

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2014/0130

BETWEEN:

**CLEMENT JOHNSON
(also known as Clem Johnson)**

Claimant

and

**[1] PETER CELAIRE
[2] PETER CELAIRE AS PERSONAL
REPRESENTATIVE OF BURNS CELAIRE
[3] ALBERT CELAIRE**

Defendants

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Singoalla Blomqvist-Williams of counsel for the claimant
Mr. Michael Bruney of counsel for the defendants

2015: June 5.

REASONS FOR DECISION

[1] **ACTIE, M.:** On 23rd April 2015 I made an order setting aside a default judgment made on 26th November 2014 by master Corbin-Lincoln with terms settled by master Glasgow on 20th January 2015 with costs in the sum of \$1,500.00 to be set off against the costs awarded on 20th January 2015. I also granted the defendants an extension of time to file their defence and counterclaim within 21 days with costs to the claimant in the sum of \$500.00 to be paid within 21 days. I reserved my reasons for my decision and I now do so.

Background facts

- [2] A summary of the facts is necessary to put this matter into prospective. On 8th July 2003 the claimant entered into a lease agreement with Peter Celaire, the first defendant, for the rental of a parcel of land measuring 4,000 square feet or thereabout situated at Anse Bateau, Point Michel in the parish of St. Luke for a term of five (5) years at a rent of \$350.00 per month.
- [3] Subsequently on 4th October 2009 the claimant entered into a written agreement with the said Peter Celaire and Albert Celaire, the 3rd defendant, for the purchase of a property described in the agreement. It is instructive that I reproduce the agreement to highlight the issues giving rise to the claim before this court. The agreement reads as follows:

AGREEMENT OF SALE

We, Peter Celaire and Albert Celaire of Point Michel in the parish of St. Luke hereby agree to sell to Clement Johnson of Trafalgar in the Parish of St. George our property situated in the area known as part of Anse Bateau Estate in Point Michel in the parish of St. Luke which totals four (4) acres consisting of one parcel as in attached plan and as described below>

Boundaries:

North west land of heirs of Burn Celaire

North east lands of Alphonsus Emmanuel and heirs of Burns Celaire

South east land of Vincent Jno Lewis

South a ravine separating it from the land of Ruth Jeffrey and Joseph Richards

West The Sea

- **WHEREAS: It is agreed that the price per acre shall be EC\$45,000(Eastern Caribbean dollars of forty-five thousand dollars and zero cents).**
- **WHEREAS: It is agreed that the total price for the four (4) acres shall be EC \$180,000 (Eastern Caribbean dollars of one hundred and eighty thousand dollars and zero cents).**
- **Payment to be made within twelve months of receipt of title in the names of Peter Celaire and Albert Celaire.**
-

IN WITNESS WHEREOF: the parties hereto have set their hands and seals this 4th day of October 2009.

**Signed Sealed and Delivered
For and on behalf of the Owner
This 4th day of October 2009
Peter Celaire
Owner**

**Albert Celaire
Owner**

**Signed Sealed and Delivered
For and behalf of the BUYER
This 4th day of October, 2009
CLEMENT JOHNSON
BUYER**

- [4] On 4th April 2014, the claimant filed a statement of claim seeking specific performance of the agreement for sale or in the alternative damages in the sum of \$356,889.00, damages for loss of business and damages for breach of contract. The claimant avers that the 1st and 3rd defendants have failed to execute the Memorandum of Transfer in accordance with the agreement. The claimant further avers that he has been and still is ready and willing to perform his obligations under the agreement as there has been part performance on his part by the payment of \$9,300.95 towards the purchase price.
- [5] On 9th May 2014 the court office entered judgment in default of acknowledgement of service in favour of the claimant in the following terms:
- (1) The 2nd defendant in his capacity as personal representative of the estate of Burns Celaire do transfer to the claimant their share namely 4 acres in the property known as Anse Bateau in Book of Titles P19 Folio 80 M in consideration of the sum of \$180,000.00 as per agreement dated 4th October 2009.
 - (2) Alternatively that the defendants pay to the claimant damages in the sum of \$356,889.00
 - (3) Damages for loss of business, breach of contract and costs.

- [6] On 29th May 2014, the claimant filed another request for judgment in default of defence and on 16th July 2014 the court office entered judgment in default of defence on similar terms as the judgment in default of acknowledgement of service made on 9th May 2014. This resulted in two judgments in similar terms in favour of the claimant.
- [7] The claimant by notice of application filed on 22nd October 2014 applied to the court for an order directing the 1st 2nd and 3rd defendants to transfer the property for the sum of \$180,000.00 in accordance with the agreement for sale and pursuant to the judgment in default entered by the court.
- [8] The matter came for determination before master Corbin-Lincoln on 26th November 2014. The defendants on that same date filed an application to set aside the default judgments and for an extension of time to file the defence out of time. The master noted that the defendants' application was not on the court's file before her. The master without seeing the application and on her own volition set aside the two default judgments as being irregular and entered a default judgment in favour of the claimant with directions to make an application to determine the terms of the judgment pursuant to CPR 12.10(5).
- [9] The claimant by notice of application filed on 11th December 2014 applied to the court to make a determination whether the claimant is entitled to specific performance as prayed in the statement of claim and on 20th January 2015 master Glasgow made the following order :
- (1) The defendants are to effect a transfer of the property consisting of 4 acres not later than 24th April 2015.
 - (2) The claimant is to ensure that the balance of the contract price is paid at the time of the transfer. Should the defendants fail to transfer the property as ordered the Registrar of the High Court is empowered to execute the Memorandum of Transfer of the property

