

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT CHRISTOPHER AND NEVIS

CLAIM NO: SKBHCV2019/0269

IN THE MATTER of an application for orders pursuant to Rules 13.2, 13.3 and 26.1(2)(k) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 as amended.

BETWEEN:

SEO HYEON PARK

Claimant

and

PELICAN BAY LIMITED

Defendant

Appearances:

Mrs. Vadeesha John-Brookes with her Ms. Hadya Dolphin for the Claimant
Mr. Victor Elliott-Hamilton for the Defendant

2022: March 17, May 3;
May 31.

RULING

- [1] **GILL, M.:** The defendant seeks orders setting aside a default judgment and for an extension of time to file a defence.

Background facts

- [2] On 29th October 2019, the claimant Seo Hyeon Park ("Ms. Park") filed a claim form and statement of claim against the defendant company Pelican Bay Limited ("Pelican Bay") alleging breach of an agreement. The claim form and all requisite documents were served on Pelican Bay at its registered office.
- [3] Ms. Park sought the following relief:

1. A declaration that the defendant company breached the purchase and sale agreement dated the 17th day of May, 2016;
2. The sum of US\$450,000.00 being the equivalent of EC\$1,222,605.00 to be paid to University Gardens Incorporated. Alternatively, the sum of US\$450,000.00 being the equivalent of EC\$1,222,605.00 to be paid to the claimant;
3. The sum of US\$22,500.00 being the equivalent of EC\$61,130.25 representing collection fees;
4. Damages for loss of rental income;
5. Interest thereon pursuant to section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act, Chap 3.11 of the Laws of Saint Christopher and Nevis;
6. Costs; and
7. Any further relief that the court deems just.

Amount claimed	EC\$1,283,735.25
Court fees	\$125.00
Legal practitioner's fixed costs on issue	<u>\$2,500.00</u>
Total claim	<u>EC\$1,286,360.25</u>

- [4] The time for Pelican Bay to file an acknowledgment of service and a defence in accordance with the Civil Procedure Rules 2000 as amended ("CPR") expired without any such filings.
- [5] Consequently, Ms. Park made a request for judgment in default which was granted and entered on 29th May 2020. I reproduce the judgment of the learned registrar verbatim as follows:

"UPON IT APPEARING

1. *That the Defendant Company has been served with the Claim Form and the Statement of Claim which were filed in this matter; and*
2. *That the time for the Defendant Company to file an Acknowledgement of Service has expired and the Defendant Company has not filed an Acknowledgement of Service.*
3. *That the time for the Defendant Company to file and serve a Defence has expired and the Defendant Company has not filed and served a Defence.*

IT IS HEREBY ORDERED AND ADJUDGED THAT

1. *Judgment is entered for the Claimant against the Defendant Company;*
2. *The Defendant do pay to the Claimant the sum of \$1,283,735.25;*
3. *The Defendant do pay to the Claimant court fees in the sum of \$201.00;*
4. *The Defendant do pay to the Claimant fixed costs in the sum of \$2,850.00; and*
5. *The Defendant do pay interest on the sum of \$1,286,786.25 at the rate of 6% per annum from the date of this Judgment until payment in full, pursuant to Section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act Chap 3.11 of the Laws of the Federation of Saint Christopher and Nevis."*

[6] The judgment in default was served on Pelican Bay at its registered office on 17th June 2020.

[7] On 18th August 2020, Pelican Bay filed the notice of application to set aside the default judgment.

[8] Pelican Bay grounds its application on the basis that the default judgment must be set aside under CPR 13.2 because it is irregular. Alternatively, it asks the court to exercise its discretion under CPR 13.3 (1) to find that the application was made as soon as reasonably practicable after it found out that the judgment was entered against it, that it has a good explanation for failing to file its acknowledgement of service and defence on time, and that it has a real prospect of successfully defending the claim. The application is further grounded under CPR 13.3(2), asking the court to find that in any event, there are exceptional circumstances justifying the setting aside of the default judgment.

Issues

[9] The court must determine:

1. Whether the default judgment was wrongly entered;
2. If not, whether Pelican Bay has satisfied the conjunctive requirements in CPR 13.3(1);
3. If not, whether there are exceptional circumstances justifying the setting aside of the default judgment.

