

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil Division)

COMMONWEALTH OF DOMINICA

Claim No: DOMHCV 1999 OF 0186

BETWEEN:

NATIONAL BANK OF DOMINICA

Respondent/ Claimant

and

[1] SAG MOTORS LTD
[2] DESMOND CARLISLE

Applicants/Defendants

Before: Her Ladyship Mde. Justice M E Birnie Stephenson

Appearances:

Mrs Heather Felix Evans of Optimum Legal for the Claimant

Mrs Cara Shillingford Marsh of Cara Shillingford Chambers for the defendants

2011: May 6

July 20

2012: April 13

2020: December 2

December 23

2021: February 5

October 19

October 26

2022: September 22

- [1] **Stephenson J.:** This is a case of considerable antiquity which was commenced in 1999 under the then applicable Supreme Court Rules¹ by way of writ of summons and this is a long outstanding application that has somehow slipped through the cracks and remained unattended for way too many years.
- [2] I wish to start by thanking Counsel Mrs Shillingford Marsh for reminding the court of this application which was never heard or attended to by either the court or counsel who had conduct of the matter. It is known that this court has suffered many calamities which have affected the running of the court, the cleanliness and safety of the files to be handled by the Registry Staff and the court and the timely hearing of matters.
- [3] Both sides have also changed counsel who had conduct of the matter at the time of the commencement of the proceedings, the obtaining of the judgment which counsel seeks to impugn, the enforcement proceedings and the initial application to set aside the judgment.
- [4] Before the court is an application to set aside a judgment in default of defence obtained by the claimant bank which application was brought some 11 plus years after the judgment was obtained and duly enforced. The defendants also seek to set aside the sale of the mortgaged property to the bank, who is the claimant in the matter.
- [5] This court wishes to say at the outset that it is trite law that it is the court's discretion that must be exercised in the light of all the circumstances of the case and the overriding objective. The Court must have regard to all the factors it considers relevant of which promptness is both a mandatory and an important consideration.

CASE HISTORY

- [6] This matter arises out of a debt collection/mortgage claim brought by the predecessors of the claimant bank The National Bank of Dominica Ltd (the claimant) against SAG Motors Ltd & Desmond Carlisle (the defendants) for which a judgment in default of defence was obtained ending in the sale of the mortgaged property. It is to be noted that the judgment was obtained on the **7th July 1999**. The original application to set aside and vacate the judgment was filed in **December 2010**. (Emphasis mine)

¹ The Supreme Court Rules 1970

[7] Before the court is an amended notice of application² for the following orders:

- a. For the continuation of an interim injunction granted on the 10th December 2010 to be continued until the hearing and determination of the application at bar;
- b. An order for the following declarations:
 - i. That the default judgment obtained by NBD on the 9th July 1999 contained an award of compound interest and was irregular, unlawful, null and void;
 - ii. That the said default judgment was excessive, irregular, unlawful, null and void;
 - iii. That the order of interest at the rate of 10% from 1st April 1999 to date of judgment was wrong in law;
 - iv. An order that the default judgment should be set aside *ex debito justitiae*; (in accordance with the requirement of justice; of right; as a matter of right.)
 - v. That all enforcement proceedings including the sale by public auction which have been taken in the matter is of no effect in law based on the fact that the default judgment obtained was irregular, null and void;
 - vi. For the caveat lodged on the Certificate of title to the property registered in Book of Titles L7 Folio 71 of the Registrar of Titles be reissued to the applicants and a further order that the Certificate of title issued to NBD be set aside, and costs.

[8] This application is being strenuously opposed by the claimant.

[9] It should be noted that the new counsel who came onto the record whilst this application was pending both obtained the leave of the court to file additional submissions and they both made oral submissions supplementing their written submissions.

[10] The following submissions were filed by both sides:

- a) On behalf of the Claimant filed on the 13th April 2012, 2nd December 2020 and 23rd December 2020; and
- b) On behalf of the defendant's 20th of July 2011, 5th February 2021 and on the 19th October 2020.

[11] The application is based on the grounds stated on the face of the application and was support by affidavits³ together with exhibits attached thereto sworn by the second named defendant Mr

² Filed on the 6th May 2021

³ Affidavit of Desmond Carlisle signed and filed on the 6th May 2011

Desmond Carlisle who was at the material time the Managing Director of the defendant company on behalf of himself and the first named defendant.

