SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SUIT NO: 0073b OF 2001

BETWEEN

(1) Group MGA International
(2) Andre Claveau

Claimants

V

(1) Rochamel Construction Ltd
(2) Clynt Wellington

Defendants

Appearances:
Mr. Kenneth Foster Q.C. for Claimants
Mr. Peter Foster for Defendants

2003: May 22
May 27

JUDGMENT

[1] Shanks J: These are applications by the Defendants (represented by Mr. Peter Foster) (1) under CPR 11.18 to set aside an order of Charles J made on 13th January 2003 in the absence of the Defendants whereby she dismissed an application to set aside a default judgment for $2.9 million dated 8th March 2002 and (2) under CPR 13.2 and /or 13.3 to set aside that judgment.

Application (1)

[2] As to the first application, according to the affidavit of Mr. Wellington (which exhibits Saunders J's notes of proceedings) and what I was told in court by Mr. Peter Foster, the application to set aside the judgment came before Saunders J on 18th December 2002 and was adjourned to 5th March 2003. Mr. Wellington also exhibits two final cause lists before Charles J for 13th January 2003, one of which contains this case and the other of which does not. In those circumstances it is understandable that there was confusion about the hearing on 13th January 2003 and that the Defendants were not represented before Charles J and I am satisfied that there was good reason for their non-attendance. In view of the decision I have reached having heard Mr. Peter Foster on the second application, it is also clear that if they had attended, some other order might have been made on that occasion. I will therefore set aside the order of Charles J made on 13th January 2003 under CPR 11.18.

Application (2)

[3] I turn to the main application. As originally formulated this was clearly intended to be an application under CPR 13.3 as opposed to CPR 13.2 (see the affidavit of Carlyle Octave dated 24th May 2002). On the material I have seen (including the claim form and statement of claim, which is extremely vague and unclear as to the basis of the claims against the Defendants, especially Mr. Wellington), I am satisfied that each of the Defendants has a real prospect of successfully defending the claim and Mr. Kenneth Foster Q.C only faintly suggested otherwise. Quite apart from anything else the concept that the claimants should be entitled to nearly $3 million for the hire of some "building

forms" is somewhat surprising and requires investigation by the court. I also note that an almost identical claim (No. 17/1999) was started by the First Claimant alone against the First Defendant alone which, so far as I am aware, is still outstanding.

[4] Under CPR 13.3, I must also be persuaded that the Defendants have applied to the court as soon as reasonably practicable after finding out about the Judgment and that there is a good explanation for the failure to serve a Defence. This requires a little consideration of the procedural history.

Procedural History

[5] The claim form was issued on 24th January 2001. On 26th October 2001 Mc. Namara & Company "entered an appearance" purportedly on behalf of each of the Defendants. No Defence was filed before or after that date. There was clearly no proper compliance with CPR 9 or 10 by the Defendants. On 10th December 2001 Mr. Kenneth Foster Q.C. requested the entry of a judgment in default of Defence for $2,910,600.00 and $50,000.00 costs. On 15th January 2002 Mr. Kenneth Foster Q.C. launched an application for a freezing order against the Defendants. On 30th January 2002 Mc. Namara & Co. applied to be removed from the record as lawyers to the Defendants. The affidavit in support of the application states that they had filed the appearance "on the instruction of the Defendants" (Roheman affidavit of 29th January 2002 para. 2) and that "despite demand the fees due to Mc. Namara & Co. for services rendered to date remain unpaid." It appears that the application and affidavit were served personally on someone called Garvin French on behalf of Rochamel Construction Ltd. and Clynt Wellington at the Hyatt

Hotel. The papers do not reveal who Mr. French is. Mc. Namara & Co. were removed from the record on 6th February 2002.