(3) Costs are awarded to the claimant in the sum of \$1,500.00.

[10] The defendants by notice of application filed on 6th February 2015 applied to set aside the judgment in default and the terms subsequently settled on 20th January 2015. The defendants also made a request for an extension of time to file a defence and counterclaim. The application naturally was opposed by the claimant.

Law and Analysis

[11] CPR 13.3 provides the instances where the court may set aside a default judgment under Part 12. Part 13.3 provides 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.

[12] A defendant seeking to set aside a regular obtained default judgment must satisfy all the three requirements of CPR 13.3 (1). In **Kenrick Thomas v RBTT Bank Caribbean Limited**¹ Barrow J.A. states that the three conditions in the Rule 13.3(1) are conjunctive and all three conditions must be met before the court can exercise its discretion in favor of setting aside a regular obtained default judgment. Have the defendants satisfy all three requirements?.

Whether the application made as soon as reasonably practicable

[13] The application to set aside was made on the 6th of February 2015 some 70 days after the judgment was entered and 15 days after the terms were settled. The defendants contend that it was only when the terms were settled that an

¹ SVGHCAP 2005/0003 of 2005

application could have properly been made to set aside the default judgment. The court finds this assertion fallacious as a judgment takes effect from the date it was made. The master merely settled the terms for the judgment made in favour of the claimant on 26th November 2014. Even if the court were to accept the defendants' contention it is noted that the defendants were in court and participated in the proceedings when the master set aside the two default judgments which were erroneously entered by the court office and then entered the default judgment with terms to be settled. The defendants were also present when the terms were settled on the 20th January 2015 but made their application some 16 days after the order was made. In **Louise Martin v Antigua Commercial Bank Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v Antigua Commercial Bank** Thomas J. states "it is accepted that no specific time period is given in the rules and stated that reasonableness, therefore, deposes on the facts of the case. He then found that the period of 15 days between service of the judgment and the filing of the application to set aside the judgment was as soon as reasonably practicable". Taking the facts in the round I am of the view that the defendants did not act with the alacrity required under Part 13.3(1) (a) and as a result have failed to satisfy that they acted as reasonably as practicable.

Reasons for failure to file a defence

- [14] The defendants advanced two reasons for the failure for filing the defence in time namely; impecuniosity and difficulty contacting other beneficiaries of the estate to obtain the documents and information needed for the preparation of the defence. These reasons are unconvincing as the court notes that counsel had on 26th November 2014 filed the same application to set aside the default judgments entered by the court office and for an extension of time to file a defence. The exact same draft defence was appended to the application. The defendants have not provided any satisfactory evidence to prove their impecuniosity and the nature of the information that was required to file the defence. Accordingly the defendants have failed to satisfy the second criteria under section 13.3. (1).

Real Prospects of successfully defending the claim

- [15] The defendants aver that the claimant is seeking specific performance by the personal representative of the estate who was not a party to the agreement in that capacity. The defendants aver that the 1st and 3rd defendants do not have the capacity to convey the land so as to give effect to the terms of the agreement without the consent of all the beneficiaries. The defendants aver that it is evident from the terms of the agreement that the property can only be transferred when the title is vested in the 1st and 3rd defendants.
- [16] I find there is great force in the defendants' argument. I am persuaded that the defendants defence has merit with a real prospect of successfully defending the claim. However I am aware that the court under Part 13.3(1) has to take all three factors into consideration before setting aside a default judgment. The court must not only look to see if there was a real defence to the claim but is obliged to take into account whether the person seeking to set aside the default judgment had made the application promptly and gave a good explanation for his/her failure to file an acknowledgement of service or a defence as the case may be. The defendants have satisfied only one limb of the three conjunctive requirements of CPR 13.3 (1). I will now have to examine whether the defendants have satisfied the court that exceptional circumstances exist in order to benefit under the provisions of CPR 13.3(2).

Exceptional circumstances

- [17] The framers of the CPR in their wisdom amended the rules and created a further provision under 13.3 which allows greater latitude and flexibility to circumvent the rigidity of the conjunctive requirements of CPR 13.3 (1) where the justice of the case requires a departure from the conjunctive requirements. **In Elvis Wyre etal v Alvin G.Edwards etal**² Webster J.A [AG] states that the new rule was introduced in 2011 to give the court a flexible approach in dealing with applications to set aside default judgments. The new rule CPR 13.3(2) provides as follows:

² ANUHCVP2014/0008 del. 3rd September 2014

“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”.

