

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: SKBHCV2016/0233

BETWEEN:

ST. KITTS NEVIS CABLE COMMUNICATIONS LIMITED

Claimant

and

MERVIN GRANT

Defendant

Appearances:

Ms. Natasha Grey and Mrs. Marlene Uter Bent for the Claimant
Dr. Henry Browne QC for the Defendant

2020: December 18
2021: March 18

JUDGMENT

- [1] **GILL, M.:** The matter before the court is an assessment of damages in the absence of witness statements. A chronology of events will explain how we have arrived at this point. The matter is of some vintage.

Chronology of events

- [2] By claim form and statement of claim filed on 22nd July 2016, the claimant brought this action against the defendant seeking the sum of \$3,131,702.38 plus interest and costs in respect of monies due and owing on a lease agreement.

- [3] On 1st November 2016, judgment in default of defence was entered for an amount to be assessed by the court.
- [4] On 7th December 2016, Master Actie, as she then was, ordered the claimant to file and serve witness statements/affidavits, submissions and authorities in support of assessment of damages within 21 days of that date.
- [5] On 18th February 2017, a different master, on an oral application by the claimant, granted the claimant an extension of time and relief from sanctions for the late filing of the said witness statements/affidavits, submissions and authorities outside of the time as ordered by Master Actie, and deemed them duly filed. The learned master also ordered damages and interest against the defendant, who was absent from the hearing.
- [6] The defendant appealed this order. On 20th May 2019, the Court of Appeal allowed the appeal and made the following order:
1. *The appeal is allowed.*
 2. *The matter is remitted to the court below for a date to be fixed for an assessment of damages hearing. The parties are to make the requisite applications for relief from sanctions for failure to comply with the Master's order.*
- [7] The claimant made the requisite application on 29th May 2019 for an extension of time to file witness statements out of time, and for relief from sanctions.
- [8] On 16th July 2019, Master Drysdale ordered the parties to file and serve skeleton arguments on the application by 13th September 2019.
- [9] This court refused the application for extension of time and relief from sanctions on 26th November 2019. Nevertheless, I adjourned the matter for assessment of damages to a date to be set by the Court Office.
- [10] On 19th December 2019, the claimant applied to the court to fix a date for the assessment of damages and for directions to be given.
- [11] The defendant objected strenuously to this application and after inviting submissions from the parties, on 17th November 2020, I made the following order:

ORDER

UPON THIS MATTER coming on for ruling on an application by the Claimant to fix a date for assessment of damages and directions on assessment;

AND UPON CONSIDERING the submissions of Counsel;

AND UPON THE COURT taking into account the Order of the Court of Appeal that the matter be remitted to the Court below for a date to be fixed for an assessment of damages hearing, and the Order of this Court in refusing the Claimant's application for an extension of time to file witness statements and for relief from sanctions, and that a date be fixed for assessment of damages;

AND bearing in mind that the result of the Order of this Court means that the Claimant is not entitled to rely on any witness statements in the assessment of damages in this case;

AND in light of Queen's Counsel for the Defendant indicating that the Claimant may be entitled to nominal damages;

AND UPON THE COURT being of the view that, notwithstanding the absence of witness statements, the Claimant should be given an opportunity to make submissions to the Court on the quantum of damages to be awarded to the Claimant;

IT IS HEREBY ORDERED AND DIRECTED that:

1. The Claimant's application is granted.
2. The Claimant shall file and serve submissions on the assessment of damages on or before 4th December 2020.
3. The Defendant shall be at liberty to file and serve submissions in response on or before 11th December 2020.
4. The matter is adjourned to 18th December 2020 for assessment of damages.
5. The Claimant shall have carriage of this order.

H. Tamara Gill
17/11/2020

The assessment hearing

- [12] The parties complied with the directions given for submissions on the assessment of damages. However, at the start of the hearing on 18th December 2020, learned counsel for the claimant, Mrs. Uter Bent, on a preliminary point, submitted that the defendant did not file a Notice in Form 31 and therefore, the Defendant could not be heard at the assessment. Counsel made an oral application to strike out paragraph 3 of the above order. Learned Queen's Counsel answered that this was a

delay tactic and an abuse of the process of the court by counsel for the claimant but he consented not to be heard on his submissions. The court proceeded to hear the claimant's submissions.