[6] On 6th March 2002 Monplaisir & Co. made an application on behalf of both Defendants to set aside the freezing order which had been made on 15th January 2002. On 8th March 2002 the default judgment was entered. On 4th April 2002 notice was given that Monplaisir & Co. had ceased to act for the Defendants and Alberton Richelieu & Associates had been appointed to act. On 29th April 2002 the judgment in default was personally served on someone called Gita Tulsie at Price Water House Coopers; again, I do not know who Gita Tulsie is. On 24th May 2002 application was made to set aside the judgment by Alberton Richelieu & Associates on behalf of Clynt Wellington; it was not clear from the documents whether the application was also made on behalf of the company Rochamel Construction Ltd. and in due course the application was amended in July 2002 to make this clear.

CPR 13.3 (1)(b)

[7] In the light of this history, can it be said that the Defendants have given a good explanation for their failure to file a Defence? Carlyle Octave, a director of Rochamel Construction Ltd., states in his affidavit of 24th May 2002 in support of the application at para 3:

> "The failure to file a Defence in the matter is due to an application by Mc. Namara & co. the Solicitors for the Defendants ceasing to act as solicitors for the Defendants and consequently withdrawing their services." (sic).

Mr. Wellington, in an affidavit sworn on 22nd January 2003, states that he had been away for two years, that he was never served with proceedings, that he did not know about the default judgment until Mr. Peter Foster told him on 21st January 2003, and that he had

never instructed solicitors to represent him or to acknowledge service on his behalf. I note that he does not suggest that he did not know about the proceedings themselves.

[8] I am afraid that I cannot accept that Mr. Wellington is right in his assertions that he never instructed lawyers and did not know about the default judgment. No fewer than three sets of lawyers before Mr. Peter Foster appear to have been under the impression that they were acting for him personally as well as for the First Defendant and Richelieu & Associates expressly applied on his behalf to set aside the Judgment in May 2002. He may not have been personally served with the claim form but by entering an appearance on his behalf Mc Namara & Co. have waived any point on service. That leaves the explanation for non-service of a Defence offered by Mr. Octave. The problem with that explanation as put in his affidavit is that the Defence ought to have been served, at the latest, some time between 26th October 2001 ("notice of appearance") and 10th December 2001 (request for entry of Judgment) but Mc Namara & Co. did not make their application to come off the record until 30th January 2002.

[9] The explanations given by the Defendants are therefore not good enough. For all I know there may be a good explanation available but it is for the Defendants to put it before the court and this they have conspicuously failed to do. I therefore have no jurisdiction to set aside the judgment under CPR 13.3.

CPR 13.3(1)(a)

[10] As to the requirement that an application to the court is made as soon as reasonably practicable after finding out about the judgment, the difficulty is that I am not told by anyone when the judgment was brought to the attention of the Defendants.

It was apparently served on Gita Tulsie on 29th April but, as I have said, I do not know who Gita Tulsie is. Mr. Wellington denies knowledge of the judgment until 21st January 2003 but I have rejected his evidence about this. It seems to me that the onus must lie on the applicant Defendants to satisfy the court that CPR 13.3(1)(a) is satisfied. Since they have not done so, I do not believe I would have jurisdiction to set aside the judgment even if I had decided otherwise on CPR 13.3(1)(b). I therefore reject the application under CPR 13.3.

CPR 13.2

[11] Mr. Peter Foster stated at the hearing that he was also basing his application on CPR 13.2, because of the inadequacy of the statement of claim and the fact that the claim for $2,910,600.00 was not a claim for a "specified sum of money" because it was based on an estimate. Mr. Kenneth Foster Q.C. stated that this point had taken him by surprise and I have some sympathy with his position. Although Mr. Wellington's affidavit of 22nd January 2003 makes reference to the judgment having been "irregularly obtained" this was in the context of his assertion that he had never been served with the claim form (an assertion which I am not prepared to accept). Since the point does not feature in the notice of application, I would have been reluctant to have dealt with it, but Mr. Peter Foster rightly

points out that the court must set aside an irregular judgment under CPR 13.2(1) and can do so without notice (CPR 13.2(2)).

