

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

Claim No: ANUHCv2021/0409

BETWEEN:

ASOT A. MICHAEL

Claimant

and

- 1. MARIE CLARE HURST in her capacity as GENERAL SECRETARY OF THE ANTIGUA AND BARBUDA LABOUR PARTY**
- 2. PAUL CHET GREENE in his capacity as CHAIRMAN OF THE ANTIGUA AND BARBUDA LABOUR PARTY**
- 3. GASTON BROWNE in his capacity as POLITICAL LEADER OF THE ANTIGUA AND BARBUDA LABOUR PARTY**

Defendants

APPEARANCES:

Kema Benjamin for the claimant

Dr David Dorsett for the defendants

2022; August 12
October 7.
October 31st (amended)

AMENDED DECISION

[1] **GARDNER HIPPOLYTE, M:** This is an application by the claimant to set aside a default judgment on a counterclaim under the Civil Procedure Rule (CPR) 13.3 (1) and 13.2.

BACKGROUND

[2] The instant claim was filed on 8th November 2021, the Applicant/Claimant Asot A. Michael, filed a Claim Form and a Statement of Claim against the Respondents/Defendants seeking:

- (a) A declaration that the Central Executive of the Antigua and Barbuda Labour Party (ABLP) cannot lawfully convene to the exclusion of the Claimant who is the duly elected Member of Parliament for the Constituency of St. Peter on the ABLP ticket at the last general election.

- (b) A declaration that the sitting of the Central Executive of the ABLP on 22nd October 2021 to the exclusion of the Claimant as the duly elected Member of Parliament for the Constituency of St. Peter at the last General Elections on the ABLP ticket, was contrary to Article 8.5.2.4 of the revised constitution of the ABLP and was therefore unlawful.
- (c) A declaration that all decisions taken at the Central Executive Meeting of 22nd October 2021 held to the exclusion of the Claimant as the duly elected Member of Parliament for the constituency of St. Peter are null and void and of no legal effect.
- (d) A declaration that the meeting held on 27th October 2021 in the Constituency of St. Peter by the Defendants to the exclusion of the Claimant as the duly elected Member of Parliament for the Constituency of Saint Peter on the ABLP ticket at the last held General Elections, which purported to elect a new Constituency Branch executive was contrary articles 8.34, 8.35, and 8.38 of the Revised Constitution of the ABLP and therefore unlawful and null and void and of no legal effect.
- (e) An injunction to restrain members of the ABLP and the Defendants personally, by themselves, their servants and/or agents, from convening Central Executive meetings to the exclusion of the Claimant.
- (f) An injunction to restrain members of the ABLP and the Defendants personally from carrying out or otherwise giving effect to any decision made by the Central Executive at its meeting held on 22nd October 2021.
- (g) An injunction to restrain the members of the ABLP and the Defendants personally from recognising as the Executive or members of the Constituency Branch of the Constituency of St Peter the persons purportedly elected on 27th October, 2021, or from giving effect to any decision or directive given by the said Executive or members of the Constituency Branch purportedly elected on 27th October 2021.
- (h) An injunction to restrain the members of the ABLP and the Defendants personally from taking any action with the aim or effect of removing the Applicant from the ABLP or preventing the Claimant from functioning as the duly elected member to the House of Representatives for the Constituency of St. Peter within the Party structure, or preventing the Claimant from carrying out his functions as the duly elected representative of the Constituency of St. Peter within the ABLP, other than in accordance with the Revised Constitution of the ABLP.
- (i) Aggravated damages, Filing fees, Process server fees, costs, and any other relief this court deems just.

[3] The Respondents/Defendants filed their Defence and Counterclaim on 24th January 2022. The Counterclaim sought the following remedies:

- (a) A declaration that the suitability of a candidate or list of candidates as determined by the Central Committee is a nonjusticiable issue;
- (b) A declaration that a candidate or a list of candidates deemed unsuitable by the Central executive cannot be a candidate in a primary election at the Constituency level and cannot be on the party ticket in a by-election for election to Parliament or on the Party ticket in a general elections otherwise;
- (c) Costs;
- (d) Further or other relief as the court may consider just pursuant to section 20 of the Eastern Caribbean Supreme Court Act.

[4] The Reply and Defence to Counterclaim was due to be filed on 22nd February 2022. The Applicant/Claimant failed to file a defence to counterclaim within the prescribed time or at all. Accordingly, on 28th February 2022, the Respondents/Defendants filed a request for default judgment, which judgment was entered on 7th March 2022.

[5] The Applicant/Claimant being dissatisfied with the default judgment, filed an application on 11th March 2022 to set aside the default judgment entered on 7th March 2022 pursuant to part 13.3 (1) of the Civil Procedure Rules.

[6] The court having reviewed the application asked the parties to address the court on section 13.2 in addition to 13.3(1), and whether the entry of the default judgement was irregular because the Registrar did not have the power to grant the remedies sought in the counterclaim. Additional time was given, and the parties filed further submissions on this latter point.

[7] I will now go on to substance of the application, first addressing the application under 13.3(1) and then 13.2 of the Civil Procedure Rule (CPR).

