OPPOSITION:

- [6] In opposition to the application is the affidavit of Mrs. Leticia Nisbett-Dore⁴. Mrs. Nisbett-Dore is a Director of the Claimant. Her evidence is that the effect of Mr. Agbeyegbe's evidence (in his affidavits of May 02, 2023, and May 05, 2023) is that the Bank made a decision to file a report against the Claimant upon service and deliberately ignored the claim.

³ Also filed on May 05, 2023 with the application.

⁴ Filed on July 24, 2023.

[7] Her evidence is further that the Bank's evidence of instructing Mr. Fay KC to prepare an opinion is lacking in that no date is given when he was instructed. Reference is made to the letter of Mr. Fay KC dated April 25, 2023, and the point is made that the letter does not say when Mr. Fay KC was instructed.

[8] Mrs. Nisbett-Dore's evidence is that the report made by the Bank to the FIU was done maliciously and as a tactic to delay the payment of money of the Claimant held by the Defendant. She contends that the Bank does not have a good explanation for its delay in filing a defense, and it has no realistic prospect of successfully defending the claim.

THE LAW:

[9] The Bank, in its submissions, contended that the Court may take the **Civil Procedure (Revised Edition) Rules 2023**⁵ into consideration, having regard to the combined effect of Rules 75.3 and 75.4 CPR.

[10] Rule 75.3 (3) (a) and (b) of the new CPR provides that if a trial date has not been fixed in proceedings commenced before the commencement date –

‘(a) the court office must fix a date, time, and place for a case management conference under Part 27 after a defense has been filed and give all parties at least 28 days’ notice of the conference; and

(b) these rules apply from the date of the case management conference.”

[11] Rule 75.3 (3)(a) and (b) of the new CPR is unambiguous. The filing of a defence is the trigger for the fixing of a case management conference. Once the case management conference is fixed, only then does the new CPR apply.

[12] Similarly, Rule 75.4 of the new CPR does not lend itself to the Bank's interpretation in my view. This rule simply provides for the Court to take into account the principles set out in Parts 1 and 25 of the new CPR when it has to exercise its discretion.

⁵ Referred to as 'the new CPR'

[13] Part 1 is the overriding objective, and Part 25 sets out the objective of case management. There are no provisions for the new CPR to be considered or applied to an application to set aside a default judgment filed under Part 13 of the previous CPR.

[14] **Rule 13.3.(1) CPR** provides that:

- ‘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 defense as the same case may be; and
 - (c) Has a real prospect of successfully defending the claim.’

ANALYSIS:

[15] The Bank must satisfy the Court of all three limbs:

1. That the application was made without delay;
2. There is a good reason for not filing a defence; and
3. It has a real prospect of successfully defending the claim.

Was the application made promptly?

[16] The application was made on May 05, 2023, three days after the default judgment was entered. This limb of the application is not contested by the Claimant.

Is there a good explanation for not filing a defence within time?

[17] In summary, the Bank's reason for not filing its defense within the time permitted is that it operated under the mistaken view that its report to the FIU halted the claim. Service is not disputed. Upon service, the Bank took positive action. The Bank's evidence is that it made a report to the FIU and sought advice from Mr. Fay KC. The evidence, as the Claimant has emphasized, does not indicate when Mr. Fay KC was instructed. The only evidence before the Court of Mr. Fay's advice is this letter issued on April 25, 2023, some five months after service from ABVI Law to the Bank's Attorneys, confirming that

Mr. Fay KC was commissioned to conduct a review of the banking relationship between the Bank and the Claimant.

[18] In my view, the Bank clearly had the presence of mind to not treat the service of the claim nonchalantly. Having sought to make a report to the FIU and seek legal advice, there is no explanation as to why a defense was not filed, except for the statement that the Bank formed the view that its report to the FIU halted the claim. I find the use of the word 'halted' instead of 'stayed' to be most apt, as the making of a report or seeking advice could not possibly stay the claim.

[19] The Bank relies on the explanation of 'good explanation' set out in **Carty v CLM Heavy Equipment Limited**⁶, in which Innocent J quoted paragraph 15 of Barnister J in **Inteco Beteiligungs AG v Sylmord Trade Inc**⁷, which states:

"'good explanation,' where it occurs in CPR 13.3(1), means an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defense is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix-up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."

[20] The Claimant submits that the principles in **Inteco** are applicable but also relies on the dicta of Lord Dyson in **The Attorney General v Universal Projects Limited**⁸ at paragraph 23, where it is stated:

'The Board cannot accept these submissions. First, if the explanation for the breach, i.e., the failure to serve a defense by 13 March, connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one that "properly" explains how the breach came about simply begs the

⁶ AXAHCV2018/0027(unreported) at para 41

⁷ BVIHCOM2012/0120(Unreported)

⁸ [2011] UKPC 37

question of what is a “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.’

[21] Counsel for the Bank submitted a different approach ought to be adopted where the reason is based on the litigant and where the reason is based on the attorney, seeking to distinguish the Court of Appeal's decision in **Laudat & Anor –v- Ambo**⁹ and the decisions in **Carty**. In **Laudat**, Edwards JA at paragraph stated:

“..... Finally, we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order or practice directions where the explanation given for the delay is a misapprehension of the law, a mistake of the law by counsel, a lack of diligence, a volume of work, difficulty in communicating with the client, a pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.”

[22] I find the Bank's evidence as to how or why the Bank came about the view that its report to the FIU halted the claim is lacking. Even more, on the Bank's own evidence, advice was sought by the Bank on the Claimant's account since December 2022. This, therefore, casts doubt on the bona fides on the Bank's view that its report alone halted the claim. It is curious that there is no evidence the Bank would seek advice on its banking relationship with the Claimant after it was served with a claim, and the Bank does not indicate whether it was drawn to Mr. Fay KC's attention that the Bank was served with a claim.

