

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. 384 OF 2009

BETWEEN:

E. J. CATO AND SONS LTD.

Claimant

V

THE HONOURABLE ATTORNEY-GENERAL OF SAINT VINCENT
AND THE GRENADINES

Defendant

Appearances:

Mr. J. Martin for the Claimant.

Ms. Ruth Ann Richards for the Defendant.

2012: July 20th

DECISION

- [1] **JOSEPH, MONICA J. (Ag.):** The Claimant filed a claim in 2009 alleging an entitlement to title of 2.09 acres of land, more particularly described in survey plan C1043,: general damages, interest, costs and other relief as the Court deems fit.
- [2] Three applications have been filed. The first, filed on 11th October 2010, is the Claimant's request for entry of judgment in default of defence. The second, filed on 14th October 2010, is an application by the Defendant, for orders for relief from sanctions and for extension of time to file a defence. The third is an application by the Claimant filed 10th May 2011, to strike out the Defendant's purported defence.

WRITTEN SUBMISSIONS: 31st May 2011, December 2011 AND FURTHER INVITED WRITTEN SUBMISSIONS: 15th February 2012, 5th March 2012

- [3] On 4th July 2012, the oral report to the Court on the ordered mediation was that there had been an unsuccessful approach to mediation. The Court was invited to produce a decision.

BACKGROUND

- [4] By application filed on 29th July 2010, the Claimant, pursuant to CPR 12.3, sought permission to obtain judgment in default of defence. The Master ruled that an application for permission was unnecessary and that the Claimant simply had to request that judgment be entered against the Defendant. On 11th October 2010, the Claimant filed a request for judgment in default.
- [5] On the 14th October 2010 the Defendant filed a defence attached to a notice of application applying for relief from sanctions and extension of time to file the defence. Counsel applied to deem the filed defence as properly filed.

ISSUES IDENTIFIED BY COUNSEL FOR CLAIMANT

- [6] (1) Whether the court can deal with the applications as one hearing or whether it has to deal with each application chronologically in order of their filing before the court.
- (2) Whether the Applicant/Claimant is entitled to have judgment entered on its behalf.
- (3) Whether the defence of the Respondent/Defendant is properly before the court.
- (4) Whether the defence having been filed before the entry of judgment can be saved even if not properly before the court.

[7] On 18th January 2012, Court invited further submissions on the following:

1. Can the court grant a default judgment on the filing of a request for entry of judgment where the relief sought is a declaration, without affidavit evidence? See Form 7 Rule 12.7 CPR 2000 which mentions money claims and delivery of goods or their assessed value. Pt 12.10 (4) and (5) mentions other remedies.
2. If affidavit evidence is required and has not been filed what is the legal effect?
3. If affidavit evidence has been filed, is the Claimant required to give evidence in the affidavit of compliance or non compliance with any legislation?

WHICH APPLICATION TO BE HEARD FIRST

[8] Counsel for the Claimant submitted that the Claimant's application should be heard first having been filed on 11th October 2010, ahead of the Defendant's application. Counsel for the Defendant advanced the argument as the Defendant had acted promptly on 14th October 2010, to file an application for relief from sanctions, the Court should heed the Defendant's application.

[9] The principle regarding the hearing of applications is that the 'first in time is heard first'. The Claimant's first in time application for request for entry of judgment must be heard first, and I so proceed to hear it. Saunders JA in **St. Kitts/Nevis National Bank Ltd. v Caribbean 6/49 Limited** Civil Appeal No. 6 of 2002 at paragraph 18 had this to say:

"The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the court office to ensure that sequence resulted in a denial of justice to the bank."

COURT AND COURT OFFICE:

- [10] The functions relating to default judgments that may be performed by the Court and the Court Office are set out in CPR 12.
- [11] The definitions in Part 2.4 read: "Court" means the High Court and, where the context so admits and in Part 62, the Court of Appeal. "Court Office" refers to - (a) the place where documents are to be filed, etc. and includes a Registry of the High Court and of the Court of Appeal; and (b) members of the court staff who carry out work of a formal or administrative nature under rule 2.6(1).
- [12] The Court Office is authorized to enter judgment for failure to file an acknowledgment of service by virtue of Rule 12.4, and failure to file a defence by virtue of Rule 12.5. (except where the rules otherwise indicate the Court).
- [13] The question as to whether it is the Court and not the Court Office that is authorized under Rule 12.10(4) and (5) to deal with default judgment where the claim is for a remedy other than for a specified or unspecified sum of money will be dealt with later in the judgment.

