

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2008/1163

BETWEEN:

**JOSEPHAT SMALL
(Trading as Recycle It Inc.)**

Claimant

and

THOMAS AMBROSE

Defendant

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Sylma Finnistere of counsel for the claimant

Ms. Leandre Verneuil of counsel for the Defendant

2015: July 22;

Case management powers – Application to set aside default judgment- Exceptional circumstances- Whether default judgment should be set aside for wrong description of claimant and failure to abandonment other reliefs in a mix claim - Rule 12.8 of the Civil Procedure Rules 2000 (CPR 2000)

JUDGMENT

[1] **ACTIE, M:** Before this court is an application to set aside a default judgment. The facts are not in dispute and I will summarise as follows. The court by order dated 27th November 2007 granted the defendant in the extant claim, who was the claimant in claim 2007/0268, liberty to remove the remainder of materials from a recycling plant left on his premises at the expense of the defendant now claimant. The materials were accordingly removed pursuant to the court's order.

- [2] The claimant in the extant claim filed on 8th December 2008, states that the defendant acted forcefully and arbitrarily in the execution of the court's order made in 2007.
- [3] The claimant avers that the defendant failed to take proper care in the execution of the order resulting in the destruction, lost or theft of machinery, equipment and other contents of the recycle plant. The statement of claim detailed the items alleged to have been destroyed, lost or damaged with costs ascribed to each item. The claimant also claimed for loss of use of equipment, labour costs, aggravated damages, interests and any further or other relief that the court may deem fit.
- [4] The court office on 4th January 2013 entered judgment in default of defence to the claimant described as "Josaphat Small trading as Recycle It Inc" in the sum of \$181,824.00 inclusive of interests and fixed costs.
- [5] On 19th March 2013, the defendant applied to set aside the default judgment. For some unexplained reason the matter remained dormant in the system. It appears that the matter was only revived in response to a letter by the claimant's counsel addressed to the Registrar on 7th March 2014 seeking information on the status of the case. The master at a case management conference conducted on 14th January 2015, noting that the file had been misplaced, ordered the parties to file and exchange submissions for the determination of the application to set aside the default judgment.
- [6] The application is opposed by the claimant who submits that the defendant has not met the criteria outline in CPR 2000 for setting aside the default judgment.

Law and Analysis

- [7] Setting aside a default judgment is not something which the court will do lightly unless the defendant has some very convincing reasons why a regularly obtained judgment should be set aside. CPR 2000 Part 13 provides for setting aside a default judgment and distinguishes between setting aside a judgment as of right

and setting aside as discretion. The defendant's application is made pursuant to CPR 13.3. CPR 2000 Part 13.3 gives the court the discretion to set aside a default judgment and provides the conditions under which the court may do so and states as follows.

“(1) If Rule 13.2 does not apply the court may set aside a judgment under Part 12 only if the defendant –

- (a) applies to the court as soon as reasonably practical after finding out the judgment has been entered;
- (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the 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.”

- [8] It is settled law that that the requirements of Part 13.3 are conjunctive and must all be satisfied in order for the court to set aside a regularly obtained default judgment. See **Kenrick Thomas v RBTT Bank Caribbean Limited**¹. The discretionary power to set aside is unconditional. If the pre-conditions are not satisfied the court has no discretion to set aside a regularly obtained default judgment. The purpose of the power is to avoid injustice as the defendant is seeking to deprive the claimant of a proper judgment obtained in accordance with CPR Part 12.

Was the application made within reasonable time?

- [9] The defendant avers that it was at a status hearing held on 15th January 2013 that the claimant informed the court that a request for Judgment in default had been filed. The defendant submits that efforts were immediately made to retrieve the file from the registry of the high court for inspection but was only successful in receiving the file on 13th March 2013, as the registry was in chaos with staff on sick out for an extended period. On 19th March 2013, the defendant filed the application to set aside the judgment. The defendant contends that he was never served with the judgment but promptly filed the application to set aside the default

¹ SVGHCAP 2005/0003 of 2005.

judgment within six (6) days of receiving and inspecting the file at the court office. The defendant cited the cases of **Louise Martin (as Widow and executrix of the Estate of Alexis Martin, Deceased v Antigua Commercial Bank**² and **Earl Hodge v Albion Hodge**³ where the court found a period of 15 and 13 days respectively between being served with the judgment and filing of the application to set aside was reasonable.

[10] The claimant on the other hand submits that the defendant's explanation for the delay is not verified by affidavit. The claimant states that time should be computed from the status hearing date of 15th January 2013 and submits that the two months delay in making the application was unreasonable.