[12] I must therefore consider whether the judgment was irregular in terms of CPR 13.2(1)(b). This refers to the conditions at CPR 12.5. It seems to me that all those conditions have on the face of it been satisfied notwithstanding the inadequacies in the statement of claim. I cannot therefore see that I have power under CPR 13.2 to set aside the judgment.

(13) However, Mr. Peter Foster submits that even if CPR 12.5 is satisfied judgment for a specified sum under CPR 12.10(1)(a) ought not to have been entered because the figure of $2,910,600.00 was expressly based on an estimate (see the particulars of para. 8 of the Statement of Claim). Looking at the definition of "claim for a specified sum of money" in CPR 2.4 ("a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic . . .") it is clear that Mr. Foster's submission is correct. The Claimant does not know or claim to know precisely how much it is entitled to under the alleged contract because the relevant square footage is not known. The sum of money is neither ascertained nor ascertainable as a matter of arithmetic. It follows that judgment should not have been entered under CPR 12.10(1)(a) but, if at all, under CPR 12.10(1)(b).

14. How does the court deal with this situation which does not seem to be contemplated by CPR 13.2 or 13.3? The answer must lie in CPR 26.9 which empowers the court, on or without an application, in a case where there has been an error of procedure or failure to comply with a rule and no consequence is specified, to "make an order to put things right" (CPR 26.9(3)).

15. The natural order to make in these circumstances would obviously have been to vary the judgment to one under CPR 12.10(1)(b), ie. a judgment "for the payment of an amount to be decided by the court". The problem with that approach is that the statement of claim is so vague and unclear as to the basis of the claim and as to why each of the defendants is sued that the court would be faced with an impossible task in deciding what was the amount for which a final judgment was due (it would have to be final judgment against both Defendants, note, and on the basis that the allegations as to liability in the statement of claim were all true). It cannot be right that the court should be put in this position. In those circumstances it seem to me that the right course to take under CPR 26.9(3) is to set aside the judgment in its entirety and to strike out the statement of claim and give the Claimants an opportunity to set out their claim again in proper form.

Conditions

[16] There is nothing in CPR 26.9(3) to prevent me imposing conditions on the setting aside of the judgment (see CPR 26.1(3) and (4)) and this seems the obvious course to take in the circumstances. The fact is that all the problems with which the court is now faced would have been avoided if the Defendants had put in a Defence when they should have or applied to strike out the statement of claim. I have already said that their explanations for the failure to do so are not good enough and it is clear form the procedural history that their conduct of the proceedings has been lamentable. I therefore have no hesitation in making it a condition of setting aside the judgment that the Defendants are ordered to pay all the costs incurred by the claimants in this case (save in relation to the freezing order application) up to date, such costs to be agreed or assessed if necessary at a separate

hearing under CPR 65.12, and further that they must actually pay $10,000.00 on account of any amount so assessed by 13th June 2003. Mr. Peter Foster suggested that it would be wrong to impose any condition if the judgment was liable to be set aside pursuant to CPR 13.2. I think he must be right in saying that. This would not prevent me awarding the costs incurred to date to the claimants in any event, however, and I would have done so even if I had set the judgment aside under that rule.

Result

[17] I will therefore order as follows:

(1) the order of Charles J made on 13th January 2003 is set aside;

(2) provided that the Defendants pay the Claimants $10,000.00 on account of the costs ordered at (3) by 13th June 2003 the statement of claim is struck out and the default judgment of 8th March 2002 is set aside pursuant to CPR 26.9;

(3) the Defendants must pay all the costs incurred by the Claimants in this claim up to date (save those in relation to the freezing order application), such costs to be assessed under CPR 65.12 if not agreed;

(4) if the condition at (2) is satisfied case management directions are to take effect as follows:

(a) Claimants are to file and serve a reformulated statement of claim complying with CPR 8.6 and 8.7 by 27th June 2003;

(b) Defendants are to file and serve Defences by 11th July 2003;

(c) If Defences are filed the court office is to list the matter for a case management conference thereafter.

Murray Shanks
High Court Judge (Ag.)