[12] The undisputed facts relevant to the matter at hand can be stated as follows:

- a. the claim was originally a debt collection (mortgage) claim brought by the claimant against the defendants who defaulted on a loan obtained from the claimant.
- b. on the 9th July 1999, the claimant obtained judgment in default of defence against the defendants in the sum of \$3,900.319.27 together with interest at the rate of 10% per annum from the 1st day of April 1999 to the date of judgment and thereafter at the rate of 5% per annum to the date of payment plus costs;
- c. the claimant subsequently enforced their judgment by applying for and obtaining an order for sale to sell the mortgaged property;
- d. the mortgaged property was finally and subsequently purchased by the claimant bank at public auction;
- e. prior to the sale at public auction there were numerous appearances before the court on application to settle articles of sale and fix the auction price. At all material times both parties appeared before the court with and by their respective counsel.

[13] The following issues fall to be determined by the court at this stage:

- a. What is the law applicable to the application at bar, should the application be considered pursuant to the rules of Civil Procedure Rules 2000 (CPR 2000) or the Rules of the Supreme Court 1970 (The RSC)?
- b. Whether it is open to the defendant to seek to set aside a judgment in default 11 years and 4 months after the judgment was entered and after the judgment has been fully enforced?
- c. Should the court allow the application to be made and should the default judgment obtained by the claimant be set aside *ex debito justitiae* in all the circumstances of the case?
- d. Was the judgment obtained by the claimant excessive and wrong in law making it liable to be set aside? Was there an irregular judgment made independently of the rules in that the claimant had no right to obtain any judgment at all?

What is applicable law regarding this application?

- [9] This matter was commenced under the RSC and judgment obtained under the RSC. The application to set aside the default judgment was made under CPR 2000. A resolution of this question becomes necessary in order to decide what are the proper rules of procedure to be applied for disposing of the application? It is considered best to consider this question as a preliminary issue before considering the application itself.
- [10] Counsel Mrs Heather Felix Evans on behalf of the claimant made the preliminary point that the application is to be dealt with under the RSC. Counsel submitted that the judgment obtained in default of defence was obtained before the commencement of CPR 2000.
- [11] Counsel directed the court's attention to part 73(1) of the CPR 2000 which states "*These Rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned.*"
- [12] There were no specific submissions from the defendants' counsel regarding which rules of procedure should be applied to the application. However, this court takes note of part 73.4 of the CPR 2000 which states "*If in proceedings commenced before the commencement date the court has to exercise its discretion, it may take into account the principles set out in these Rules⁴ and, in particular, Parts 1 and 25.*" (Emphasis mine)
- [13] The application before the court is for the setting aside of a judgment in default obtained by the claimant which by its very nature requires the court to exercise its judicial discretion, this is well settled law. In **Gregory Bowen and another -v- Dipcon Engineering Services Limited⁵** Satrohan Singh JA stated that "the power of a judge to set aside a judgment in default is discretionary ..."
- [14] Therefore, it is this court's view that in considering the application at bar the court can take into consideration and account the principles as set out in Parts 1 and 25 of CPR 2000 whilst considering the RSC.
- [15] Counsel for the defendants in her written and oral submission to the court urged several grounds upon the court in support of the defendants' application to set aside the default judgment. In fact, this court was presented with voluminous bundles by both sides comprising over 60 tabs and

⁴ CPR 2000

⁵ Civil Appeal No 9 of 2001 (Grenada)

about 700 pages. There were multiple submissions made by both sides which submissions were as stated before augmented by oral arguments by counsel.

[16] This court intends no discourtesy to either Counsel Mrs Shillingford Marsh or Mrs Felix Evans in not making reference to all their submissions for this court sees that the essential issues in the case fall into a narrow compass.

[17] The court has carefully perused the applications and affidavits in the matter and has given deliberate consideration to all of the submissions of Counsel in this matter and failure to make reference to any submission does not mean that it has not be considered.

