

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

SUIT NO. ANUHJCV2002/0387

BETWEEN

EDY GAY ADDARI

Claimant

And

ENZO ADDARI

Defendant

And

CLAIM SUIT NO. 2002/0388

BETWEEN

EDY GAY ADDARI

Claimant

And

ENZO ADDARI

First named Defendant

ANTIGUA SLIPWAY LIMITED

Second named Defendant

Appearances:

Karen Campbell and Rika Bird for the Claimant /Respondent
Dr. Errol Cort and Sharon Cort for the Defendant/Applicant
James Fuller Director of Antigua Slipway Limited in person

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2004: January, 29th, February, 5th

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JUDGMENT

(Applications to set aside judgments obtained in default of
acknowledgement of service)

[1] **Joseph Olivetti J:** “This is an easy case” said Mr. James Fuller, as a director of Antigua Slipway Limited (“Antigua Slipway”) when he declined the court’s offer to allow him time to obtain legal representation for Antigua Slipway. I agree with him although he is a layman and not to be confused with his brother, John, a well-known attorney - at- law in this jurisdiction. These applications to set aside default judgments only seem complicated having regard to the fact that a considerable fortune is at stake here and to the wealth of documents filed emanating, no doubt, from the determination of Mr.Addari to be heard on the merits of the claims and from Mrs Gay Addari’s equal resolution to hold on to her default judgments.

[2] Several applications were filed in these matters. However, the court has intimated to counsel that it will only consider the two applications to set aside the default judgments as it seems to the court that these are first in time and that the other applications filed on behalf of Mrs. Gay Addari which are later in time will not necessitate a separate hearing as the questions raised therein are intrinsic to any decision reached on the applications and that in any event it would be a more efficacious way of managing the cases. Accordingly, by Counsel’s consent the applications to set aside the default judgments were argued together although the cases have not been consolidated.

[3] Briefly, the facts giving rise to these applications are that Mrs. Gay Addari, the estranged wife of Mr. Addari, filed Suit No. 387 of 2002 on the 29th

July 2002. This was properly initiated by Fixed Date Claim Form as she was seeking relief under the Married Women's Property Cap 267. In that Suit she sought among other things declarations that she was entitled solely and absolutely to four parcels of land at Browne's Bay, St. Phillip's Antigua and the shares in Antigua Slipway held by Ripples Holding Company Ltd (Ripples). Neither Antigua Slipway nor Ripples was made a party to this action.

[4] On the 31st July 2002 the court granted an application to serve Mr. Addari outside the jurisdiction. The affidavit in support of the application was sworn by Karen Campbell, of counsel, who deposed in paragraph 9 that she was told and verily believed **"that the Defendant is currently out of the jurisdiction and is unlikely to return for some time. The Defendant is in Rome, Italy. He is currently staying at Hotel Guilio Cesare ."**

[5] The same counsel argued the matter and seems to have overlooked the numerous and wise judicial pronouncements to the effect that it is not proper for counsel who swears to an affidavit, especially in contentious matters, and I would add, potentially contentious matters, to argue the matter. See, for example, the dicta of **A.M Lewis C.J at page 270 para (i) in Casimir v. Shillingford and Pinard [1967] 10 W.I.R. 269** where he said:

"During the course of the argument, I made reference to the fact that it was not proper (I put it no higher than that) for a barrister who is going to appear in a cause to swear an affidavit in the same cause, even if he swears in his capacity as solicitor. In England, of course, barristers do not practise as solicitors and the rule without the rider which I have added may be found at the back of the White Book relating to the conduct of barristers. It puts the court which has to pronounce upon the acceptability of the affidavit in an embarrassing position when the person who has made this affidavit as solicitor appears before it in the same cause as counsel, and it is more appropriate that either some other person, preferably the party who desires to speak, should swear the affidavit, or that if the circumstances are such that counsel has to swear it himself that he should then brief other counsel to argue the case before the court."

[6] Likewise, Mrs. Gay Addari filed Suit No. 388 of 2002 on the 24th July 2002 by way of an ordinary claim form. She claimed, among other things, a declaration that the shares in Antigua Slipway are held by Mr. Addari or his agent or nominee on trust for her, that Antigua Slipway execute any necessary transfer and deliver to her all property which it holds on trust for her and interestingly, a declaration for the benefit of the parties' son, Mr. Manuel Addari who as it transpires is not a minor but an adult. On the 31st. July 2002 a similar order to serve Mr. Addari outside the jurisdiction was made.