REQUEST FOR JUDGMENT IN DEFAULT

- [14] Counsel for the Claimant advanced the argument that the Claimant does not need to obtain permission to obtain judgment against the Crown under rule 12.3(1) (b). Counsel cited consolidated Court of Appeal case HCVAP 2008/006 **Ministry of Communications & Works, the Attorney General v Clement Cassell** (Cassell) and HCVAP 2008/007 **Ministry of Communications & Works, the Attorney General v Laurretta Daley**.(Daley).
- [15] Counsel for the Defendant admitted that the Claimant was entitled to entry of judgment on 11th October 2010, but that the Court should consider the submissions on behalf of the Defendant in support of an application for relief from sanctions.

[16] I find that permission to file entry of judgment is required in certain instances in Rule 12.3 (1). The Claimant does not fall within any of those instances. The rule makes no mention of permission being required to file entry of judgment against the Crown. In the consolidated case Cassell and Daley, Barrow JA had this to say:

“In my view 12.3(1) (b) does not extend to the Crown and therefore does not establish that permission must first be obtained before judgment in default may be entered against the Crown. There is no such rule anywhere in CPR 2000.”

[17] On the Claimant's request, the Court Office must enter judgment where a Defendant fails to comply with the rules in these instances: failure to file an acknowledgment of service (Rule 12.4) the claimant satisfying stated conditions, and failure to defend (Rule 12 (5)). The procedure for applying is set out in rule 12.7:

“A claimant applies for default judgment by filing a request in Form 7”. A bullet indication reads: “Rule 16.2 sets out additional information that must be provided where the claim is for an unspecified sum of money.” (reference to rule 16.2 will be made later)

[18] Rule 12.10(1) deals with the nature of default judgment, setting out the instances when default judgment arises. Those are: where the claim is for a specified sum of money (paragraph (a)); for an unspecified sum of money (paragraph (b)), and for goods (paragraph (c)). Rule 12.10(4) and (5) deal with default judgment where the claim is for a remedy, other than for a specified or unspecified sum of money or goods. The sub rules provide:

(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.

(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be by notice but must be supported by evidence on affidavit and rule 11.15 does not apply. (11.15 deals with the requirement for service of an application made without notice.)

[19] Sub-rules (4) and (5) state that it is for the Court (not the Court Office) to make a determination where the relief sought is for a remedy other than a specified one. The Claimant seeks the reliefs of a declaration (other remedy) and for damages for an

unspecified sum. The former relief (other remedy) requires the filing of an affidavit in accordance with paragraph (5). An affidavit was not filed.

[20] The claimant also claims general damages of an unspecified sum and damages would need to be assessed. In forwarding a request for entry of default judgment, the claimant is to comply with Rule 16.2 which deals with the procedure relative to assessment of damages.

[21] I outline my understanding of the relevant rules. Pt. 12 authorizes the granting of requests for entry of judgment by the Court Office and the Court, upon the filing of a request for entry in Form 7. The Court Office, if the conditions are satisfied, grants the request. The format of Form 7 suggests that the request envisages liquidated sums and is silent as to other remedies. I think there is a reason for this. The Court Office is mandated by the rules to perform administrative functions, legal functions being undertaken by the court.

[22] Where it is a straightforward administrative function the court office, upon being satisfied that stated conditions are satisfied, enters default judgment. Where it is not a straightforward administrative function, (for example, a claim for a remedy other than sums specified and unspecified and goods), the filed documents are to be referred to a judge for determination.

[23] In a legal function, those filed documents ought to include: under sub rule (5) of rule 12, an application accompanied by an affidavit, setting out evidence which the court, together with the statement of claim, would consider, in fashioning the terms of the judgment. There is a distinction between the administrative functions of the Court Office and the exercise of legal and discretionary function of the court. The court makes a determination on the evidence, by affidavit or otherwise, placed before it. Rawlings J (as he then was) in **Antigua Commercial Bank v Louise Martin** Civil Appeal No. 22 of 2007, para. 13 had this to say:

“Sub rules 12.10(4) and (5) provide that where default judgment is entered on a claim in which the remedies claimed are other than for liquidated sums, an application should be made for the court to determine the terms of the default

judgment, which judgment shall be entered in such form and terms as the court considers the claimant is entitled to on the statement of claim. The practice direction requires the court office to refer the papers filed in the case to the judge who would settle the terms."

