

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

VIRGIN ISLANDS

Claim No. BVIHCV2021/0199

BETWEEN:

MALCOLM MADURO
dba **SUNSHINE POWER BOAT RENTAL**

Claimant

-and-

DEPARTMENT OF CUSTOMS

Defendant

Appearances:

Karen Reid and Mandy Harnarinesingh for the Claimant; and
Jo-Ann Williams – Roberts and Renard Penn for the Defendant.

2022: January 25;
February 22

DECISION

Defendant's application to set aside default judgment

[1] **PARIAGSINGH M. (Ag.):** - Before the Court is the Defendant's application filed on November 19, 2021 seeking an order setting aside default judgment entered against the Defendant dated October 26, 2020.

PROCEDURAL HISTORY:

[2] On March 20, 2020 the Claimant commenced proceedings against the Defendant in relation to the seizure of his boat on October 27, 2019. The Claimant sought several declaratory orders and, in the alternative, the cost of his vessel. The Claimant also sought special damages, exemplary damages interest and costs.

[3] The claim was served on the Defendant on May 05, 2020 within the time prescribed for service of a claim.

[4] The Defendant did not file an acknowledgment of service neither a defence to the claim.

[5] On July 17, 2020 the Claimant filed a Form 7 Request for Default judgment seeking both judgment in default of an acknowledgment of service and a defence together in the same request form.

[6] On September 24, 2020 the Claimant's Form 7 Request was listed for hearing before Master Sandcroft (Ag.) and permission was granted to the Claimant to file a supplemental affidavit of service. The matter was then adjourned to October 26, 2020.

[7] On October 26, 2020 ¹the matter again came up for hearing and the Master dealt with the Form 7 request and granted judgment in default of both an acknowledgment of service and a defence in the following terms:

1. Delivery of the Claimant's vessel wrongfully seized and detained by the Defendant and/or wrongfully seized and/or detained by the Defendant in breach of their statutory duty owed to the Claimant or the sum of USD \$130,000.00 being the value of the said boat and engines or such value as shall be assessed by the Court.
2. The cost of import fees, shipping fees, customs and other duties for the importation of a new vessel in the event that the vessel is not returned and the Defendant is ordered to pay the value of the vessel, as shall be assessed by the Court.
3. Special damages at the rate of USD\$1,200.00 per day from 27th October, 2019 to today and continuing
4. Damages, including aggravated damages, for breach of statutory duty, detainee and/or trespass and/or conversion for the wrongful seizure and/or

¹ Judgment dated October 26, 2020 was entered on October 30, 2020

detention and/or continued detention of the vessel by the Defendant as shall be assessed by the Court

5. Exemplary damages
6. Costs
7. Interest (from the date of issue of the claim) to today.
8. Court fees on claim- \$135 .00
9. Legal Practitioner's fixed costs on issue- \$2,100.00
10. Court fees on entering judgment- \$65.00
11. Legal Practitioner's fixed costs on entering judgment - \$400.00.
12. The assessment of damages is to be set for a date to be fixed by the Registrar.

[8] This was not an application for summary judgment. There was no affidavit filed in support of the application. It was purely an administrative judgment without reference to the merits of the claim. The Defendant was not present or represented at the hearing on October 26, 2020 when default judgment was granted.

[9] The judgment dated October 26, 2020 was served on the Defendant on November 10, 2020 approximately three (3) weeks after the order was made. The Defendant took no steps to apply to set aside the order made in its absence.

[10] On May 18, 2021 approximately (6) months after having notice of the judgment, the Defendant attended a hearing of the assessment of damages before another Master. Directions were given for the filing of evidence for the assessment. The Defendant did not comply with any of these directions.

[11] By another order made by the Master on July 14, 2021 time was extended for the Defendant to file its evidence for the assessment, this order was also not complied with.

[12] The assessment of damages came on for hearing on September 29, 2021. The learned Master adjourned it to September 30, 2021 (the next day) for the Defendant to show cause why damages should not be assessed in the sums claimed having regard to the Defendant's conduct of the assessment thus far.