[18] This court sees the need to consider only the following:

- i. Whether or not the judgment in default which was entered was at all void or irregular?
If it was void then the judgment would have to be set aside as it would be a nullity
- ii. If the judgment was irregular, then it would be voidable and susceptible to the court exercising its discretion to set it aside. How then would the lengthy delay affect the application?

Void, Voidable or irregular

[19] A void judgment is only one made without jurisdiction, other defects merely render the judgment irregular or voidable.

[20] Even if the judgment is irregular by virtue of the fact that it was for the wrong amount as contended by the defendant the length of the delay in making the application to set aside the judgment is inexcusable particularly in view of the fact that the defendants were at all material times represented by competent counsel.

[21] It is to be noted that the defendant failed to file a defence as was required by the law applicable at the time and the judgment was duly obtained against them. It is further noted that at no time did the defendant deny the existence of the debt or that they were not in default of the terms of their mortgage with the claimant. It is to be noted that the defendants did not seek to file a defence out of time or seek the court's leave so to do. Counsel for the defendant sought to strongly urge the court to set aside the judgment obtained primarily because it was excessive in that it contained compound interest. Counsel contends that the judgment is void. I do not agree with Counsel in this regard.

[22] A void judgment is one where the court acts without an arguable basis of jurisdiction. This is not so in the case at bar. At all material times the court had the jurisdiction to entertain the claim and make the order it made. The error (which error was pronounced years after the judgment was obtained) as to the interest charged in the judgment which made the judgment erroneous and not void ab initio as contended by counsel for the defendants.

[23] This court does agree with counsel for the defendants that if a defendant finds a judgment in default has been entered against him for an excessive amount the judgment ought to be set aside. Counsel referred to and relied on **Rabess & Rabess -v- The National Bank of Dominica**⁶ in support of her submission. This case made reference to **Muir -v- Jenks**⁷ in which it was held [that] "Where a Plaintiff signs a Judgment in Default of appearance for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, subject to the right of the plaintiff, in a proper case, to apply to have the amount of the judgment reduced. "

[24] In **Muir -v- Jenkins** Bluckly LJ in referring to the entering of a judgment in default in a sum exceeding due to the plaintiff said

"If the plaintiff in the absence of the defendant, proceeding properly under the rules, signs judgment for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, unless the party who holds the judgment applies as he may to reduce it to the proper amount. If application to amend be duly made it may be right not to set the judgment aside but to reduce it to the proper sum; but unless the party who holds the judgment elects to have it put right, then upon the authority of *Hughes v. Justin*. (1) it seems to me the defendant is entitled to say "This is a wrong judgment, set it aside." ⁸

[25] It is to be noted based on the authority of **Muir** that the defendant's entitlement to have an irregular judgment set aside as of right. In **Hughes -v- Justin (1894) 1 QB 667** This right however, is subject to the exercise of the power of amendment and the futility of interfering with the judgment. In the case at bar during the passage of time the mortgaged property has been sold and the proceedings applied to the judgment debt. One has to consider look very carefully at all the circumstances relevant to the application and proceedings at bar.

⁶ DOMHCVAP2011/030

⁷ ([1913] 2 KB 412

⁸ ([1913] 2 KB 412 at 417

[26] Should the court accede to the application and set aside the judgment *ab initio* the judgment debtors would in this court's view be faced with a judgment debt based on the contractual rate over the many years that passed even before they applied to set aside the judgment which would not be fair and just to either party in fact it would amount to a futility of interfering with the claimant's judgment.

The delay

[27] In the case at bar the defendants waited some 11 years and 4 months to make their application to set aside the judgment which is a preliminary point taken by counsel for the claimant in response to the application made by the defendant.

[28] Counsel for the claimant made reference to and relied on Order 2 rule 2(1) the application to set aside the judgment on the ground of irregularity "shall not be allowed unless it is made within a reasonable time"

[29] Counsel further submitted that Order 19 Rule 9 clothed the court with a discretion to "set aside or vary any judgment" Counsel Mrs Felix Evans urged the court the use of the word any in the Rules of the Supreme court means that there is no qualification as to the kind of default judgment which the court has the discretion to deal with that the court's discretion can be exercised in respect of any default judgment whether regular or irregular.