- [24] In applying under Rule 16.2, the claimant is to state whether he is in a position to prove amount of damages or is not yet in a position to prove the amount of damages.
- [25] If he is in position to prove the amount of damages then he is to give an estimated time the assessment would take. If he is not in such a position the claimant is to state when he can do so. That rule reads:-
- (1) An application for a default judgment to be entered under rule 12.10(1) (b) must state -
 - (a) whether the claimant is in a position to prove the amount of the damages; and, if so
 - (b) the claimant's estimate of the time required to deal with the assessment; or
 - (c) that the claimant is not yet in a position to prove the amount of damages.
 - (2) Unless the application states that the claimant is not in a position to prove the amount of damages, the court office must fix a date for the assessment of damages and give the claimant at least 14 days notice of the date, time and place fixed for the hearing.
 - (3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.
 - (4) The court office must then fix a period within which the assessment of damages will take place and a date on which a listing questionnaire is to be sent to the claimant.
- [26] The claimant's application for request for entry of judgment did not supply the information required by that rule. No affidavit detailing evidence was filed. The information required to enable the Court or the court office to act is missing. Consequently, the Court is unable to grant the application made. The filed request for entry of judgment reads:

- “(a) The time for the defendant to file and serve his defence has expired (no extension of time having been agreed between the parties);
- (b) No defence and/or counterclaim has been served upon the claimant or the claimant’s legal practitioner;
- (c) The defendant has not paid any monies toward or in settlement of the claim;

Judgment should be entered for:

- 1. A declaration that the claimant is entitled to have title to 2.09 acres of land more particularly described in Survey Plan C1043 issued to it.
- 2. An order that damages and costs be assessed.”

APPLICATION FOR RELIEF FROM SANCTIONS:
APPLICATION TO STRIKE OUT DEFENCE:

[27] The Defendant filed an application on 14th October 2010 for orders: that pursuant to Rule 26.8 the Defendant be granted relief from sanctions: pursuant to rule 10.3 and 26.1(2) (k): the time within which the Defendant may file the defence exhibited to the affidavit in support of the application be extended, and that the Defendant’s defence is properly before the court. I consider the relevant rules:-

Rule 10.3 (1) deals with the period for filing a defence:

Paragraph (1): “The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form.” By 26.1(2), the Court is authorized to extend the time for compliance of any rule. That rule reads under para (k):

(2) “Except where these rules provide otherwise the court may –
 (k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.”

26.8 (1) “An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

- (a) made promptly; and
- (b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that –

- (a) the failure to comply was not intentional;
 - (b) there is a good explanation for the failure; and
 - (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
- (3) In considering whether to grant relief, the court must have regard to –
 - (a) the effect which the granting of relief or not would have on each party;
 - (b) the interests of the administration;
 - (c) whether the failure to comply has been or can be remedied within a reasonable time;
 - (d) whether the failure to comply was due to the party or the party's legal practitioner; and
 - (e) whether the trial date or any likely trial date can still be met if relief is granted.
- (4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[28] The overriding objective of the rules set out in Part 1 -

"The overriding objective of the rule is to enable the court to deal with cases justly.

1) Dealing justly with the case includes –

- (a) ensuring so far as practicable, that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with cases in ways which are proportionate to the –
 - (i) amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) financial position of each party

1.2 The court must seek to give effect to the overriding objective when it –

- (a) exercises any discretion given to it by the Rules; or
- (b) interprets any rule"

- [29] Counsel for the Claimant submitted that the defence is not properly before the court as it was filed out of time and without an order from the court. In Crown Counsel Charlene Douglas' affidavit in support of the application for relief of sanctions, reference is made to the fact that the court should consider the short time that elapsed between the dismissal of the defendant's notice of application to strike out the claimant's claim and the filing of the defence.
- [30] There is a distinction between exhibiting a defence and filing a defence. Exhibiting a defence shows bona fides of the defendant, without assuming the order-making function of the court. Where a defence is exhibited, it would be open to the court to consider whether the exhibited defence should stand, and be regarded as a properly filed defence. Filing of a defence presupposes that the defence is properly filed, that is, in accordance with the rules. An out of time defence cannot be filed in the absence of an order by the Court and cannot stand.
- [31] I look at the supporting affidavit to determine whether it discloses the conditions that the Court is to consider in considering a relief from sanctions application. One of them, was the application made promptly? The suit was instituted on 23rd November 2009. I accept that there were staff changes in the various offices of the Defendant and Chief Surveyor's office up to the final week in January 2010.
- [32] On 16th February 2010 the Defendant filed a notice of application to strike out the Claimant's claim on the grounds that the claim disclosed no reasonable grounds for bringing it and that there was a failure to comply with the Public Officers Protection Act, which application was considered by the Master court on 9th March 2010, and dismissed. So instead of making an application for sanction relief, the defendant chose to file a notice to strike out.
- [33] The time of twenty eight days for filing the defence ran after the date of service of the claim and expired on 22nd December 2009. There were a number of applications before the Master, the last being dismissed on 11th October 2010. The application for relief from

