

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

IN THE COURT OF APPEAL

HCVAP 2011/006

BETWEEN:

DR. MIRANDA FELLOWS

Appellant

and

[1] CARINO HAMILTON DEVELOPMENT COMPANY LIMITED

[2] JORN EIVIK

Respondents

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

Appearances on paper:

Ms. Kalisia Isaacs of Myrna R. Walwyn & Associates for the Appellant

No appearance for the Respondents

2012: April 16;
June 6.

Civil appeal - Interlocutory appeal – Setting aside judgment in default – Claim for unspecified sum of money

The appellant entered into an agreement with the respondents to purchase a condominium from them. Subsequently, a dispute arose between the parties over the identity of the condominium in question. The appellant instituted legal proceedings against the both respondents claiming inter alia damages for fraudulent misrepresentation in the amount of EC\$1,000,000.00 and interest thereon.

A claim form was served on the respondents who acknowledged service but failed to file a defence in time. The appellant subsequently filed a Form 7 request for the court office to enter in her favour judgment in default; this application was not signed by the Registrar. The respondents did however, without any application to file and serve their defence out of

time, file a defence. The appellant filed and was granted an application for the defence to be struck out and judgment be entered in her favour. Thereafter, the respondents made an application pursuant to rule 13.3 of the Civil Procedure Rules 2000 ("CPR"), which was ultimately granted by the Master under rule 13.2 of the CPR, to set aside the default judgment and for an extension of time to file a defence and seeking relief from sanctions. The appellant appealed the order on the basis that the Master made her decision on grounds which were not argued before her, contrary to the maxim that no man ought to be condemned without the opportunity of being heard.

Held: dismissing the appeal and affirming the order made by the Master on 18th March 2011 save that paragraph 2 is varied to give the defendants 30 days from the date that a stamped copy of this order is served on them to file and serve their defence, that:

1. Claims for a specified sum of money can never include a claim for damages for fraud as a specified sum of money mean a sum that is ascertainable or capable of being ascertained as a matter of arithmetic. Thus, the claim made by the appellant was not a claim for a specified amount of money. It therefore must be a claim for an unspecified sum of money. As such it required to be proceeded with as an application under CPR 12.10(5) in Form 6, supported by evidence on affidavit, which application is to be decided by the court. This is a judicial process, and not an administrative one as it is when the Form 7 procedure is followed. Accordingly, the Master was correct to set aside the default judgment that was entered in the appellant's favour as the judgment was an irregular one.

Rule 12.10(5) of the **Civil Procedure Rules 2000** applied; Rule 16.2 of the **Civil Procedure Rules 2000** applied.

2. The Master clearly had a discretion by virtue of Rule 13.2 of the CPR to set aside the default judgment with or without an any application by the respondents.

JUDGMENT

- [1] **MITCHELL, JA [AG.]:** This is an interlocutory appeal against Master Pearletta Lanns' decision to set aside a default judgment. The relevant facts are simply stated. This was a claim for breach of a building and sale contract relating to a condominium in Nevis. The claimant/appellant, Dr. Fellows, entered into an agreement with the defendants/respondents, Carino Hamilton and Mr. Eivik its director, to purchase a condominium from them by way of a loan from a bank. She paid the deposit to the defendants and entered into the mortgage. A dispute arose between the parties over the identity of the condominium in question. The

appellant alleged that the 1st respondent had wrongfully sold her chosen condominium to someone else, and the 2nd respondent had knowingly made false representations to her. She brought a claim against the two of them for a number of reliefs. The prayer at the end of the claim read:

“AND THE CLAIMANT CLAIMS:

As against the 1st Defendant, Carino Hamilton Development Company Limited, a property development company incorporated under the laws of St Christopher and Nevis:

- (a) Rescission of any and all contracts the Court may hold to be legally enforceable;
- (b) Payment of all outstanding amounts due under the mortgage together with any and all ancillary and corollary payments arising as a result of the mortgage,
- (c) Payment of interest due on the mortgage in the amount of EC\$103,759.06 as of the 21st of August 2009, and accruing at EC\$181.82 per diem to the date of Judgment.

As against both Carino and the 2nd Defendant, Jorn Eivik, the Managing Director of Carino:

- (c) Damages for fraudulent misrepresentation in the amount of EC\$1,000,000 and interest thereon; and,
- (d) Costs;
- (f) Any other remedy to which this Honourable Court may grant.”