[30] Counsel for the claimant further submitted and relied on the Privy Council's decision in **Dipcon Engineering Services Ltd -v- Bowen and DOC⁹** and noted that in that case a delay of 4 1/2 years was considered significant enough to weigh against an application to set aside a default judgment even though they were discussions being held between the parties.

[31] Lord Brown of Eaton -under-Heywood in delivering the court's opinion did say at paragraph 33 of the judgment that "... it would not have been right to set aside this judgment after four and a half years unless the proposed defence were substantially more convincing than merely not "hopeless".

[32] In the case at bar, we know not of a defence to the claim per se.

⁹ (2004) 64 WIR 117, 2004 [UKPC] 18

[33] Among the other cases referred to be counsel in support of her position that the defendants' application should not be allowed due to the inordinate and excessive delay was **Mercurine Pte Ltd -v- Canberra Development Pte Ltd** ¹⁰counsel quoted the Court of Appeal's judgment where it was stated

"In both types of setting - aside applications -i.e., relating to regular and irregular default judgment respectively – the defendant's delay in making the application is a relevant consideration and may be determinative where there has been undue delay ... As a rule of thumb, the longer the delay, the more cogent the merits of the setting-aside application would have to be"

[34] Under the Supreme Court Rules the court had the power to set aside an irregular judgment which could be applied for by any party "injuriously affected by it". **Re: Windsor -v- Chalcraft**¹¹

[35] In the case at bar the defendants at all material times knew of the claim made against them by the claimant and at all material times knew of the proceedings and took part in the proceedings and therefore cannot now in this court's view sincerely seek to set aside the judgment and all the subsequent proceedings to enforce the judgment.

[36] The reason presented by the defendant was that they were basically awaiting a ruling of the Court of Appeal in another matter to inform them of whether or not to make the application in the case at bar. In the meantime, the defendants and his counsel and even a financier on the defendants' behalf participated in the enforcement proceedings fully.

[37] The defendants in this court's view made a deliberate decision not to apply to set aside what they claim to be an excessive judgment in a timely manner. To this court, the defendants acquiesced in the enforcement proceedings by fully participating in the hearing and even at the auctions through a third-party financier. It is only after the mortgage property was sold and the defendant who was a party to the ruling in the Court of Appeal Case of **Sag Motors -v- Royal Bank of Canada and Desmond Carlisle -v- Royal Bank of Canada**¹² that the defendants were prompted to make this application.

[38] This court cannot help but consider that the defendants' actions amount to an abuse of process as was the finding of Justice of Appeal Barrow in the **Dominica Industrial and Development Bank -v- Mavis Williams**¹³ appeal when the learned Justice of Appeal considered the appellant's delay in

¹⁰ [2008] 4 SLR (R) Singapore

¹¹ [1938] 2 ALL E R 751

¹² High Court Civil No 11 of 2010 (Dominica) and High Court Civil NO 12 of 2010 (Dominica)

¹³ Civil Appeal No 20 of 2005 (Dominica)

appealing. Likewise, the defendants in the case at bar have chosen not to apply to set aside the judgment in a timely manner as 11 years by no stretch of imagination can be considered timely. The extensive delay in the case at bar is indeed a decisive factor whether or not to grant the application under consideration.

[39] The intentional delay in the case at bar is indeed a weighty consideration. There is no doubt in this court's mind that the defendants' lawyers have sought to couch their application in language that suggest that the judgment obtained by the claimant was void and unlawful and should be set aside *ex debito justitiae*. **Choraria v Sethia**¹⁴ was quoted and applied by Justice of Appeal Barrow in the **Dominica Agricultural and Development Bank** case¹⁵.

[40] This court is of the view that this case is relevant to and applicable to the case at bar particularly regarding the inordinate delay on the part of the defendants to bring this application. To allow this application it is this court's view would visit great injustice to the claimant, there must be an end to litigation.

The default judgment

[41] "Judgment in default as is used in the supreme court connotes judgment obtained by one party as a result of some failure on the part of the opposite party to do something which he is directed to do by the Rules of Court." Per Bollers CJ in **Hemchand Bhagwandin -v- Ernest Collins** ¹⁶

[42] It is the defendants' contention that the judgment obtained by the claimant was in an excessive amount and therefore is void and should be set aside *ex debito justitiae*. The definition of void judgment was already stated previously in this judgment.

