

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS**

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

Claim Number: **BVIHCV2018/0105**
Between

Chiverton Construction Limited

Claimant

and

Auto Sales and Parts Limited

Defendant

APPEARANCES:

Ms Neline Bute for the claimant

Ms Karen Reid with David Abednego for the defendant

**2019: March 12
June 21**

Judgment

- [1] **ACTIE M:** This an application filed by the defendant to set aside a default judgment granted in favor of the claimant. For the reasons given below the application is granted with costs to the claimant.

Background

- [2] The claimant filed a claim against the defendant on 22nd May 2018 for moneys due and owing under a contract. The claim was properly served on the defendant's registered agent. The defendant failed to file an acknowledgment of service. The

claimant filed a request for judgment in default on 29th June 2018 pursuant to CPR 12.4 and obtained judgment on 8th November 2018.

[3] On 16th November 2019, the defendant applied to set aside the default judgment and to file a defence. The application is opposed by the claimant.

[4] CPR 13.3 sets out the principles to be applied upon an application to set aside a default judgment. When considering an application to set aside a default judgment the court must consider the applicable requirements of CPR 13.3.

[5] Rule 13.3(1) states the court may set aside a judgment entered under Part 12 only if the defendant –

13.3 (1) (a) Applies to the court as soon as reasonably practicable after finding out that judgment had 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) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances. The defendant filed an application to set aside the default judgment

Whether the request was filed as soon as practicable

[6] The defendant filed the request on the 16th November 2018 which is eight (8) days after the judgment and satisfies the first requirement of the rule.

Whether there is a good explanation for the failure to file an acknowledgement of service

- [7] Mrs. Esmie Nibbs, the sole director of the defendant company, deposed that Mr Leandro Nibbs, one of the two directors of the company, died on the 21st November 2017. She produced medical evidence which indicates that she was admitted to hospital and discharged on the 28th May 2018, four (4) days after the claim was served on the 24th May 2018. Mrs. Nibbs said that although the claim was addressed to her the registered agent gave it to her son, Elvis Nibbs who failed to disclose the existence of the claim. Mrs. Nibbs said that she only became aware of the claim when she attended the registered agent office on 19th August 2018 for an unrelated matter. Mrs. Nibbs said that Elvis Nibbs for obvious reasons did not bring the claim to her attention as the claim filed by the claimant was grounded on a unlawful contract entered into by Elvis and the claimant. In an amended application, Mr Nibbs states that her son Elvis did not open the sealed envelope neither did he made her aware of it. Mrs. Nibbs deposed that the contract drawn and executed by the claimant and signed by her son Elvis was false/fraudulent as the parties acted in concert to defraud the defendant company.

Whether the defendant has a real prospect of successfully defending the claim

- [8] Mrs. Nibbs states that the defendant company has a real prospect of success as the purported contract relied on by the claimant was not executed by the defendant company or anyone authorized to sign on its behalf. Mrs. Nibbs avers that the purported contract is an attempt to defraud the defendant company or to obtain funds far in excess of the works actually done by the claimant. Mrs. Nibbs states further that the work done were contrary to the terms of an oral agreement entered into by the claimant and the defendant company. Mrs. Nibbs states further that the claimant is entitled to no more than \$2500.00 in respect of works done under the oral contract.

Exceptional circumstances

- [9] Mrs Nibbs states that in any event there exist exceptional circumstances as the defendant was prevented from learning of the proceedings because the claim was erroneously handed to the same person colluding with the claimant. Mrs. Nibbs states

that the claim is false and or fraudulent and did not learn of its existence not until 19th August 2018 after a request for judgment had been filed.

The claimant's submissions

[10] The claimant in response states that there is no dispute that the defendant has satisfied the first condition of the rule. The claimant is of the view however that the defendant has not provided a good explanation for the failure to file the acknowledgment of service. The claimant contends that the explanation given cannot suffice as the claim was duly served on the registered agent. Any administrative inefficiency, forgetfulness or inadvertence is inexcusable on the part of the defendant cannot be imposed on the claimant. In respect to the third limb, the claimant states that the particulars given in support of the fraudulent inducement is baseless as it was reasonable for the claimant to have concluded that Mr Elvis Nibbs was clothed with the authority to enter into the contract. The claimant avers that there are no exceptional circumstances to bring the matter into the realm of matters envisage in CPR 13.3(2) and the **Carl Baynes v Ed Myers**¹ case

Analysis

[11] CPR 13.3 (1) sets out the principles when the court is exercising its discretion to set aside a regularly obtained judgment. The rule places the burden on the applicant to satisfy the three conjunctive requirements. It is conceded that the defendant acted promptly in making the application to set aside the default judgment within eight (8) days and satisfies the first limb of the rule.