[7] Mr Gay Addari's solicitors subsequently filed applications to enter judgment in default of acknowledgement of service. The application in Suit 388 was supported by the affidavit of Jerome Henry, a clerk in the Chambers of the solicitors of Mrs. Gay Addari which was filed on the 5th

November, 2002. Paragraph 2 of the affidavit referred to an affidavit of service by Miss Maria Teresa Addari in the form of a sworn statement made before a Notary in Rome. The original affidavit in Italian and an English translation were exhibited as **JH2**.

[8] Miss Addari's affidavit of service states that she personally served her brother, Mr. Addari, with the claim form and other documents in the action at 1:00p.m. on the 11th September, 2002 at the domicile of Mr.Enzo Addari in Rome, Viale Della Tecnica 183 first floor.

[9] A similar application was made in Suit 387. Both applications were granted .The default judgment in Suit 387 is dated 25th October, 2002 and that in Suit 388, 12th November,2002. Essentially, the judgments gave Mrs. Gay Addari the relief she claimed in her statement of claims.

[10] Mr. Addari filed both his applications to set aside the default judgments on 3rd December 2003. He supported his applications by his affidavits which were in identical terms in both suits and an affidavit of his sister Miss Maria Addari.- **Exhibit EA 15** dated 22nd June 2003. He exhibited a draft defence and numerous documents to his affidavits. Essentially, he deposes that he had not been served with the claim forms or alternatively that he has a reasonable prospect of defending the action.

[11] In her affidavit, Miss Addari deposes to the effect that she had lied when she had sworn that she had served the claim forms on her brother on 11th September, 2002. She also said that she swore another statement on 23rd January, 2003 to the effect that she had served Mr. Addari with the default judgments but that was also untrue and that she never served him with any documents. She said she made those affidavits as a result of having been tricked by Mrs. Gay Addari but that subsequently having understood the consequences of her action and the harm she had caused to her brother she made a clean breast of it to her brother and shortly after made this last affidavit by way of self-indictment before a Notary in Rome being fully cognizant that she was laying herself open to criminal prosecution, at least in Italy. She also gave oral testimony before the court to that effect.

The law

[12] There is no dispute that the position is governed by CPR 2000 Part 13. I find it helpful to set out the relevant provisions in full:-

Cases where a court must set aside a default judgment

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) a failure to file an acknowledgement of service - any of the conditions in rule 12.4 was not satisfied ;or
- (b) (this does not apply)

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

[13] **Cases where court may set-aside or vary default judgment**

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

- (a) applies to the court as soon as reasonably practicable after finding out that judgment had 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) If this rule gives the court power to set aside a judgment the court may instead vary it.

[14] Part 13.4 sets out the procedure to be followed namely that the application must be supported by evidence on affidavit and that the affidavit must exhibit a draft of the proposed defence.

Preliminary Point

[15] Counsel for Mrs. Gay Addari took the point that the applications could not properly be made on the two grounds relied on. Counsel submitted, without much conviction, that the grounds were mutually exclusive having regard to the introductory wording of CPR13.3 **“If Rule 13.2 does not apply”** and that the application should be on one ground or the other not

both. Counsel did not advert to any case law which precluded an applicant relying on both grounds. The applications was argued in the alternative and I see no merit in this objection having regard to the plain meaning of the words relied on and to their context. To my mind these words merely convey that if one ground is not applicable the court may go on to consider the other ground. It does not prohibit an applicant from relying on both grounds and in practice practitioners often do so.

Application under CPR13.2(1) (a)

[16] Essentially the issue here is whether the claim forms were served on Mr. Addari. The proof of service relied on by Mrs. Addari in her applications for the default judgments was the affidavit of service of Miss Maria Addari. However, as already noted, Miss Addari sought to impugn the contents of her affidavit by the subsequent affidavit she filed in support of her brother's application and her oral evidence at this hearing. She denied that she ever served Mr Addari.

[17] Mr.Addari, in his affidavit, deposed that he left Antigua in January, 2002 , that he was hospitalized for three periods in June, August and September in Rome that he has surgery and that after his discharge from hospital in early October he underwent a prolonged period of rehabilitation and was in braces until July,2003. He said that Miss Maria Addari never served him with any documents. Both Mr. Addari and his sister were cross-examined at the hearing but they stuck to their

positions although they were hampered somewhat by having to rely on the skills of the Court's interpreter, Ms. Francesca Coletti.