- [2] The claim form was served on the defendants, who duly filed and served an acknowledgement of service. Rule 10.3(1) of the **Civil Procedure Rules 2000** (“CPR”) gives a defendant 28 days after the date of service of the claim form to file and serve a defence. Their defence was due to be filed and served at the latest by 14th October 2009. There was no agreement between the parties to extend the time for filing and serving the defence. Nor was there any application by the

defendants for an extension of time within which to file and serve their claim. Six days late, on 20th October 2009, they filed their statement of defence.

[3] The following day, 21st October 2009, presumably unaware of the lately filed defence, and pursuant to CPR 12.7, the claimant filed a Form 7 request for the court office to enter in her favour judgment in default of defence in the amount of \$1,000,000.00, plus interest in the amount of \$114,486.44, plus costs, i.e., judgment for the reliefs specified at paragraphs (d) and (e) of the prayer in her claim. The Registrar did not reject this irregular request but, instead, required the legal practitioner for the claimant to make minor alterations to it. It was subsequently refiled to request judgment only for the amount of \$1,000,000.00 plus costs. The Registrar meanwhile did not sign the judgment in default, presumably because of the defence that had been filed the day previous to the filing of the request.

[4] According to CPR 27.3, once a statement of defence is filed, a case management conference must generally take place within not less than 4 nor more than 8 weeks. On 26th April 2010, before the case management conference could take place, the claimant applied for the statement of defence to be struck out and for judgment in default of defence to be entered, or, in the alternative, for an order fixing a case management conference in the matter. This application was duly dealt with by the Master who heard from both counsel. On 25th May 2010, she ordered the defence to be struck out and she directed the Registrar to enter judgment in default of defence. There was no appeal from this order. The Registrar duly entered judgment in default against the defendants based on the irregular request previously filed.

[5] This is the judgment in default which the Registrar entered:

“UPON A REQUEST for entry of Judgment in Default of Defence having been filed by the Claimant against the 1st and 2nd Defendants as a result

of the 1st and 2nd Defendants failure to file a Defence in accordance with CPR, Part 10:

"IT IS HEREBY ORDERED -

[1] Judgment be and is hereby entered for the Claimant as against the 1st and 2nd Defendants in the sum of EC\$1,000,000.00; and

[2] Costs to the Claimant in the sum of \$3,117.00

Dated the 16 day of July 2010

Registrar"

[6] The defendants brought an application pursuant to CPR 13.3 to set aside the judgment in default of defence and for an extension of time to file a defence and seeking relief from sanctions. The Master heard the application in the presence of both counsel and on 18th March 2011 she delivered her written decision. She set aside the default judgment pursuant to CPR 13.2 on the ground of irregularity. She gave leave for the defence to be filed and served. She wrote:

"[34] ...I am of the view that the default judgment is irregular because the claim was a claim for damages and the judgment was entered for a liquidated or specified sum of \$1,000,000 when no document evidencing this loss was identified or annexed to the Statement of Claim as required by CPR 8.7.

...
[36] It cannot be said, and it has not been shown that the sum of \$1,000,000 is a sum that is capable of being ascertainable as a matter of arithmetic.

[37] The judgment is to the effect that the Claimant is entitled to damages of \$1,000,000 arising from the second Defendant's fraudulent misrepresentation. Damages for fraud must be proved, but there are no supporting documents to prove an award of \$1,000,000. A judgment of \$1,000,000 is not one to be taken lightly especially where, as in this case, no explanation or basis for the manner in which the claim for \$1,000,000 has been given by the Claimant.

[38] That said, I am of the view that the Request should have been for judgment in default of Defence for payment of an amount to be

decided by the court pursuant to CPR 12.10(1)(b) or in terms to be decided by the court under CPR 12.10(4) and (5).

[39] I pondered whether the defect could be cured by varying the judgment so that it becomes judgment in terms to be decided by the court upon application under Rule 12.10(4) and (5).

[40] Rule 13.2 does not allow it. However, in my judgment, the irregularities identified are substantial irregularities, sufficient to merit setting aside the Request and hence, the judgment.”

[7] She ordered:

“[1] The judgment entered on 16th July 2010 be and the same is hereby set aside on grounds of irregularity.

[2] The Defendants shall file and serve their Defence to the Claimant's claim by March 29, 2011.