[11] The court accepts the uncontroverted evidence that the judgment has not been served on the defendant. CPR 42.6 requires the service of every judgment or order made by the court. It is imperative that orders and judgments are served on parties in a timely manner as Part 42.8 provides that a judgment takes effect on the date given or made. I accept the evidence of Mr. Shawn Innocent, former counsel on record for the defendant, who affirms that the file became available for inspection on 13th March 2013. I am of the view that the delay of 6 days is considered reasonable in the circumstances. Accordingly, the defendant has gotten over the first limb of CPR Part 13.3.

Does the defendant have a good reason for the delay in filing the defence?

[11] The evidence before the court indicates that there were several claims filed involving the same parties in respect of the recycling business of Recycle It Inc. The defendant states that claim 2008/0640 involving the same parties was discontinued on 30th October 2008. The defendant submits that the reason for the failure to file the defence was because he was of the mistaken belief that it was

² ANUHCv1997/0115.

³ BVIHCv2007/0098.

the extant claim which had been discontinued by the claimant. In my view this averment is unconvincing and cannot be accepted by the court. A notice of discontinuance must reference the claim number which is being discontinued. The defendant admits that there were numerous claims involving the parties. The defendant had to be more vigilant and was under an obligation to inspect the claim number which was discontinued. It cannot be accepted that the defendant would be so reckless in making such a nonchalant assumption knowing the consequences for failing to file a defence within the timeline provided by the rules. The court totally rejects the explanation given by the defendant for failure to file the defence. The defendant has accordingly failed to satisfy the requirement of Part 13.3(b).

Does the defendant have any prospect of success?

- [12] I am also convinced on the evidence that the defendant's defence is unmeritorious. The draft defence contains bare denials of the forceful entry on the claimant's premises. The defendant also denies that the items were destroyed or that the claimant suffered any loss. The defendant states that the claimant failed to plead negligence and to particularize the any of the negligence alleged. I am of the view that the defendant has not provided any viable defence. There isn't any compelling evidence in the defence to permit the late filing of a defence at this stage bearing in mind that the claim was filed in 2008.

Exceptional circumstances

- [13] The defendant having failed to satisfy the conjunctive requirements of CPR 13.3 (1) is of the view that there are exceptional circumstances for which the judgment in default should be set aside pursuant to Part 13.3 (2). The defendant avers that the description of the claimant as "Josephat Small trading as "Recycle It Inc," is confusing as to the capacity in which the claimant presents the claim. The defendant submits that Recycle It Inc. is a limited liability company with separate legal entity. The defendant also submits that the judgment is irregular as the claim was a mixed claim for which damages were to be assessed in accordance with

CPR 12.10(1) (b) and 16.2(1). The defendant further submits that there wasn't any evidence before the court to prove the value of the items alleged to have been destroyed, lost or stolen. The defendant further contends that the claimant was in breach of CPR 12.8(3) as the judgment was not granted in the terms there being no evidence that the claimant abandoned the other reliefs claimed.

Law and analysis

- [14] It is trite law that special damages must be specifically pleaded and proved. The grant of a default judgment does not entitle the claimant to obtain damages at large without proof. The Privy Council in **Strachan v. The Gleaner Company Ltd & Anor (Jamaica)** states that the claimant must prove his loss or damage by evidence.⁴ Where a claimant estimates damages in pleadings, being damages which will have to be assessed were there a trial, the claimant cannot enter judgment for that assessed amount without proof. In **Rohibni Khan v Neville Johnston**, Rajkumar J said;

“it is doubtful if whether a claim for damages which would normally be assessed under Part 16 can be converted for a specified sum of money merely by the claimant's ascribing a figure to it”⁵.

- [15] The court office, once the requirements of CPR 12.4 or 12.5 are satisfied, **must** enter judgment for the claimant. The evidence reveals that the claimant ascribed a value to each of the items alleged to have been destroyed lost or stolen but did not provided a scintilla of evidence to prove any of the amounts stated therein. In such instances, where there is a failure to substantiate the specified sums claimed in a request for default judgment the proper order is for default judgment to be granted with damages to be assessed.
- [16] The defendant further contends that the judgment in default was not granted in the terms prayed in the claim and that the claimant has not complied with CPR 12.8. CPR 12.8 deals with claims for a specified sum of money and states as follows:

⁵ Rohihni Khan v Nevil Johnson TT CV 2009-02311 delivered on 10th July 2009.