[13] On September 30, 2021, the Master granted the Defendant a further indulgence and extended time for the filing of his evidence for the assessment which was fixed for December 01, 2021.

[14] On October 21, 2021 the Defendant filed its witness statements for the assessment of damages with the consent of the Claimant.

[15] On November 19, 2021 the Defendant filed the instant application to set aside the judgment entered on the basis that there are exceptional circumstances. This application is strenuously opposed.

[16] The application does not address the Rule 13.3 (1) CPR² criteria at all. The Defendant contends that Rule 13.3 (2) CPR is a separate and distinct route to set aside a default judgment that does not require consideration of the factors set out in Rule 13.3 (1) CPR.

² CPR – Civil Proceedings Rules 2000 as amended

THE APPLICATION:

[17] The sole ground for this application is that exceptional circumstances exist for setting aside the default judgment.

[18] The Defendant contends that it is in the public's interest, for justice to be done between the parties and in consideration of the jurisdictional reputation of the Virgin Islands as a Financial Services jurisdiction that the default judgment ought to be set aside.

[19] The Defendant also contends that the vessel is lawfully detained and relies on the Customs Management and Duties Act 2010 and the Drug Trafficking Offences Act. It contends that forfeiture proceedings could not be instituted due to the then early stages of the pending criminal proceedings against persons who were alleged occupants of the vessel for drug related offenses. The Defendant contends that the relief sought by the Claimant ought not to be granted until judgment is handed down in the criminal proceedings.

[20] In the affidavit in support the Defendant contends that the exceptional circumstances relied on is the right of the Crown to forfeit the Claimant's vessel. Reliance is placed on Sections 22, 131 and 134 (2) of the Customs Management and Duties Act 2010.

THE OBJECTIONS:

[21] The Claimant contends in summary that Part 13 Rule 13.3(2) CPR is not a stand-alone route to set aside a default judgment. He contends that it operates to alleviate the harshness of the conjoined factor test in Rule 13.3(1) CPR where there are truly exceptional circumstances.

[22] The Claimant further contends that in any event, the amended draft defence filed by the Defendant does not disclose reasonable grounds with a realistic prospect of success for defending the claim.

THE ISSUE RAISED BY THE COURT:

[23] After the Court heard oral submissions by both parties, the Court through the Court Clerk brought to the attention of both parties the authority of **Lux Locations Limited v Yida Zhang**³.

[24] The Court fixed a second hearing to allow the parties the opportunity to be heard on solely on this authority and in particular, whether the default judgment was regularly obtained or if any grounds existed to set aside as of right pursuant to Rule 13.3 (1) CPR.

[25] The Claimant submitted that the correct procedure was followed. The Claimant submitted that if the ground of irregularity was raised by the Defendant in its application, he would have had the opportunity to put before the Court the queries issued by the Court Office to demonstrate that the request for judgment made complied with what the Court Office requested in the request.

[26] The Defendant submitted there are grounds for setting aside on the basis of irregularity for the reason that permission was required to obtain default judgment. The Claimant submitted that permission to enter default judgment was not required.

³ ANUHCVP2020/0025

THE EVIDENCE:

[27] Having considered the affidavits filed in support of and in opposition to the application I am of the view that not much in the resolution of this application turns on the affidavit evidence.

[28] Both parties spent considerable time addressing factual issues raised on the claim. for example, whether the Claimant had a licences to have his vessel or rent in in the BVI. In my respectful view, the sole ground raised by the Defendant, exceptional circumstances, is hinged on whether (1) the Defendant can apply under Rule 13.3 (2) CPR directly and (2) the defence relied on in law, the Customs Management Act, creates a defence with a “knock out” point. The resolution of both these issues do not turn on any of the slew of factual assertions made by both parties.

EXECPTIONAL CIRCUMSTACNES:

[29] The Defendant submitted that exceptional circumstances is a stand-alone route available to it to apply to have the default judgment set aside. It was submitted that the words “In any event...” which appears at the beginning of Rule 13. (3)(2) CPR creates an entirely separate route to set aside a default judgment independent of Rule 13. (3) (1) CPR.