CIVIL PROCEDURE RULE 13.3

[8] CPR 13.3(1) specifies the three conditions which a defendant must satisfy before a default judgment can be set aside¹. It is also settled law that the conditions are conjunctive². I will now consider the three conditions.

APPLIES TO THE COURT AS SOON AS REASONABLY PRACTICABLE

[9] The default judgment was granted on the 28th February 2022; entered on the 7th March 2022 and on the 7th of March this is when the claimant became aware of the default judgment. The application to set aside was filed on the 11th March 2022. The applicant/claimant applied to the court for the judgment to be set aside 4 days after it was entered. Counsel for the claimant has referred to **Louise Martin v Antigua Commercial Bank**³ and **Earl Hodge v Albion Hodge**⁴ where 15 and 13 days were considered as soon as reasonably practicable. Counsel for the Respondent/defendant highlights in his submissions that the applicant has not satisfied the court under CPR 13.3(1) (b) and (c). Therefore, it would appear he has conceded on this condition of the rule. Having reviewed the case law and the application, I accept that the period of 4 days is “**as soon as reasonably practicable**” after finding out judgment was entered.

[10] In the circumstances I find that this component of the three-pronged test has been satisfied.

GOOD EXPLANATION FOR THE FAILURE TO FILE A DEFENCE

[11] The applicant/claimant has submitted that the reasons for the failure to file the defence to the counterclaim on time was because the parties had been encouraged by this court in another matter to engage in settlement talks. That the other matter was very similar in nature, consisted of similar parties and since all the matters were related, the claimant's Attorneys-at-Law did not think it was prudent to prosecute all the cases whilst attempting to settle. The claimant in paragraph 8 of the

¹ 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 the judgment has been entered;
(b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
(c) Has a real prospect of successfully defending the claim.

² As per Barrow JA at paragraph 7 of **Kenrick Thomas v RBTT Bank Caribbean Limited**, Saint Vincent and the Grenadines Civil Appeal No 3 of 2005 (delivered 13th October 2005, unreported) and **Public Works Corporation v Mathew Nelson consolidated with Elton Darwton et al v Mathew Nelson** as per Pereira CJ at paragraph 13.

³ ANUHCv 1997/0115 at paragraph 9

⁴ BVIHCv 2007/0098 at paragraph 14

affidavit in support of the application highlights in more detail what was being considered, and further states that even though the defence to the counterclaim was not filed it had been drafted.

[12] The applicant/claimant relies on **Inteco Beteiligungs AG v Sylmord Trade Inc.**⁵ Justice Bannister identified that the expression “good explanation” -

“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 defence is something other than mere indifference to the question whether or not the claimant obtains judgement. The explanation may be banal and yet be a good one for the purposes of CPR 13.3.”

[13] The counsel for the respondent/defendant indicated that the explanation provided is not a good explanation. It is suggested that guidance can be gleaned from **Attorney General v Universal Projects Ltd.**⁶ where the Privy Council in the judgment of Lord Dyson stated that:

“To describe a good explanation as one which “properly” explains how the breach came about simply begs the 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.”

[14] I wish to point out that the similar points were articulated by the learned Chief Justice Pereira in **Public Works Corporation v Mathew Nelson consolidated with Elton Darwton et al v Mathew Nelson**⁷ in that case it was highlighted that administrative difficulties or deficiencies do not amount to a good explanation. Reference was made to a decision by Edwards JA and examples were stated⁸ of when Counsel do not have a good explanation which will excuse non-compliance with an order or practice direction.

⁵ BVIHCV (COM) 2012/0120 at paragraph 15

⁶ [2011] UKPC 37 at paragraphs 21-23

⁷ DOMHCVAP 2016/0007 7 DOMHCVAP 2016/0008 at paragraphs 14, 19, and 20.

⁸ Michael Laudat et al v Danny Ambo DOMHCVAP2010/0016 as per Edwards JA paragraph 14

“ 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 direction where the explanation given for the delay is misapprehension of the law, mistake of the law by counsel; lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.

[15] There is no affidavit in response to the application to set aside the default judgment from the respondent/defendant. Information is referred to in the submissions by the counsel for the respondent/defendant but since it is in the submissions and not in an affidavit the court is not able to take these facts into consideration. I have however noted the argument suggesting that the excuse provided does not bring it within the realm of a good explanation.

[16] The applicant/claimant has proffered the excuse that the main reason for the delay was that the parties were in settlement discussions and did not want to act in bad faith. The excuse is an explanation, but the court is of the opinion that this is not a “good explanation.” Instead, I am of the view that counsel for the applicant/claimant should have applied for and/or communicated with counsel for an extension of time to file the defence, instead of placing reliance on acting in good faith due to the settlement talks. The CPR does not provide for this type of situation, instead the rules provide for avenues for an extension of time to file the defence.

[17] Accordingly, I therefore find that a good explanation has not been made out and the applicant/claimant fails under this rule.

HAS A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM

[18] Since the test is conjunctive, it is unnecessary to consider this ground at this juncture having failed under “good explanation”.

[19] Accordingly, the applicant/claimant has failed to satisfy the conjunctive test under CPR 13.3(1) and this part of the application is refused.