[12] The defendant's reason for not filing the acknowledgement of service is premised on the fact that although the claim was properly served on its registered agent it was not brought to the attention of the sole director who at the time of service was admitted in hospital. The director, in her original application stated that her son who had colluded

¹ ANUHCVP2015/0026

with the claimant had for obvious reasons neglected to inform her of the claim. In her amended application, she states that the claim was given to her son in a sealed envelope but he failed to give it to her.

[13] What is a good explanation has not been defined by the rules. Lord Dyson in the Privy Council case in **The Attorney General v Universal Projects Limited**² said:

"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."

[14] The reason given is that the Defendant was unaware of the claim form until the request for judgment had been made. The fact that the defendant never received the claim form is a relevant factor in deciding whether to exercise the discretion to set aside a default judgment although on its own would not be enough as the claim had been properly served. However, the court takes into consideration the other facts in this case, namely that the defendant company's sole director was ill and hospitalized at the time of service and also the fact that the sole director has implicated her own son as having acted in collusion with the claimant to defraud the company. I also take into consideration the fact that the director acted promptly in filing an application for an extension of time to comply with the rules as soon as she became aware of the claim and the time for compliance had passed. The claimant had by then made the request for judgment in default. I am of the view that the defendant has given satisfactory reasons for the failure to file the acknowledgement of service.

[15] The third limb to be satisfied is the prospect of success on the proposed defence. The defendant must demonstrate that it has "a real prospect of successfully defending the claim" in order to set aside a regularly obtained judgment in default. The defence should carry some degree of conviction and not merely arguable.

² [2011] UKPC 37

[16] The position of the defendant is that the contract relied on by the claimant was obtained by false or fraudulent means. The defence suggests that the claimant seeks to derive a benefit from dishonest conduct with the director's son to defraud the company. Mrs Nibbs states that her son Elvis did not have authority to enter into a contract on behalf of the company, a fact allegedly known by the claimant. The defendant avers that its indebtedness to the claimant under an oral contract entered into by the defendant company and the claimant amounts to no more than \$2500.00. To allow the judgment to stand will confer a unjust enrichment to the claimant to the detriment of the defendant. It is clear from the defendant's allegations that the claimant did not come to the court with clean hands. If the allegations are true then in my view the defendant has a real prospect of successfully defending the claim. I am of the view that this is a good ground to exercise the court's discretion to set aside the default judgment as the defendant has satisfied the court that there is a real prospect of success.

[17] The court when exercising its discretion to set aside a default judgment must always bear in mind the overriding objective to deal with cases justly. Looking at all the facts in the round, I am satisfied that the defendant has satisfied the three (3) conjunctive requirements of Rule 13.3 (1). There are issues of facts and law which need to be resolved at a trial.

[18] Having found that the defendant has satisfied the requirements of Rule 13.3(1) there is no need to consider the exceptional circumstances under rule 13.3(2) .

ORDER

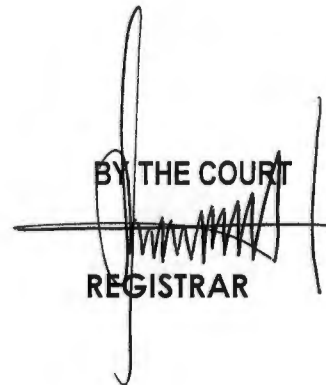
[19] For the foregoing reasons, it is hereby ordered and directed as follows:

1. The defendant's application to set aside the default judgment is granted.
2. The defendant shall file and serve its defence within fourteen (14) days today's date.

3. The claimant may file a reply in accordance with CPR 10.9.
4. The matter shall thereafter be listed for case management conference in accordance with CPR 2000.
5. The defendant shall pay the claimant costs in the sum of \$750.00 prior to the next case management conference. .

AGNES ACTIE

MASTER, HIGH COURT

BY THE COURT

REGISTRAR