sanctions was filed on 14th October 2010. A party should not assume that an application would be decided in his favour by the court, even where legislative provisions seem to be in his favour.

[34] I advert to Counsel for Defendant's submission filed on 15th February 2011 that in opposing the claim, then counsel had hastened to file a Notice of application to strike out. Counsel inadvertently did not file an acknowledgment of service. As is evidenced from the dicta of the High Court, the sole reason for the failure of the application was that Counsel did not file the said acknowledgment. Presumably, had this been done, the claim would have been struck out."

[35] Perhaps it might be wise in the preparation of a defending case to look, not only at the weakness of a claim filed, but also to look at one's total case: to ascertain its weakness and strength and consider all the procedural steps that may be taken in defending the filed claim.

[36] A question that may be posed: During the period of time for filing the defence, was it possible, utilizing some of the information in the application to strike out, to prepare and file a defence? Then possibly consideration could be given as to whether there needs to be a changing of the statement of case under Pt 20, which deals with changes to statements of case. Rule 1(1): A party may change a statement of case at any time before the case management conference without the court's permission unless the change is one to which two situations are given relating to limitation periods.

[37] I think when all the rules are considered together, the intention is that a court may exercise its discretion where it considers that the circumstances of the case, and the reasons given by the party applying, warrant the exercise of a discretion. In other words, the reasons given by the applicant must be strong enough to sway the court in favor of granting the application.

[38] The circumstances surrounding the application must be such as to provide a balance in the case, thus assisting the Court in dealing justly with the case. In exercising my discretion to grant the application, for relief from sanctions, I have considered the reasons and circumstances given in the affidavit filed in support of the applications for relief from sanctions and the filing of the defence. I do not grant the application sought by the defendants.

IS LEGISLATION TO BE REFERRED TO WHEN REQUEST FOR ENTRY OF JUDGMENT MADE:

[39] Sections 3 and 4 of the Public Officers Protection Act (Cap 276) provide limitations where proceedings are instituted against the Crown. The conditions for entry of default of judgment do not mention that the Claimant is required to state that they have complied with any legislation. I hold that the Claimant is not required, when applying for entry of judgment in default, to indicate that legislative provisions have been complied with. That is not for this stage.

CONCLUSION

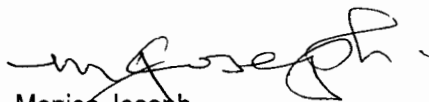
[40] Rule 12.10(5) provides for the filing of an affidavit in support of the request for entry of judgment in default, where the application relates to a remedy other than a specified or unspecified sum. As no affidavit was filed providing the evidence to enable the Court to decide on the terms of the order, the Claimant's application for entry of judgment is dismissed.

[41] Additionally, on the request for entry of default judgment, the claimant failed to comply with the provisions of rule 16.2, forwarding evidence to the court office, as to whether or not he is in a position to prove the amount of damages and an estimate of the time required to deal with the assessment. As this is a claim for unspecified sum, documents and information received by the Court Office would be presented to the judge for determination. The claimant's claim is dismissed for this additional reason.

[42] One of the conditions for a successful application for relief of sanctions is the prompt filing of an application. The defendant's application for relief from sanctions, not having been made promptly, is dismissed. The purported defence filed on 14th October 2010 by the Defendant is dismissed.

ORDER

1. The Claimant's application for entry of judgment in default of defence is dismissed.
2. The Defendant's application for relief from sanctions is dismissed.
3. The Claimant's application that the purported defence of the Defendant filed on 4th October 2010 be struck out is granted. That defence is struck out.
4. There is no order as to costs.



Monica Joseph
High Court Judge (Acting)
13th July, 2012