“(2) A claimant who claims a specified sum of money together with interest at an unspecified rate may apply to have judgment entered for either the sum of money claimed-

(a) and for interest to be assessed; or

(b) together with interest at the statutory rate from the date of the claim to the date of entering judgment.”

**(3) If a claim is partly for a specified sum and partly for an unspecified sum the claimant may abandon the claim for the unspecified sum and enter default judgment for the specified sum”.
(emphasis added)**

[17] The court in **Matthew Harris v Lindsay Mason (Trading as “Tropical Home Design Construction Services)**⁶ states that there is nothing irregular in entering judgment for a specified sum with damages to be assessed in a mixed claim⁷. However CPR 12.8(3) provides that if a claim is partly for a specified sum and partly for an unspecified sum the claimant may abandon the claim for the unspecified sum and enter default judgment for the specified sum. The scope CPR 12.8(3) suggests that only claims within 12.8(2) are susceptible to default judgment by request. If an additional remedy is claimed, the defendant can obtain default judgment if that additional remedy is abandoned in the request for default judgment⁸. It is noted that the claimant claimed for exemplary damages in addition to the specified sums stated in the claim. However the request for judgment in default was silent on the claim for exemplary damages. It is imperative that the claimant expressly states whether or not the other relief claimed is abandoned or is still being pursued. There must be finality in the assessment of damages. It cannot be left to mere conjecture as to whether the other relief claimed is being abandoned by the mere silence to so state in the request. The court cannot infer an abandonment of the other reliefs. Where there are other reliefs which are not abandoned by the claimant then judgment in default with an amount to be assessed is to be entered. Where the claimant in a request for default judgment seeks judgment on a

⁶ GDAHCVAP 2014/0028

⁷ *Matthew Harris v Lindsay Mason (Trading as “Tropical Home Design Construction Services* Per Pereira CJ GDAHCVAP 2014/0028.

⁸ Civil Procedure White Book 2011Vol.1.

specified sum but is silent on the other reliefs claimed in the statement of claim it is advisable that the court office should refer the request to a Judge or master.

- [18] The defendant takes issue with the description of the claimant intituled as “Josephat small trading as Recycle It Inc”,. The defendant avers that Recycle It Inc. is a limited liability company. The court accepts that this description is a misnomer. The court notes that the parties have been in litigation involving the recycling business of Josephat Small. The extant claim was filed as a result of the enforcement of a court order authorising the defendant to remove materials from his premises belonging to the recycling business. The court is not in possession of the order so as to note the description of the parties. However it is trite that in an action to redress a wrong done to a company, it is for the company and not the director, to recover damages alleged to be due to it unless it is a derivative action. The company is s a legal entity which can sue or be sued in its own name. The fact that the company may be a one person company does not remove its’ separate legal entity personality. The one man person beneficial owner may be indistinguishable from the company however the corporate personality applies and therefore a claim cannot be brought in the name of the owner trading as the company.

Should the claim and resulting default judgment fail as a result of the misnomer?

- [19] The general rule is that a claim will not fail by adding or failing to add a party. CPR Part 8.5 states:
- “ (1) The general rule is that a claim will not fail because a person -
 - (a) who should have been made a party to the proceedings or
 - (b) was added as a party to the proceedings who should have not have been added.
 - (2) However –
 - (a) where a claimant claims a remedy to which some others is jointly entitled, all persons jointly entitled to the remedy must be parties to the proceedings, unless the court orders otherwise.

[20] This rule in my view can also apply where there is a misnomer in the description of the plaintiff as in the case at bar. The appellants in **Deidre Pigott Edgecombe v Antigua Flight Training Centre**⁹ applied for the default judgment to be set aside pursuant to rule 13.3(2) of the **Civil Procedure Rules 2000**. The appellant claimed that CPR 13.3(2) gives the court power to set aside a regularly obtained judgment if exceptional circumstances have been shown warranting the setting aside of the judgment. The exceptional circumstance advanced by the appellants was that the respondent was not a legal person and did not exist as a matter of law and therefore the judgment obtained by the respondent is contrary to law as the respondent, not being a juristic person, could not be a party bringing a claim and obtaining a judgment thereon. Pereira CJ states:

“The appellants have sought to rely on the case of *Lazard Brother & Company v Midland Bank Ltd.* here Lord Wright in answer to the question whether the order nisi should not be set aside as a nullity the said order nisi having been signed against a non existent defendant as the bank had ceased to exist as a juristic person before the date of the writ ’ responded in these terms:

“... a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently non existent. If the Defendants cannot be before the Court, because there is in law no such person , I think by parity of reasoning the court must refuse to treat these proceedings as other than a nullity”