Claimant's submissions

- [13] The claimant stated the salient facts in the statement of claim and submitted that the sum claimed can be determined from the pleadings. The claimant contended that it has a right to damages from the judgment in default. The defendant is taken to admit liability as pleaded.¹ The pleadings set out the amount that the claimant claims and there is no claim for general damages. It is for a specified sum of \$3,131,702.38, although not spelled out in the claim as special damages.²
- [14] The claimant urged upon the court that the claim form and statement of claim, and the request for judgment in default which forms part of the court record, all assist the court to determine the award to be made to the claimant. The claimant stated that when one looks at the request for the default judgment, it is clear that it has not deviated from the amount it is seeking, and that what was to be determined by the court as outlined in the request was the issue of interest.
- [15] The arrears outstanding and the late charges accrued are the total of the sum claimed in the pleadings, hence, the claimant submitted, the amount to be awarded can be ascertained from the claim form and the statement of claim. Since the claimant is not making a claim on the assessment for an amount in excess of what is in the claim form, the claimant posited that the court can therefore award what is in the claim form.
- [16] Exhibited to the statement of claim is a document dated 7th June 2011 the claimant referred to as a proposal from the defendant, signed by him, to the former managing director of the claimant. The claimant contended that by this document, the defendant, among other things, admitted the debt, admitted that the debt was substantial, and offered to make a substantial payment to the claimant. It should be noted that there is no sum specified in the document as to the indebtedness of the defendant to the claimant.

¹ See DOMHCV1010/016 Michael Laudat and the Attorney General of the Commonwealth of Dominica v Danny Ambo, per Edwards JA at paragraph 30

² See SKBHCV2009/0214 Howard Engineering Inc. v La Vallee Development Corporation and Frigate Bay Development Corporation at paragraph 34

[17] The claimant relied on the case of **MCVI St. Kitts Company Limited v Edward Gift and the Attorney General of Saint Christopher and Nevis**³ on the issue of the acknowledgment of a debt in correspondence. At paragraphs 16 and 17 of the judgment, Actie M., as she then was, stated:

16. “....An acknowledgment has to be in writing and signed by the person making it, and has to be an admission of liability in respect of a debt or other liquidated amount or a sum that is capable of being ascertained.

17. The House of Lords in **Bradford & Bingley plc v Rashid** held that an acknowledgement for the purpose of the Limitation Act is not confined to admissions of debt that were indisputable as to quantum as well as liability. The House of Lords at paragraph 21 cited **Surrendra Overseas Ltd v Government of Sri Lanka (19770 1 WLR 565** where Kerr J. said “that the debtor can only be held to acknowledge the claim if he has in effect admitted his liability to pay that which the plaintiff seeks to recover. But his acknowledgement need not identify the amount of the debt. His acknowledgment will be sufficient if the amount for which he accepts legal liability can be ascertained by extrinsic evidence.”

[18] In relation to the case at bar, the claimant proffered that the proposal by the defendant provides evidence to the court that:

- (a) The defendant’s written and signed proposal of 7th June 2011 is a clear admission of the debt owed by the defendant to the claimant; and
- (b) The absence of the specific quantum of the debt in the proposal is not a bar to recovery of the debt.

[19] The claimant is of the view that the amount for which the defendant accepts legal liability is stated in the statement of case and can therefore be ascertained from the pleadings.

[20] The claimant further submitted that an award of nominal damages is neither applicable nor appropriate in these circumstances having regard to the substantial quantum of the debt and the defendant’s admission in his proposal of 7th June 2011 that the claimant would “receive substantial payment”; that he is not in a position “to substantially pay down the debt”; and that the late fees/penalty “are substantial”.

Issue

[21] The court must determine the quantum of damages, if any, to be awarded to the claimant.

³ SKBHCV2016/0105, delivered March 29, 2017

Law and analysis

- [22] At an assessment of damages hearing, the claimant must prove the amount of damages to which he claims he is entitled. Rule 16.2(5)(a) of the Civil Procedure Rules 2000 as amended (CPR 2000), under the heading 'Assessment of damages after default judgment' reads:

(5)(a) The claimant shall be entitled to rely on the evidence of all witnesses called by him or her pursuant to the witness statements filed and served by him or her and to make submissions to the court.

- [23] As a consequence of the order of this court on 26th November 2019 refusing an application by the claimant for an extension of time to file witness statements out of time and to be granted relief from sanctions, there are no witness statements in this assessment on which the claimant can rely. This order of the court was not appealed.
- [24] Pleadings are not evidence. A statement of claim is an assertion or allegation of facts which, in order to succeed, the claimant must prove by evidence.
- [25] Both liability and loss must be established. Where judgment in default is entered, as in the case at bar, the defendant is deemed to be liable as pleaded in the claim. However, he must prove his damages at the assessment stage. In **Michael Laudat and The Attorney General of the Commonwealth of Dominica v Danny Ambo**,⁴ Edwards JA stated:

"Ordinarily, at an assessment of damages hearing, the court would not enquire into matters of liability because the defendant, having failed to file an acknowledgment of service and/or a defence is taken to admit liability as pleaded. At the assessment of damages hearing, the court is not required to re-open the application or request for default judgment; and it would not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to the cause of action while the default judgments stands. The issue of the defendant's liability having been settled by the default judgment, the only issue for the court is **how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of any special damages claimed and general damages. Where damages for any pleaded cause of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim.**