[18] Mrs. Gay Addari's counsel sought and obtained the court's permission for her client to comment by way of evidence in chief on matters raised by the applicant and Mrs. Addari did so at great length. Surprisingly, despite the initial observation by her counsel to the effect that her knowledge of English was such as not to enable her to give instructions without an interpreter, she refused the services of the court's interpreter throughout her testimony.

[19] Mrs. Addari struck the court as a very self-possessed woman - hardly the down trodden and wronged wife that at first blush the claim forms seemed to hint at. She told the court that in September 2002 she explained everything to Miss Addari and asked her to serve her brother as in Italy only someone personally acquainted with a person could effect service on that person. She said Miss Addari fully understood and agreed to serve her brother. She also told us that Miss Addari was afraid to effect service of the default judgments as her brother was angry on being served on the first occasion but that she said she served him in the presence of their mother and that he was so angry he struck her in the face. Albeit this is all hearsay as counsel for Mr. Addari properly pointed out but it is interesting to note that these allegations were never put to either Mr. Addari or to Miss Addari when they were cross-examined.

[20] Mrs. Gay Addari's counsel invited the court to refuse the application and to find that service was effected on Mr. Addari by Miss Addari. Counsel submitted chiefly that the application was based on the evidence of a self confessed liar. If the court accepts this reasoning then it would follow inevitably that the applications for the default judgments were also grounded on the evidence of a person whose credibility is seriously challenged and by the same persons who at first relied on her veracity. This cannot be right as in a manner of speaking one cannot approbate and reprobate at the same time.

[21] Having heard the evidence the court harbours real doubt as to whether Mr. Addari was ever served with the claim forms. It is interesting that in her evidence and in her affidavit of the 19th January 2004 Mrs Addari said that Mr. Addari resided at the same place that Miss Addari initially said she served him. It is clear from Mrs. Gay Addari's oral testimony that that was Mr Addari's usual place of residence when in Rome and that it was about one hundred meters from her own house, yet there is no mention of this address in the affidavit which grounded the application for leave to serve outside the jurisdiction and certainly we did not hear of even one attempt at service at the Hotel Gulio Cesare, which presumably was where Mrs. Addari said he was living when she instructed her lawyers in July, 2002. Accordingly, I will set aside both default judgments and give leave to Mr. Addari to defend the claims.

[22] By way of comment I note that in paragraph 2 of her affidavit Mrs Gay Addari said **"My lawyer in Antigua Rika Bird urged me to serve notice on my husband from whom I have been separated since August 1977 and who was domiciled during this period at Viale Della Tecnica 183 Rome"** One wonders why in matters of such moment the claim forms were ever entrusted to the client to effect service when it was clear, even from the client's own evidence, that she had the services of an Italian lawyer who was with her in Rome and in any event the services of independent lawyers or process servers could have been easily obtained. I do not for one moment accept Mrs. Gay Addari's evidence that she used Miss Addari because only a person who knows another person can serve him. This defies commonsense if nothing else and would undoubtedly hamper international commerce with Italy. The practice of having clients serve claim forms leaves service open to challenge as is amply illustrated by these cases and should not be encouraged.

[23] I must add that under Rule 13.2(2) the court can of its own accord set aside a default judgment if it was irregularly obtained. Suit 387 was a fixed date claim. As such it was not open to the Mrs. Addari to obtain a default judgment as this is specifically precluded by Rule 12.2(b) This point was not argued but having regard to my power under 13.2(2) I also hold that on that ground also the default judgment in Suit 387 must ex debito justitiae be set aside.

[24] Having allowed the applications under CPR 13.2 () (a) there is no need for me to consider the alternative ground. However, as it was argued I will state my views briefly.

Application under CPR13.3 (1)

[25] The main issue here is whether Mr. Addari has a real prospect of successfully defending the claims on their merits.

[26] The court clearly has a discretion under Rule 13.3 (1) to set aside the judgments if the provisions of this rule are satisfied. Numerous judicial dicta explain the ambit of this discretion and its rationale. I can do no better than refer to Lord Atkin's classic statement in the case of **Evans v Bartlam [1937] A.C. 473 at page 480:**

"... unless and until the Court has pronounced a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[27] I also refer to the general principles set out in Paragraph 13/9/18 of the United Kingdom Supreme Court Practice 2000 which were derived from the judgment of the English Court of Appeal in **The Saudi Eagle [1986] 2 Lloyd's Rep. 221 at page 223.**

[28] These principles have been adopted and applied by our courts. See for example **Fergusson v. Volney** 2001 E.C.S.C.J 190 and **Luke v. Alexander** 2002 E.C.S.C.J 88.