- [18] The rule is silent as to what amounts to exceptional circumstances. Justice Webster J.A (ag) in **Elvis Wyre et al v Alvin G. Edwards et al**³ above states the issue of what amounts to exceptional circumstances within the meaning of sub-rule 13(2) will vary from case to case depending on the facts of each case⁴. The **White Book on Civil Procedure 2003** with reference to provisions in the UK Civil Procedure Rules which are analogous to our CPR 13.3 states:

“The discretionary power to set aside is unconditional. The purpose of the power is to avoid injustice. The major consideration on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other compelling reason why the judgment should be set aside or he should be allowed to defend the claim”.

- [19] In **Graham Thomas v Wilson Christian trading as Wilson Construction**⁵ in relation to CPR 13.3(2) Michel J as he then was states:

[2] ... The flexibility of the English court in setting aside of default judgements was clearly articulated by Lord Wright in the House of Lords’ case of **Evans v Bartlam** where he stated that –
“The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.... The Court might also have regard to the applicant’s explanation why he neglected to appear after being served, though as a rule his fault (if any) in respect can, be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose.”

[3] It is reasonable to conclude that it was primarily to dilute the rigidity of our own Rule 13.3(1) and to bring it more in line with the English Rule by providing greater latitude to our judges to find the justice of the case rather than merely to find presence or absence of three set prerequisites that the new sub-rule (2) of Rule 13.3 was introduced, The amended Rule 13.3, after setting out the

³ ANUHCVP2014/0008 del. 3rd September 2014

⁴ Paragraph 43

⁵ ANUHCVP2011/0629 delivered on 13th July 2012

rigid provisions of 13.3(1), then introduces a new 13.3(2) which states that – “ 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”.

[20] I am convinced that the defendants have satisfied the court that there is a realistic defence. The agreement of sale made on the 4th October 2009, which is the crux of the contention before the court, was made between the claimant and the 1st and 3rd defendants, as owners. It is a term of the contract that payment is to be made within 12 months of receipt of title in the names of the 1st and 3rd defendants, Peter and Albert Celaire. It is contended that the 1st defendant contracted both as owner and as personal representative of the estate. The evidence reveals that the 1st defendant was appointed personal representative of the deceased (Burns Celaire) on 14th September 1992. The court notes that the grant of letters of administration names the 1st defendant as the only son and only one entitled to the succession of the deceased. The third 3rd defendant is not mentioned as an heir in that grant. A second grant of administration was issued on 13th July 2004 appointing one Alice Activille as daughter and one of the persons entitled as personal representative of the said estate. The defendants counsel informed the court that the second grant has since been revoked but no such evidence was provided to the court. It appears that the grants are not conclusive of the beneficiaries of the estate of Burns Celaire as the grant issued in 1992 describes the 1st defendant as the only son and only one entitled whereas the 2nd grant names Alice as one of the persons entitled. The 1st and 3rd defendants by their own admissions state that information required to prepare the defence was in the possession of other beneficiaries who live out of the jurisdiction.

[21] A person cannot convey more than he possess. The principle “**nemo dat quod non habet**”: no one can convey what he does not own is a live issue here. It is a clause in the agreement that “*Payment to be made within twelve months of receipt of title in the names of Peter Celaire and Albert Celaire*”. This clause suggests that the agreement was between the 1st and 3rd defendants to transfer their share entitlement. The evidence in the instant case is not clear as to the persons

beneficially entitled to the estate of the deceased. Having reviewed the evidence it is necessary to determine whether the 1st and 3rd defendants are beneficiaries of the estate capable of disposing the entire estate or whether their capacity to sell was limited to their share entitlements.

[22] I am of the view that there are myriad issues which should be ventilated and determined at trial. The evidence suggests that there are several persons beneficially entitled to the estate. It would be inequitable and unjust to give effect to the order of the master directing the transfer of the entire property to the claimant on the 25th February 2015 as the defendants would be passing title which they may not possess. This would lead to obvious injustice to the other beneficiaries of the estate. The court must first determine the intention and capacity of the defendants in relation to the contract with the claimant.

[23] The draft defence contains a counter-claim which also seeks reliefs under the lease agreement. The interest of justice will be better served if the parties are given an opportunity to ventilate all those issues at trial rather than disposing the property at this preliminary stage. I am of the considered view that the defendants have satisfied the requirement of CPR 13.3 (2). Exceptional circumstances exist to set aside the judgment in default granted on 26th November 2014 and the terms of that judgment which were settled on 20th January 2015. It follows that the defendants should be allowed to file a defence out of time with costs to the claimant and I so ordered.

Agnes Actie
Master