...A claimant's failure to prove damages under a pleaded head of claim in the evidence adduced is not an error of procedure, or a failure to comply with a rule,

⁴⁴ DOMHCVAP2010/016 at paragraphs 30 and 31

practice direction, or court order or a matter which a court of its own initiative should put right by an order which gives the claimant a further opportunity to prove such damages. There is obviously a tension between principle and fairness. Regardless of whether or not the defendant is permitted to be heard on the issue of quantum, the court should critically carry out assessment on the scheduled date on the evidence adduced, with the overriding objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages on the claim.” (Emphasis added)

[26] In my view, the issue of liability raised by the claimant, in relation to the proposal exhibited to the statement of claim as an admission by the defendant, is of no moment in the context of these proceedings. The defendant’s liability on the claim is already determined by the default judgment. If the claimant’s reliance on the document is to show that the defendant is liable in substantial damages, then the claimant faces the same predicament as with pleadings. The statement of claim is the formal written statement of what the claimant alleges. Any exhibits or attachments to the claim are part of the pleadings. Therefore, to be accepted as proof of loss or damage, documents must form part of the evidence by being duly exhibited to the witness statements on which the claimant relies.

[27] The inescapable conclusion is that there is no evidence before this court that the claimant can rely on to prove the quantum of damages the court should award in this matter. The pleadings are not proof of the damage allegedly suffered.

Nominal damages

[28] Weighing on the court’s mind in setting a date for the assessment of damages in the absence of witness statements or any other admissible evidence, was the suggestion by learned Queen’s Counsel for the defendant, at that hearing, that the claimant may be entitled to nominal damages. Learned counsel for the claimant failed and/or refused to address this head in the claimant’s written submissions, save and except to record a rejection of such an award as “neither applicable nor appropriate in these circumstances”. Nevertheless, the court probed and prodded counsel in an effort to be guided in the event an award of nominal damages is indeed applicable and appropriate in this case. It was only after the court drew to counsel’s attention an authority on the subject that

counsel chimed in with the argument that nominal damages does not necessarily mean small damages.⁵

[29] The Privy Council in the Trinidad and Tobago case of **Greer v Alstons Engineering Sales and Services Ltd**⁶ held that when the necessary evidence is not provided, it is open to the court to give consideration to an award of nominal damages.

[30] McGregor on Damages⁷ discusses the circumstances in which nominal damages may be awarded as follows:

“Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss, but absence of evidence of the amount of loss.”

[31] In this present case, however, it can be argued that the loss itself, not considering the amount, pleaded in the claim has not been proved; that the fact of a loss is not shown by evidence. In order to recover any damages, loss must be established by evidence proving that loss. However, I consider the nature of this claim to be of some influence in determining the fact of the loss suffered by the claimant. This is a claim for outstanding rent and other charges. The default judgment establishes liability in the defendant. The liability of the defendant is his indebtedness to the claimant. The claim alleges that the defendant is liable to pay outstanding rent. The default judgment establishes that liability. In my view, therefore, the fact of the loss emerges from the liability in the claim validated by the judgment. The issue being the absence of evidence in the assessment of the amount of loss, nominal damages are applicable and appropriate here.

[32] The question now arises as to what the court should award in nominal damages on a \$3 million claim. The court in, **Cosmos William v The Comptroller of Customs and The Attorney General**,⁸ after citing **Greer**, stated:

⁵ See *Cosmos William v The Comptroller of Customs and the Attorney General* SLUHCV2006/0259, per Mason J. at paragraph 16

⁶ (2003) WIR 388, [2003] UKPC 46

⁷ 17th Edition at paragraph 10-004

⁸ *Supra* at note 5

“Nominal damages however does not mean small damages but it is the duty of the court to recognize it by an award that is not out of scale.”

- [33] The duty of the court is to make an award that is reasonable in the circumstances.⁹ The court received no assistance from learned counsel for the claimant as to what would be a reasonable sum in nominal damages in this case.

Conclusion

- [34] There is no evidence of the amount of loss suffered by the claimant, only an allegation as pleaded. The default judgment only establishes liability in the defendant. There being no evidence adduced by the claimant to prove the quantum of damages, I am of the view that a nominal sum of \$50,000.00 is appropriate in this case.

Order

- [35] Based on the foregoing, I order as follows:
1. The defendant shall pay the claimant damages in the sum of \$50,000.00.
 2. The defendant shall pay the claimant prescribed costs pursuant to CPR 65.5 in the sum \$4,500.00.

Tamara Gill

Master

By the Court

Registrar

⁹ See ANUHCVP2018/0030 Dolcie Christian v King’s Casino Limited, per Thom JA at paragraph 28