[29] Mr. Addari has met the procedural requirements of 13.4. I therefore have to consider the three matters set out in 13.3.(1). On the first two considerations, I accept his explanation that he was not served with the claim forms and that he only heard of actions taken by Mrs. Gay Addari from his sister in about June, 2003. The applications were filed in December 2003 after he had investigations made on his behalf. I do not find, having regard to his evidence that he was ill for a prolonged period of time (which was not challenged) and to the steps he took to ascertain

what was going on with all his property worldwide even though as he admitted in cross-examination he gave priority to assets outside Antigua and Barbuda, that he delayed unreasonably in making the applications. Even if I am wrong and he did get the claim forms at the hands of Miss. Addari as alleged, his serious medical condition would be an acceptable reason for his failure not to file an acknowledgement of service or a defence as it is hardly likely that one so ill would immediately treat litigation in foreign lands as a pressing concern.

[30] On the third limb, which is the most important one, I have considered firstly the statement of claims. In Suit 387 Mrs Gay Addari alleged that her marriage to Mr Addari broke down in late 2001 as a result of his adulterous association with another woman; she pleaded further that in 2001 she decided to purchase shares in Antigua Slipway for US\$1,560,984.00 and that it was a complicated agreement. It is clear that the agreement is the same as that referred to in Suit 388.

[31] Mrs Addari pleaded further that it was agreed between she and Mr Addari that although the agreement would be in his name he would hold the shares on trust for her and that she would make initial payments of \$476,000.00 due. She said in August 28, 2001 she paid the deposit due of US\$100,000.00 and later the sum of US\$676,400.00

[32] Mrs Addari further alleged that she and Mr Addari purchased four parcels of land at Browns Bay plots 39 and 40 were bought on the 31 July 2000 and she paid the purchase price of US\$398,000.00. The transfer was taken in the name of Mr Addari but she alleged that she is the beneficial owner. She pleaded that Parcel 45 was purchased on or about 25 July 2002 for US\$190,000.00; that the transfer recorded Mr Addari as owner and that she contributed to the purchase price and is therefore the beneficial owner.

[33] Mrs Gay Addari pleaded that Parcel 47 was bought in 1999 by way of staged payments for US\$510,000.00 and that she paid the purchase price although the transfer was taken in Mr Addari's name.

[34] In Suit No 388, Mrs Gay Addari alleges that under an agreement made on or about 5th October 2001, (she does not expressly plead a written agreement but this can be inferred from the pleadings) between Torann Investments Limited and Novelle Constant and Antigua Slipway and Mr Addari and Caribbean Financial Services Corporation (CFSC) Mr Addari agreed to purchase the majority shares in Antigua Slipway. Payments were by instalments and was to be funded in part by CFSC. She claimed that she paid two sum totaling US\$400,000.00 on the 25th August 2001 and an additional sum of US\$376,400.00 on closing. Mrs Addari further pleaded that she and Mr Addari had agreed that the agreement would be executed in his name and that he would hold the shares purchased on

trust for her. She pleaded further that Mr Addari was not managing Antigua Slipway properly, hence it would appear her reason for seeking relief

[35] Mr Addari's affidavit and his draft defences and counter-claim (E.A.16) to my mind evidence that he has a real prospect of successfully defending the claims. Essentially, he is asserting that the monies used to purchase the lands and the shares in Antigua Slipway were his monies and that Mrs. Gay Addari has no beneficial interest in those properties. I also note that he has exhibited several documents in support of his allegations and that by contrast when one looks at the claims as filed by Mrs. Gay Addari they can only be described as bald assertions which are not backed up by any documentary evidence. Save the reference to the agreement for the purchase of shares in Antigua Slipway on matters in which I am certain that documentary evidence is or ought to be available. It is pertinent to note that this is not in keeping with CPR 8.7(3), which mandates that a claim form or statement of claim must identify or have annexed thereto a copy of any document that the claimant considers necessary to his or her case.