[30] The Claimant on the other hand submitted that the application does not get off the ground on this argument alone. The Claimant submits that Rule 13.(3)(2) CPR is not a stand-alone provision but a fallback position that the Court has open to it to consider if there is a “knock out point” even if the Defendant does not meet the criteria in Rule 13.3 (1) CPR.

[31] I agree with Counsel for the Claimant. I do not understand or interpret Rule 13. (3)(2) CPR to be a separate route to set aside a default judgment. Both parties relied on

the decision of Board in **Meyer v Baynes**⁴ approving the statements of the Honourable Chief Justice at paragraph 26 of the Court of Appeal's judgment which states:

[26] What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement reasoning of Bannister J, has approved by this Court, that it must be 'one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained'. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant **has failed, to satisfy rule 13.3(1).** A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a "knock out point" in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive. Indeed I would have been prepared to hold, had the learned master been correct as to the non-viability of the claims herein, that such could be regarded as an exceptional circumstance. In the exercise of the discretion afresh, and for the reasons set out above I find no basis for holding that the bases put forward by Mr. Meyer, amount to exceptional circumstances warranting Mr. Baynes being deprived of his default judgment. I would accordingly restore the default judgment.'

[32] In my view the Defendant does not get to Rule 13. (3)(2) unless there has been a consideration of 13. (3)(1) CPR. In the instant application, the Defendant has not put any evidence before the Court to assess delay, the reasonableness or

⁴ [2019] UKPC 3

unreasonableness of same or the reason for the breach of the rules and not filing an acknowledgment of service or a defence.

[33] Having considered the amended draft defence submitted by the Defendant I can decipher no knock out points. At its best, the defence is an arguable defence and has a reasonable prospect of success.

[34] As a matter of law, the Defendant concedes that it has not followed the procedure for condemnation and forfeiture. The reasons advanced ignore vital facts. In particular, it ignores the fact that the Claimant who owns the vessel has not been charged and is not in any way affiliated with the criminal prosecution. Further, the trigger for forfeiture proceedings under the Customs Management Act is the service of a notice of seizure by the Commissioner on the person he considered to be the owner of the vessel. The evidence is that the notice was affixed to the vessel.

[35] I also find no merit in the arguments of the Defendant that it could not do anything to trigger forfeiture proceedings until the criminal prosecution is completed. None of the legislation referenced requires the completion of the criminal matter to commence condemnation or forfeiture proceedings. The vessel is not the subject of a criminal offence.

[36] In the circumstances even if I am wrong and Rule 13.(3)(2) CPR is a standalone provision, in my view the proposed amended defence or the affidavit in support disclose no exceptional circumstances which warrants setting aside the judgment under Rule 13. (3)(2) CPR.

[37] The application therefore fails on this ground .

JUDGMENT IRREGULARLY OBTAINED :

[38] Under Rule 13.3 (1) CPR a default judgment must be set aside if it is irregular. There is no discretion to be exercised. If a judgment is irregularly obtained, it must be set aside. Part 13.2 (1) CPR states:

- 13.2 (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.**

[39] **Blackstone's Civil Practice 2019 at page 458** states:

'A default judgment obtained using the request procedure in error instead of the application for judgment procedure was irregular and capable of being set aside as of right under r. 13.2 (Intense Investments Ltd v Development Ventures Ltd [2005] EWHC 1762 (TCC), [2005] BLR 478). It is submitted that this decision ignores the constraints of r. 13.2 which specifies precisely the circumstances in which the court must set aside default judgment. These do not include using the wrong procedure to enter the default judgment.