[3] Thereafter the matter shall take its normal legal course.

[4] The parties shall bear their own costs.”

[8] It is against this order of 18th March 2011 that this appeal lies. The complaint is that the Master misapplied CPR 13.2 and made her decision on grounds which were not argued before her, contrary to the maxim that no man ought to be condemned without the opportunity of being heard. CPR 13.2 provides:

“13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of -

(a) ...[no application]

(b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.

(2) The court may set aside judgment under this rule on or without an application.”

[9] CPR 12.5 which is referred to above at CPR 13.2(1)(b) provides the conditions that are to be satisfied by a claimant who requests the court office to enter judgment in default. It reads:

“12.5 The court office at the request of the claimant must enter judgment for failure to defend if -

- (a)...[N/A]
- (b)...[N/A]
- (c) the defendant has not -
 - (i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6); or
 - (ii) ...[N/A]"

[10] CPR 12.5 has to be read in the light of CPR 12.10 and CPR 16.2. CPR 12.10(1) defines the nature of a default judgment. It provides at paragraph (a) that a default judgment on a claim for “a specified sum of money” must be judgment for that amount. Clearly, this means a proper claim for a specified sum of money. The term a “specified sum of money” is defined in CPR 2.4 to mean a sum that is ascertainable or capable of being ascertained as a matter of arithmetic. Damages for fraud can never fit into this definition. CPR 12.7 provides Form 7 as the usual form to be used in requesting of the Registrar a default judgment on a claim for a specified sum.

[11] CPR 12.10(1)(b) provides that a default judgment on a claim for an “unspecified sum of money” must be judgment for the payment of an amount to be decided by the court. The footnote to this paragraph explains that the procedure for assessment of damages where judgment is entered under this paragraph is dealt with at CPR 16.2. CPR 16.2 provides that an application for a default judgment to be entered under CPR 12.10(1)(b) must state various things. Note that an “application”, not a “request”, must be made for judgment in default in this case. The only form of application in CPR 2000 is Form 6. The use of this word “application” means by necessary implication that Form 7 may not be used to request a default judgment in respect of an unspecified sum of money. CPR 16.2 also provides the subsequent procedure by which a hearing for the judge or Master to assess damages will be fixed. It will be on an application without notice. The application will be heard by the judge or a Master in the usual way, and the terms of the default judgment settled. This is a judicial process, and not an administrative one as it is when the Form 7 procedure is followed.

[12] In the case of a claim for “some other remedy”, CPR 12.10(4) and (5) come in to play. These 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 on notice but must be supported by evidence on affidavit and rule 11.15 does not apply.”

Note the use again of the word “application.” The procedure that is required to be followed by CPR 12.10(5) in a claim for some other remedy is identical to that in a claim for unspecified damages dealt with above.

[13] In my view the Master was correct to find that CPR 12.10(1)(b) was not an appropriate sub-rule on which she could have proceeded. Given the various reliefs prayed for in the claim quoted at paragraph 1 above, this was a claim for “some other remedy” in addition to a claim for damages. It required to be proceeded with as an application under CPR 12.10(5).

[14] What the Master was faced with in this case was a claim which was framed as a claim for a quantified amount of damages of \$1,000,000.00. This sum having been claimed as “damages for fraudulent misrepresentation” was clearly without merit. As the Master was aware, damages for fraud are always general damages which are required to be assessed by the court. It is a basic rule of civil procedure that it is not open to a claimant to specify an amount of general damages in any claim arising out of a tort. The Master was faced with an impossibly bad default judgment and was constrained to do the best she could to remedy the situation. She was entitled by CPR 13.2(2) to take the step she did on her own initiative and without any application by the defendants. She cannot be faulted in the exercise of a discretion she undoubtedly had.

- [15] In the circumstances, I would dismiss the appeal and confirm the order of the Master, varying it only to extend the time for the defendants to file and serve their defence to the claimant's claim.
- [16] The defendants/respondents having played no part in this appeal, they are not entitled to costs on its dismissal, and each party will bear their own costs.
- [17] The Order will be that the appeal is dismissed and the order made by the Master on 18th March 2011 is affirmed save that paragraph 2 is varied to give the defendants 30 days from the date that a stamped copy of this order is served on them to file and serve their defence.

Don Mitchell
Justice of Appeal [Ag.]