[36] Counsel for Mrs. Addari has submitted that in any event the judgments ought not to be set aside as Mrs. Gay Addari has relied on the judgments and acted to her prejudice. Concerns have been voiced chiefly about the management of Antigua Slipway. Counsel submits that Mrs. Gay Addari

would be prejudiced if the judgments are set aside as her client has invested eight million dollars in Antigua Slipway, since the date of the judgment. Counsel relied on the cases of **Attwood v. Chichester (1878)3QBD 722** and **Haigh v Haigh (1885)31 CH.D 772** and footnote 9 in an extract from **Halsbury's Laws of England Vol. 37** to the effect that a default judgment may not be set aside if the delay caused prejudice to the plaintiff. Mr Addari cited case No. 2000 Folio 1193 in the High Court of Justice in England QBD Commercial – **Credit Agvincole Indosuez v. Unicot Limited and Others** and Case No. 2000 Folco 202 from the same court - **Manx Electricity Authority v J P Morgan Chase Bank**.

[37] In the **Attwood** case the judgment was set aside - it was not in the Haig case. However, that case is readily distinguishable from the present as the court refused to set aside the judgment on the basis that the applicant was fully aware of the proceedings, had entered a defence and had allowed it to be set aside and judgment entered as a result of her wilful failure to produce documents and this against the trenchant written advice of her solicitor. I have found that there was no such knowledge and willful failure here.

[38] It is worthy of note that even in the face of such willfulness by the applicant, Pearson J. very reluctantly ruled against her. See the beginning of his judgment at page 482.

[39] Mrs. Addari in her oral testimony stated that having already invested \$8 Million in Antigua Slipway she would not invest another dollar if control were handed back to Mr. Addari. This readily brings to mind the fabled Solomonic judgment in the case of the disputed paternity claim. I trust Mrs. Gay Addari was speaking thoughtlessly - in the heat of the moment so to speak. and I will give her the benefit of the doubt having regard to the internationally -recognized traits of the Latin temperament.

[40] It seems to me, having considered all the arguments, that Mrs Gay Addari has not suffered any irreparable prejudice and the seeming prejudice to her can be contained. Her investment, if established, would not be dissipated prior to final determination of these matters if the parties can agree on a method of managing Antigua Slipway in the interim and if her claims are not well founded she would be entitled to the return of her investment. The parties should meet with the other shareholders and establish an interim management committee. In this way each one can secure his interest until the cases are determined as Antigua Slipway would be able to continue to operate in the most efficient manner without being unduly hampered by this litigation.

[41] The court has a duty to ensure that justice is done, not to punish a person for procedural defaults without more. When I consider all the circumstances before me I am of the view that it would be a grave injustice, for the reasons given, to allow Mrs. Gay Addari to retain the

fruits of judgments she obtained in default of acknowledgement of service. She would not be unduly disadvantaged by a full hearing, as is the usual course, if her claims are meritorious.

[42] I must also point out that the best interests of Antigua Slipway are not necessarily those of either party and that Mr. James Fuller would be well advised to ensure that Antigua Slipway and all its shareholders are made fully aware of these proceedings so that they could obtain legal advice to protect Antigua Slipway's interests.

[43] On the question of costs I note Mr Addari's estimate of \$10,000.00 and Mrs Gay Addari's of \$20,000.000. No doubt considerable expense was incurred by both parties. However, the court cannot lose sight of the nature of the application before it. In all the circumstances I will order Mrs Gay Addari to pay \$2500.00 for each application.

[44] For the avoidance of any doubt the effect of this judgment is that the legal position with respect to the ownership of the disputed shares and the parcels of land remain the same as they were immediately prior to the institution of the actions i.e. they are owned by Mr Addari. I trust that the parties would conduct themselves accordingly and with the aid of their lawyers arrive at a consensual interim solution to protect their interests if not resort to the court is always available.

Conclusion

[45] For the foregoing reasons I will allow Mr. Addari 's applications and this

Court orders as follows:-

- (i) The default judgment in Suit 387 of 2002 is set aside;
- (ii) The default judgment in Suit 388 of 2002 is set aside;
- (iii) Leave to Mr. Addari to file and serve his defence and counterclaim in both suits on or before 19th February,, 2004; with leave to incorporate by reference the documents exhibited to his affidavit if he so desires;
- (iv) Leave to Antigua Slipway to file and serve its defence on or before 12th March 2004;
- (v) Mrs. Gay Addari to file and serve her Reply and defence to counterclaim not later than 2nd April, 2004
- (vi) Mrs. Addari to pay the costs of these applications fixed at \$ 2,500.00.each.
- (vii) Cases to be referred to case management to a date to be fixed by the court office after 2nd April 2004.

Rita Joseph-Olivetti
High Court Judge