What about the case where a judgment has been entered incorrectly, in circumstances other than those set out at r.13.2.? in Northern Rock (Asset Management) plc v Chancellors Associates Ltd [2011] EWHC 3229 (TCC), [2012] 2 All ER 501, an acknowledgement was returned to the claimant with the "I do not intend to defend this claim" box ticked in error. The claimant submitted a request for judgment form to the court instead of making an application for judgment in default, and, incorrectly judgment was entered by the court as an administrative act without any judicial consideration of the case. The circumstances clearly fell outside the situations envisaged by r. 13.2. The Court held that it has jurisdiction

under r.3.1.(2)(m) to set aside the judgment it is was fair and just to do so, on the grounds that the overriding objective would normally demand that a judgment should be set aside, where it has been obtained irregularly on the basis of an obviously mistaken admission, where there was a properly arguable defence, where the application to set aside was brought reasonably promptly and where there was no prejudice caused by the setting aside.'

[40] Apart from the nuance in our jurisdiction with there being no application for judgment procedure, the learning is relevant in my view, to the approach the Court ought to take. The Court will in furtherance of the overruling objective to deal with cases justly set aside a judgment irregularly obtained once it is fair and just to do so.

[41] In respect of judgment in default of acknowledgment of service Part 12.4 (d)CPR was not satisfied. In particular, the only claim was not for a specified sum of money, apart from costs and interest. In my view, the Court could not enter judgment in default of acknowledgment of service on this claim.

[42] In respect of judgment in default of defence, this relief could have been obtained if a proper request was made.

Was there a proper request?

[43] The short answer is no. There was a Form 7 filed which purports to be a hybrid request for both judgment in default of acknowledgment and defence in the same form. This in my view is procedurally incorrect.

[44] Judgment in default of an acknowledgment of service can only be for a liquidated sum. Bannister J (Ag.) in **Integral Petroleum SA v Melares Group Limited**⁵ discussed what is a claim for a fixed sum of money and opined that default judgment

⁵ BVIHCOM2015/0087

can only be granted for failure to file an acknowledgement of service if the claim is for a fixed sum. I agree and adopt his reasoning set out in his judgment.

[45] It stands to reason therefore that where a Claimant is seeking judgment for mixed remedies, unless all the other relief claimed is abandoned and the only remedy sought is a liquidated sum, then the Claimant simply cannot obtain judgment in default of acknowledgment of service.

[46] Another aspect is that even if I were to ignore the entirety of the request as it relates to failure to file an acknowledgement of service, the form request made is still improper in my view. The primary relief sought was the return of the vessel. That is not a remedy that can be obtained on a request for a default judgment. If the Claimant wished to request judgment in default of defence, he had to first abandon his claim for return of the vessel. He would have then been able to request judgment in default be entered for the replacement costs of the vessel. Alternatively, the request had to request judgment be entered on terms to be decided by the Court. The Claimant could not obtain the relief of return of the vessel or alternatively, damages in an administrative judgment.

[47] This view is supported by Rule 13.7 CPR which provides that:

'If the Claimant has abandoned any remedy sought in the claim form in order to enter a default judgment, the abandoned claim is restored if the judgment is set aside.'

[48] Further, the request claimed fixed sums and in the alternative a sum for the same head of damage claimed to be assessed by the Court. This is also incorrect in my view. The Claimant cannot claim the same remedy in the alternative in a default judgment application. It is either the Claimant claimed a fixed sum or damages to be assessed by the Court, not the both. This is another aspect I consider to make the request irregular.

[49] Whilst it may be considered a matter of substance over form, in my view even ignoring the obvious procedural defectiveness of the request, the Court still could not enter judgment in default based on the relief claimed. The Claimant would have had to abandon that part of his claim for the return of the vessel.

Was permission required to enter default judgment?

[50] Counsel for the Claimant submitted that permission was not required. Counsel for the Defendant submitted that permission was required and relied on the decision of Sandfort M (Ag) as he then was, in **Damion Morgon v The Attorney General of the Virgin Islands**⁶ wherein the learned Master came to the conclusion that permission to enter judgment in default against the Crown was required. Perhaps the authority of **Capital Bank International Limited v V. Nazim Burke et al**⁷ was not brought to the Master's attention. In this authority the Honourable Chief Justice in delivering the decision of the Court of Appeal fully endorsed the decision of Barrow JA in **Ministry of Communications & Works et al v Clement Cassell**⁸ (delivered 19th June 2008, unreported). The Court held that permission was not required as the permission requirement applied to four categories of persons and referred to State and not the Crown. It follows therefore that permission was not required to obtain default judgment against the Crown.