[23] In my view, the Bank's misapprehension of the law is not a good reason for not filing a defense. The Bank's conduct in assuming that its report 'halted' the claim falls squarely into the inexcusable oversight referred to by the Board in **Universal Projects**. This conduct is a clear indifference towards this claim with the risk of judgment in default being entered.

⁹ HCVAP2010/0016 (unreported- Court of Appeal, Dominica)

[24] This alone is sufficient to dispose of this application. For completeness and in the event I am wrong, I will nevertheless consider the other limb.

Does the Bank have a real prospect of success?

[25] **Blackstone's Civil Practice**¹⁰ gives the following guidance on 'reasonable prospect of success':

"The approach to be taken by the court was summarized by Moore-Bick J in *International Finance Corporation v Utefaxia Spril* [2001] CLC 1361: 'A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice, he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favor of setting the judgment aside... the expression "realistic prospect of success" in this context means a case which carries a degree of conviction."

[26] The Bank submitted that the defense of frustration in respect of the Claimant's claim for breach of contract and, in another instance, attaches proof of payment in relation to a transaction not completed. The Bank also contends that there is no cause of action for interest. Further, the Bank contends that it has a realistic prospect of success as:

1. One of the Claimant's requests was complied with.
2. In respect of the other request, the agreement between the parties has been frustrated.

[27] The Claimant submitted that the admission of the banking relationship between the parties in the draft defense puts the parties in a debtor and creditor relationship. In this relationship, the Claimant submits, it holds the legal title to the debt, relying on **Joachimson v Swiss Bank Corporation**¹¹. The Claimant also relies on the case of **Rubenstein v Safe Harbor Bank Ltd**¹². In this case, Thom J (as she then was) granted summary judgment against the Bank in circumstances where the Bank's defense was that the sums deposited were seized by the Crown acting by the FIU pursuant to the Proceeds of Crime and Money Laundering Act.

¹⁰ 2020 Edition page 470

¹¹ [1921] 3 KB 110

¹² HCA 27 of 2008 (unreported – St. Vincent and the Grenadines)

[28] The Claimant also relied on the dicta of Blenman J (as she then was) in **Devcon Ltd v Cap Juluca Properties Ltd**¹³ in support of its submission that the defense of frustration is not available to the Bank. This, it is submitted, is because the Bank is capable of effecting the transfers to the Claimant in keeping with the agreement of the parties. The Claimant submits that the Defendant has put no evidence of any restriction on the Bank effecting the transfers to the Claimant of its funds, and the terms of the agreement between the parties empower the Bank to use 'any means and routes' capable of facilitating the transfer.

[29] I agree with the Claimant. At its highest, the defense of frustration is arguable and does not cross the threshold of something more than arguable with real conviction.

Other challenges not raised in the application but raised in submissions:

[30] Although not raised in the application, the Bank has raised challenges of no proper service, irregularity, and exceptional circumstances. I find no merit in any of these arguments, notwithstanding that they were not properly raised, for the following reasons:

1. Firstly, the irregularity complained of is to form and not substance. The Bank's argument is that the claim for interest, not being pleaded but being sought in the request, was enough for the Court to have refused the application. I find that argument incredible. A default judgment is a right that accrues based on the Defendant's inaction. Once the conditions in Part 12 are satisfied, the Claimant is entitled to it. The form of the judgment, a fixed sum or a sum to be assessed, does not affect the right to obtain a default judgment.
2. Secondly, the court not awarding interest as claimed only benefits the bank. The bank complains that the court, in taking the approach of having the defendant prove its damages through a process in which the defendant has the

¹³ AXAHCV2009/0014

chance to participate, was irregular. This submission goes against the very core of the Board's decision in **Lux Locations v Zhang**¹⁴:

"50. The same applies, in the Board's view, when it appears to the court that the statement of claim should be struck out, for example, because it is incoherent, does not disclose a legally recognizable claim, or is obviously ill-founded. **The aim of the default judgment procedure is to provide a speedy, inexpensive, and efficient way of dealing with claims that are uncontested and to prevent a defendant from frustrating the grant of a remedy by not responding to a claim. However, those objectives do not justify a court in giving judgment on a claim that is manifestly bad or an abuse of the court's process, even if the defendant has failed to take the requisite procedural steps to defend it. The public interest in the effective administration of justice is not advanced, and on the contrary, would be injured by granting the claimant a remedy to which the court considers the claimant is not entitled.**"

3. Thirdly, the service point was already addressed by this court when the court granted the default judgment. Non-service is not a ground of the application. In any event, it is clear that the objective of service has been achieved.
4. Fourthly, the exceptional circumstances relied upon are the alleged irregularity of the judgment on the basis that the claimant did not plead interest and/or sought to claim interest on an alleged contractual basis in a witness statement filed in support of the assessment. I find no need to even recite the law on exceptional circumstances, save to say that the bank is far from being close to the mark here. This argument is summarily dismissed.

DISPOSITION:

[31] For the above reasons, the application must be refused.

¹⁴ [2023] UKPC 3

COSTS:

[32] Costs follow the event as the general rule. There is no good reason to depart from the general rule. The bank shall pay the claimant's costs, to be summarily assessed if not agreed.

ORDER:

[33] Accordingly, it is hereby ordered that:

1. The Defendant's application filed on May 5, 2023, is dismissed.
2. The Defendant shall pay the Claimant's costs of the application, to be summarily assessed if not agreed between the parties within 21 days from today, upon the application of either party.

**Alvin Pariagsingh
Master**

By the Court,

Registrar