The Law

[10] CPR 13.2 reads:

- (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
 - (a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or
 - (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.
- (2) The court may set aside judgment under this rule on or without an application.

[11] This requires an examination of the conditions in CPR 12.4 and CPR 12.5. Including the rubrics, the rules read as follows:

“Conditions to be satisfied – judgment for failure to file acknowledgement of service

- 12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgement of service if –
- (a) the claimant proves service of the claim form and statement of claim;
 - (b) the defendant has not filed –
 - (i) an acknowledgement of service; or
 - (ii) a defence to the claim or any part of it;
 - (c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;
 - (d) **the only claim is for a specified sum of money**, apart from costs and interest, and the defendant has not filed an admission of liability to pay all the money claimed together with a request for time to pay it;
 - (e) the period for filing an acknowledgement of service under rule 9.3 has expired; and
 - (f) (if necessary) the claimant has the permission of the court to enter judgment.

Conditions to be satisfied – judgment for failure to defend

12.5 The court office at the request of the claimant must enter judgment for failure to defend if –

- (a) (i) the claimant proves service of the claim form and statement of claim; or
 - (ii) an acknowledgement of service has been filed by the defendant against whom judgment is sought;
- (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
- (c) the defendant has not –
 - (i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or
 - (ii) **(if the only claim is for a specified sum of money)** filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
 - (iii) satisfied the claim on which the claimant seeks judgment; and
- (d) (if necessary) the claimant has the permission of the court to enter judgment.”
(Emphasis added)

“Claim for a specified sum”

[12] Pelican Bay submits that the default judgment entered by the learned registrar does not amount to a specified sum. Therefore, the judgment is irregular and must be set aside. Pelican Bay points out that there are multiple components to the default judgment including the claim for collection costs, which is the subject of contention.

[13] The claim includes the sum of US\$22,500.00 equivalent to EC\$61,130.25 for collection costs. The judgment for the specified sum of \$1,283,735.25 includes the claim for collection costs. This is admitted by Ms. Park.

[14] Pelican Bay submits that there is no clause in the agreement between the parties entitling Ms. Park to the sum of US\$22,500.00 and as such it is not a sum which is ascertainable or capable of being ascertained. It is not a debt owing or outstanding under the contract. Pelican Bay observes that the claim for collection costs appears to be a claim for costs as

between Ms. Park and her attorney by way of general damages. It sets out the well-established principle that a party in litigation is only entitled to party-to-party costs.¹ Pelican Bay maintains that in granting judgment for the entire sum, the learned registrar acted in excess of her jurisdiction and submits that the inclusion of collection costs, which is not a claim for a specified sum, renders the judgment irregular and it must be set aside.

[15] CPR 2.4 defines a “claim for a specified sum of money” as:

- (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;

[16] This definition was discussed by Bannister J in **Integral Petroleum SA v Melars Group Limited**² where His Lordship stated:

“I accept that freight and demurrage will be recoverable , if at all, under a contract, but the definition of ‘claim for a specified sum’ requires that the sums claimed, as well as being recoverable under a contract, be ascertained or ascertainable as a matter of arithmetic. This means, in my judgment, that the claim itself must show either that the sum is an ascertained sum (e.g. a claim for repayment of an outstanding loan) or, if it is only ascertainable (such as a contractual entitlement to unpaid hire), the contractual terms which enable the Court Office to see that the sum has been correctly ascertained – for example, by multiplying a contractual daily rate by the amount (*sic*) of days for which hire has remained unpaid. The latter type of claim cannot be described as ascertained and without the pleading of the relevant contractual term(s) and the necessary multiplier(s), the claim is not ascertainable.”