[51] Counsel for the Defendant referred me to **Sections 4 and 13 of the Crown Proceedings Ordinance, Chapter 21** and the **Crown Proceedings (Authorised Officers) Order 1956** in aid of her submission that permission was required to obtain judgment in default against the Crown. I am of the view that these pieces of legislation do not assist the Defendant in this regard. These pieces of legislation make it clear

⁶ BVIHCV2019/0332

⁷ GDAHCVAP2010/0025

⁸ MNIHCVAP2008/0006

that the Crown is liable for tortious acts of its servants and/or agents. It also provides that authorised officers may sue or be sued by or for the Crown.

[52] Noteworthy is that the named Defendant is not one such authorised officer. There is no office bearing the name “ Department of Customs”. This is not a public law matter where there is no *lis* between the parties. This is a private law action where the proper party has to be sued as it affects the ability to enforce orders if the wrong party is sued. This point however, in my view, whilst very attractive, was not part of the application nor was it addressed by the parties save for the material being provided to the Court.

Was the judgment irregular?

[53] I invited both parties to address this issue based on the Court of Appeal decision in **Lux Locations Limited v Yida Zhang (supra)**. In this authority the Court held that a default judgment, being an administrative act and not a judicial decision, should not be considered a judgment or order of the High Court within the meaning of section 31(1)(b) of the Supreme Court Act. This to my mind is very important. As a default judgment is not an order of the High Court and the Court of Appeal is a creature of statute, there is no right of appeal to the Court of Appeal from a default judgment. The only remedy is to apply to set it aside under Part 13 CPR.

[54] In this case, a request for both judgment in default of acknowledgment of service and defence was made in one document. The request was not considered by the Court Office administratively. It was listed before the Master who proceeded to determine the request and some terms of the judgment. This in my respectful view is irregular.

[55] In my respectful view the request made was irregular in itself. More so, the Court entered judgment in default for the relief as claimed by the Claimant on the request which it could not have done having regard to the relief. There being no right of appeal

from a default judgment, I am of the view that this Court does have the jurisdiction and I so hold, to find that the Court acted in excess of jurisdiction in granting the order that it did. Further, the application ought not to have been before the Master in the first instance and the application in itself was defective and ought not have gotten pass the Court Office without being refused.

[56] This in my view is sufficient to hold that the default judgment obtained was irregular and has to be set aside.

[57] I note that even though Counsel for the Claimant submitted that had the application been made under Rule 13.3 (1) CPR evidence of the fact that the request was filed in a form requested by the Court Office would have been advanced. In my respectful view any such evidence would not have changed my decision. The fact remains the request filed was incorrect and the relief granted was not relief the Claimant could have been granted on a default judgment.

COSTS:

[58] The Defendant has not been successful in its application. The judgment is being set aside on a ground not raised by either party.

[59] The filing of this application would not have been necessary if a proper application for default judgment was made in the first instance. The Claimant's irregular application is what triggered the filing of the application.

[60] In my respectful view, the Claimant cannot benefit from an order for costs which caused the Defendant to file the instant application, although the Defendant has been unsuccessful in its application.

[61] The Claimant did raise the issue of wasted costs. Again, everything that followed from the hearing on October 26, 2020 was a result of the defective application. In my view, an order for wasted costs as requested by the Claimant is not warranted.

[62] In the circumstances, there shall be no order as to costs.

ORDER

[63] For the reasons set out above, it is hereby ordered that:

1. The judgment in default of acknowledgment and defence obtained by the Claimant against the Defendant dated October 26, 2020 is set aside on the ground that it was irregularly obtained;
2. Permission is granted to the Defendant to file and serve its defence to this claim on or before 4:00pm on February 28, 2022; and
3. There shall be no order as to costs.

Alvin Shiva Pariagsingh
Master

By the Court

Registrar