In my view, *Lazard* is clearly distinguishable from the case at bar. In *Lazard*, there was clearly no juristic person who could be identified with the Bank It had ceased to exist to all intents and purposes. Here it is clear that a juristic person, namely Grace Norman, was carrying on business under the trade name “Antigua Flight Training Centre.” It is not said that Grace Norman who certified the statement of claim is not a juristic person. ***Furthermore, I would venture to say that the law has moved on since Lazard and the focus has shifted to preserving otherwise valid and meritorious claims which may be defective on the basis only of a misnomer.***“ (My emphasis)

⁹ ANUHCVP2015/0005 delivered on 26th June 2015

Conclusion

- [21] The provisions in CPR 13.3 place the burden on an applicant requesting an order to set aside a default judgment to satisfy the court that all the conditions specified in CPR 13.3 are met and that the court's discretion should be exercised so as to set the judgment aside. In exercising the discretion, the court is obliged to have regard to all the relevant matters and must of course exercise its discretion so as to give effect to the overriding objective in CPR Rule 1.1 and to further the overriding objective by actively managing cases.
- [22] I take account of all the circumstances of the case and is of the view that the defendant's application to set aside the default judgment should fail. Firstly, the defendant has failed to satisfy the conjunctive requirements of CPR 13.3. secondly, the applicability of exceptional circumstances in CPR 13.3(3) does not apply in this case as the misnomer in the description of the claimant is not considered as an exceptional circumstance to allow the setting aside of the judgment.
- [23] It is accepted that the claimant was incorrectly described in the claim. However the claim and the resulting default judgment should not be set aside as the description and other anomalies can be rectified by a simple amendment. The claimant obtained a regular judgment having satisfied the requirements of CPR 12.5. What turned out to be a false description of the claimant can be corrected by a minor amendment to reflect the description of the parties as stated in claim number 2007/0268. Similarly, the other defects namely the failure to prove the specified amounts in the claim and to indicate whether or not the claim for exemplary damages and/or other reliefs in the claim are abandoned can be remedied by a simple amendment. The relief for exemplary damages, if being pursued, could be advanced in the context of an assessment of damages. These simple amendments will save the claim and the resultant default judgment. The parties will not be prejudiced by the amendment as they were the same parties in claim 2007/0268.

[24] In summary, the court accepts that the judgment in default should have been entered for an amount to be assessed by the court and not for a specified sum as was granted in the order. The court being of the view that the specified sum pleaded was not proved and there not being an indication whether or not the relief for exemplary damages was abandoned in accordance with CPR 12.8 (3).

[25] The judgment in default was based on erroneous information which justifies the variation of the default judgment. The court, having considered the case of **Deidre Pigott Edgecombe v Antigua Flight Training Centre**, is of the view that a variation of the default judgment rather than setting aside for those procedural defects is a more equitable way to proceed in keeping with the overriding objectives of the rules. CPR 13.3 (3) states where the rule gives the court power to set aside a judgment, the court may instead vary it. The interests of justice require that the default judgment be varied instead of setting aside to read default judgment for amount to be decided on an assessment of damages.

Order

[26] In the circumstances and for reasons outlined above I make the flowing orders:

(1) The defendant's application to set aside the default judgment is refused with costs of \$350 to be paid to the claimant within 21 days of today's date.

(2) The default judgment made on 4th January 2013 is varied to read as follows:

(a) Judgment in default of defence is granted to the claimant for an amount to be assessed by the court;

(b) The description of the claimant and other parties shall be amended to reflect the names of the parties as in claim number 2007/0268;

- (3) The claimant shall file the amended default judgment within 7 days of today's date.
- (4) The claimant shall indicate whether or not the claim for exemplary damages and any other reliefs are being pursued or abandoned.
- (5) Thereafter all further proceedings shall bear the corrected parties in the same manner as was described in the order of the court in claim number 2007/0268.
- (6) The claimant shall, within fourteen (14) days after the order is perfected by the court office, serve the amended default judgment on the defendant.
- (7) The claimant shall file and serve written submissions and witness statements with authorities in support of the assessment of damages within fourteen (14) days of service of the amended default judgment on the defendant.
- (8) The defendant shall indicate whether he wishes to be heard after filing the necessary notice within seven (7) days of the claimant's service of written submissions in accordance with Part 12.13 and Part 16.2.
- (9) The assessment of damages shall be conducted on a date to be set by the court office.

[28] I thank counsel for the parties for their helpful submissions.

Agnes Actie
Master