[17] In **Dr. Miranda Fellows v Carino Hamilton Development Company Limited and Another**,³ the Court of Appeal upheld the decision of the learned master who, without an application, set aside a default judgment under CPR 13.2 on grounds of irregularity. The prayer at the end of the claim included a claim for damages for fraudulent misrepresentation

¹ *Cockburn v Edwards* (1881) 18 Ch. D 449

² BVIHCV (COM) 0087 OF 2015, heard together with BVIHCV (COM) 0122 of 2015 *East-West Logistics LLP v Melars Group Limited*, at paragraph 31

³ HCVAP 2011/006 (Saint Christopher and Nevis – Nevis Circuit)

in the amount of EC\$1,000,000.00. Judgment in default was entered by the learned registrar in the specified sum of EC\$1,000,000.00. The learned master was of the view that the default judgment was irregular because the claim was a claim for damages and judgment was entered for the said sum when no document evidencing this loss was identified or annexed to the statement of claim. Further, it could not be said, and it was not shown, that the sum was a sum that was capable of being ascertained as a matter of arithmetic. At paragraph 14 of the judgment, Mitchell JA (Ag.) opined:

“What the Master was faced with in this case was a claim which was framed as a claim for a quantified amount of damages of \$1,000,000.00. The sum having been claimed as “damages for fraudulent misrepresentation” was clearly without merit. As the Master was aware, damages for fraud are always general damages which are required to be assessed by the court. It is a basic rule of civil procedure that it is not open to a claimant to specify an amount of general damages in any claim arising out of a tort. The Master was faced with an incurably bad default judgment and was constrained to do the best she could to remedy the situation. She was entitled by CPR 13.2(2) to take the step she did on her own initiative and without an application by the defendants. She cannot be faulted in the exercise of a discretion she undoubtedly had.”

[18] As she was entitled to do to obtain default judgment, Ms. Park abandoned part of her claim,⁴ and prayed for the sale price of the condominium, US\$450,000.00 or EC\$1,222,605.00 together with collection fees, court fees and costs.

[19] Ms. Park submits that even if a default judgment is deemed to be irregular, the court has a discretion under its inherent jurisdiction to make an assessment as to a fair and just decision, having regard to all the circumstances of the case. She posits that having regard to other aspects of her submissions which address Pelican Bay's delay in making the application to set aside the default judgment, its absence of a good reason for its default and the lack of real prospects in defending the claim, it would not be fair and just to set aside the default judgment on the basis that the issue of collection fees disqualifies the claim as a claim for a specified sum, when the court has the inherent jurisdiction to vary the judgment in such a circumstance.

⁴ See CPR 12.8 (3); see also *Josephat Small v Thomas Ambrose* SLUHCV2008/1163 at paragraph 17

Disposition

[20] Whereas CPR 13.3 allows for variation of a default judgment,⁵ there is no such provision in CPR 13.2. If the court finds that the judgment is irregular, then it was wrongly entered and must be set aside. In my view, there is no room for intermingling of CPR 13.2 and CPR 13.3. CPR 13.3 only comes into play “If Rule 13.2 does not apply,...”.⁶

[21] I am of the view that the default judgment is irregular in that the sum of \$1,283,735.25, inclusive of collection costs, in the default judgment as entered by the learned registrar does not amount to a specified sum. The claim for collection costs is a claim in general damages. The fact that it is specified in the claim as US\$22,500.00 does not make it a specified sum for the purposes of the definition of “a claim for a specified sum” in the rules. It is not a sum that has been correctly ascertained. There is no proper basis in the claim as to how this figure was arrived at out of the contract or as a matter of arithmetic. To rule otherwise would be to sanction the pulling of figures from the sky and putting them in a claim and declaring, “I have specified a sum” and being awarded that sum, however unreasonable and/or incorrect. The claim must establish a legitimate basis for a specified sum.

[22] It matters not that the major part of the sum, that is, the amount claimed for the sale price of the condominium, can amount to a specified sum. This court has no discretion under CPR 13.2 to vary the default judgment by excluding the amount for collection costs or to order that damages be assessed. Faced with the irregularity, I have no option but to set aside the default judgment.

[23] Since CPR 13.2 applies, it is not necessary to consider the application on the alternative limb pursuant to CPR 13.3, which I venture to say may well have produced a different result.

Order

[24] Based on the foregoing, it is ordered as follows:

- 1) The default judgment entered on 29th May 2020 is set aside.
- 2) Pelican Bay shall file and serve its defence within 14 days of the date of this order.

⁵ CPR 13.3(3)

⁶ CPR 13.3(1)

- 3) Thereafter, the claim shall take its normal course in accordance with CPR 2000 as amended.
- 4) Given the nature of these proceedings, Pelican Bay shall pay Ms. Park costs of the application in the sum of \$1,500.00.

Tamara Gill
Master

By the Court

Registrar