CIVIL PROCEDURE RULE 13.2

[20] I will now turn to consider whether the default judgment obtained on the 28th February 2022 ought to be set aside on the basis that it is an irregularly obtained judgment.

[21] CPR 13.2 requires the court to set aside a default judgment if the conditions as in this case under CPR 12.5 were not satisfied. In summary, the court office under CPR 12.5 at the request of the claimant must enter judgment for failure to defend once service is proved, an acknowledgment is

filed, the period to file a defence and any extension has expired, and the defendant has not filed a defence.

[22] It is accepted generally that the court office can enter default judgment on a counterclaim. It is agreed by the parties that the applicant/claimant failed to file a defence to the counterclaim within the period required by the rules. Additionally, there was no extension of time to file a defence agreed to between the parties or an order of the court permitting the same. The parties in this case differ on the issue that this a default judgement that could have been granted by a court office, a registrar and I go so far as to say by a master of the court.

[23] The respondents/defendants filed a request in form 7 as well as an application for the court to determine the terms of the judgment. Two affidavits in support are provided to support the application under CPR 12.10(4) and (5). The counterclaim sought reliefs that are declaratory in nature. Previously stated at paragraph 3 above.

[24] It is argued by the applicant/claimant that since the relief is declaratory in nature and not a claim for a money judgment the default judgment was outside the parameters of 12.10(1) (a) and (b) and should not have been entered by the court office on the filing of the request of form 7. Reference is made to the case of **Arthur Saldivar v John Bricento et al**⁹. The counsel for the respondents/defendants disagrees with this proposition primarily because the Belize jurisdiction is not binding and the arguments laid therein are not persuasive because the rules are different. I agree with counsel's suggestion that since the rules are different it is not binding. Additionally, in Saldivar emphasis was placed by the court on a necessary implication and not an express position set out by the rules. Reference was made to the procedure set out in the English rules in Blackstone's Civil Practice and there being two mechanisms under the rules for entertaining default judgements.

[25] The civil procedure rules for the Eastern Caribbean Supreme Court are not analogous in that respect. The English rules at 12.4 refer to the Procedure for Obtaining Default Judgement, which establishes clearly the two separate mechanisms for default judgement. The CPR in our jurisdiction at the heading Procedure it only refers to filing a request under form 7 and under the heading Nature of a default judgment it allows for an application to be made when it is a claim **for some other remedy**.

⁹ Claim no 362 of 2018

[26] I however turn to the additional arguments proposed by Counsel for the applicant/claimant where the court in **Patten v Burke Publishing Co**¹⁰ highlighted the following –

It is not the normal practice of this division to make a declaration when giving judgment by consent or without a trial as in the case of a judgment in default of defence or of notice of intention to defend the proceedings. That is a practice of a very long standing.”

[27] As well as counsel further referred the court to **Wallesteiner v Moir**¹¹ where it was stated by Buckley LJ as follows –

‘It has always been my experience, and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence and a fortissimo if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation. “

[28] In my opinion what is important is not whether the correct form was used but whether the court office, the Registrar or even a master has the jurisdiction to enter default judgement for terms to be decided when the relief sought is declaratory in nature. And if they do not then the default judgement granted was irregular and ought to be set aside.

[29] Counsel for the respondent/defendant has countered the applicant’s argument with reference to CPR 12.13 and **Attorney General v Universal Projects Ltd**. Counsel also referred the court to Pattern

¹⁰ [1991] 1WLR 541, 543.

¹¹ [1974] 3 All ER 217

v Burke Publishing Co. Ltd¹² as further authority to support the proposition that a declaration can be granted without a trial. The facts of this case are different in that the declaration was reference a breach of contract which is vastly different from the reliefs sought in this instant case. In this instant case the declarations sought are the suitability of a candidate or list of candidates as determined by the Central Committee is a nonjusticiable issue; and a candidate or a list of candidates deemed unsuitable by the Central executive cannot be a candidate in a primary election at the Constituency level and cannot be on the party ticket in a by-election for election to Parliament or on the Party ticket in a general election otherwise.

[30] I therefore disagree with the arguments proposed by counsel for the defendant/respondent and find favour with the arguments proposed by counsel for the claimant/applicant and state that if there is no jurisdiction/authority to perform an act then the judgment is irregular¹³ and must be set aside, because the conditions to enter the judgment were not satisfied.

[31] Accordingly, the application to set aside the default judgement because it is irregular is granted.

CONCLUSION

[32] Accordingly, the application failed under 13.3(1) but is granted under 13.2 CPR.

[33] For the abovementioned reasons the order of the court is as follows:

1. The claimant's application to have the default judgment set aside is granted;
2. The court office to issue a date for further case management;
3. Costs to be agreed if not assessed;
4. The claimant to draw file and serve this order.

Charon Gardner-Hippolyte
High Court Master

BY THE COURT

REGISTRAR

¹² [1991] 1 WLR 541 at 543

¹³ **Kenyn Pamela Couden** administratrix of the Estate of **Gary Clouden v Phil Culzac SVGHCV 2011/0466**