[43] Basically, where a default judgment is obtained which can be considered irregular and even incapable of being corrected by way of variation the defendant has a right to have it set aside as a matter of right. However, in **Mercurine Pte Ltd -v- Canberra Development Pte Ltd**¹⁷ it was held that the right is not an absolute right even though the judgment may be irregular. It was held *inter alia*

¹⁴ [1998] EWCA Civ 24

¹⁵ *Supra*

¹⁶ (1967) 11 WIR 335 at page 336

¹⁷ (*Supra*)

that the defendants right to have the judgment set aside is also subject to the duty to make their application within a reasonable time. This court finds this decision to be sound in principle and policy. (emphasis mine)

[44] When considering an application to set aside a default judgment the court will have regard to whether or not the defendants' application was made promptly even if the defendant has a real prospect of successfully defending the claim.

[45] Counsel Mrs Felix Evans for and on behalf of the claimant has submitted that the application has not been made in a reasonable time. It was contended by counsel that under the RSC delay is an important factor and under Order 2(1) of the RSC. Counsel cited and relied on Order 2 rule 2(1) which states *"an application to set aside for irregularity any judgment shall not be allowed unless it is made within a reasonable time"*

[46] The delay between the judgment in default being granted and the application to set aside the judgment in the case at bar is 11 years and 4 months. That in and of itself is an excessive delay. The only explanation which can be garnered from the defendants is that the second named defendant was involved in another matter before this court in which the issue of interest was being canvassed and the defendants and their then counsel was awaiting for that matter to be dealt with to inform them as to whether to take action herein.

[47] It is noted that in the meantime the defendants and their counsel participated in the various enforcement proceedings in the case at bar. It is also noted that the defendants also actively took part in the auction sale to purchase the property through a third party.

[48] It is therefore clear to this court that the defendants at all material times had their hands on the pulse of this matter so to speak and knew at all times what was happening and it is interesting to note that no effort was made by the defendants to seek not even a stay in this matter pending the outcome of their other matter. One cannot help but ask the question as to whether it would be fair to all the parties for after the passage of 11 years and the fact that the mortgaged property has been sold that the defendants can be permitted to set aside the judgment.

[49] I am satisfied based on counsel Shillingford Marsh's submissions that the judgment obtained by the claimant is attractive in that the judgment obtained may be irregular. In the circumstances of this case

the existence of factors which may make the judgment irregular is clearly outweighed by the inordinate delay and inaction by the defendants and that is regrettable. In my judgment these factors point towards refusing to set aside the judgment

[50] One has to consider the excessing delay in this matter and that the mortgaged property has been sold even four years before the defendants saw it fit to apply to have the defence in default of defence being set aside and consideration has to also be given that the enforcement of the judgment and the claimant realizing its mortgage interest in the property was not done behind the defendants' back but quite to the contrary the defendant partook in the proceedings at every step taken.

[51] There was clearly a failure by the defendants to make their application to set aside the default judgment within a reasonable time as is required by the law, both under the RSC and the CPR.

[52] In all of the circumstances of this case this court concludes that, this application was not made promptly and there is no good reason setting aside the judgment. It would clearly not be appropriate having regard to all the various factors to which the court has taken into consideration and which this court is required to have regard.

[53] Thus, after duly considering and analysing submissions made, the cases referred to by both counsel, the facts and law this court humbly finds that the defendants should have applied to set aside the judgement obtained against them in a timely manner and to make the application some 11 plus years after when they knew of the judgment at all material times ought not to be allowed and therefore this application fails on the preliminary point alone.

[54] The defendants' application is therefore dismissed in its entirety. Consequently, there is no need to address the purchase of the mortgaged property by the mortgagor.

[55] The general rule is that the successful party is entitled to costs of the proceedings. The successful party will have, that is the claimant, shall have its costs to be assessed if not agreed.

[56] I wish to thank counsel for their helpful submissions and authorities.

[57] For all the reasons as stated above the court makes the following order:

1. The defendants' application is dismissed in its entirety;
2. Costs to the claimant to be assessed if not agreed.

M E Birnie Stephenson
High Court Judge

By The Court

[SEAL]

Registrar