GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
IN THE HIGH COURT OF JUSTICE

CIVIL CASE NO. GDAHCV2002/1073

BETWEEN

JANIN CARIBBEAN CONSTRUCTION LIMITED

Claimant

AND

GRENADA GENERAL INSURANCE COMPANY LIMITED

Defendant

Appearances:
Mr. M. Sylvester for the claimant
Mr. D. Knight, Q.C for the Defendant

2005: February 22

JUDGMENT

[1] BENJAMIN, J: By a Claim Form filed on April 8, 2002 the Claim brought proceedings against the Defendant for the following.

1. The sum of EC$61,132.24, being costs and expenses incurred by the claimant, the claimant being indemnified by the defendant against such costs and expenses by virtue of a Policy of Insurance MCT 00316 issued by the defendant.

2. The sum of EC$14,320.12 being costs and expenses incurred by the claimant, the claimant being indemnified by the defendant against such costs and expenses by virtue of a Policy of Insurance MCT 00401 issued by the defendant.

3. The sum of $5,000 being the fee payable to the Arbitrator appointed pursuant to the conditions of the aforesaid policies.

4. Pre-judgment interest on the above amounts from 20th December 2000 to date of final judgment.

5. Interest from date of final judgment to date of payment.

6. Exemplary damages.

7. Costs.

8. Such other relief, which to this honourable court seems just.

The Statement of Claim filed on even date particularised the Claim as being in damages for breach of the motor vehicle insurance policies issued by the defendant in respect of motor vehicles owned by the Claimant company. The Claimant sought to be indemnified in respect of motor vehicular accidents involving the said vehicles, which accidents have resulted in judgments against the claimant.

[2] There appears on the Court's file a letter dated June 12, 2002 by the Registrar to Mr. Wilberforce Nyack, Attorney-at-Law, declining to accept the Memorandum of Appearance tendered for filing and indicating that the proper document to be filed would be an acknowledgement of service pursuant to the Civil Procedure Rules 2000. ("CPR 2000")

[3] There being no acknowledgment of service or defence filed by or on behalf of the Defendant, judgment was entered in default on May 23, 2002, pursuant to a request by the Claimant. It was adjudged that the Defendant pay to the Claimant the sum of $89,128.36 with interest on the sum of $82,337.36 at the rate of 6 per cent per annum from the date of judgment to the date of payment.

[4] On July 31, 2002, the Claimant requested the issue of a Judgment Summons pursuant to Part 52 of CPR 2000 against the Defendant.

[5] By a Notice of Application filed by Ms. Kim George, Attorney-at-Law for the Defendant, on October 1, 2002, an application was made to the Court for the judgment entered in default against the Defendant on May 23, 2002 to be set aside. The grounds upon which the application was made were stated to be as follows:

"1. The Registrar refused to accept an entry of appearance in the form exhibited with the affidavit of Keith Guy Renwick filed in support of this application

2. Judgment in default ought not to have been entered against the Defendant since the Registrar was aware of the Defendant's intention to defend the matter, or in the alternative, the said judgment which was in default of defence could not have been entered pursuant to the Rules of the Supreme Court 2000 since the said judgment did not conform with the requirement of Part 12.5 thereof.

3. The said judgment was entered pursuant to the Civil Procedure Rules 2000, which have no application to the Supreme Court of Grenada.

4. The said judgment amounts to a denial of justice as it is based on the award of the Claimant's own attorney-at-law acting as role arbitrator."

The hearing of the Judgment Summons abides the outcome of the Defendant's application to set aside the judgment.

[6] The relevant substratum of fact has been gleaned from the affidavit in answer of Anthony Geoffrey Croome, the Claimant's managing director, filed on November 1, 2002. The Claimant has had two judgments entered against it in February 1999 and April 1999 as a result of traffic accidents involving the Claimant's trucks which were insured under two policies of insurance by the Defendant. Notification of the claims and the resulting judgments was brought to the attention of the Defendant by the Claimant in a plethora of correspondence to which no response was made.

[7] Acting upon information from its broker to the effect that the Defendant had verbally advised that the claims embodied in the judgments would not be honoured, the Claimant, by letter dated December 8, 1999 and January 25, 2000 invoked the provision for arbitration of a dispute under the policies. The Claimant nominated Mr. Anselm B. Clouden, then acting as the Attorney-at-Law for the Claimant, as its arbitrator by letter of October 19, 2000. Efforts were made to secure a nomination of an arbitrator by the Defendant. These efforts, which included the filing of a suit for the appointment of a single arbitrator, were to no avail. Pursuant to section 9 of the Arbitration Act, cap 19, the Claimant's nominee was treated as the sole arbitrator. Submissions were treated as the sole arbitrator. Submissions were invited from the parties, to which invitation only the Claimant responded. The arbitrator's award was published

by letter of December 19, 2000 to both sides. The said award has been complained of in the application. The Defendant now seeks to have the judgment in default set aside. The Claimant had requested the Court to dismiss the application to set aside the judgment in default and to award costs.

[8] Upon the application coming up for hearing learned Queen's Counsel for the Defendant relied upon arguments presented in another matter in which it was submitted, by way of preliminary argument, that the procedure prescribed under CPR 200 ought not to be followed as the same is not applicable in the Supreme Court of Grenada and the West Indies Associated States. More specifically, it was argued that Statutory Instrument No. 3 of 2001 styled 'the Eastern Caribbean Supreme Court Civil Procedure Rules 2000' published in the Official Gazette of July 6, 2001 did not qualify as a publication of the CPR 2000 within the said Act, the Rules of the Supreme Court 1970 remained in force having not been properly repealed and replaced. Put into the context of the present application, the Defendant asserted that the Registrar ought not to have rejected its purported entry of appearance and was thus barred from entering judgment in default. The foregoing, as I see it, embrace grounds 1, 2 & 3 set out in the Defendant's notice of application.

[9] The second aspect of the application challenges the award of the sole arbitrator as having been made by the Claimant's own attorney-at-law, thus amounting to a denial of justice. No argument was offered on this limb of the application but rather, there was laid over with the Court a copy of an extract (the source not disclosed) intituled 'natural justice'.

[10] On behalf of the Claimant, extensive written submissions were laid over in support of its opposition to the application.

[11] The relevant background to the CPR 2000 needs to be provided as a preface to treating with the argument. Pursuant to section 17 of the West Indies Associated States Supreme Court Order 1967, the Chief Justice and two judges of the Court thereby constituted, issued Statutory Instrument No. 3 of 2001 – the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. There has been no demur as to the authority of the Chief Justice and two Judges so to do. SI No. 3 of 2001 was published in the Official Gazette of July 6, 2001.

[12] Rule 2 of SI No. 3 of 2001 states:

> "The Rules in the schedule hereto are the rules governing civil procedure in the Eastern Caribbean Supreme Court".

Although reference was made to the Rules being set out in a schedule, this was not to be.

[13] It is convenient to set out the remaining Rules in extenso: -

> "3. Reference to Rules: It shall not be necessary to include the Schedule to these rules in the annual volume of the Laws of a Member State or Territory of the Eastern Caribbean Court, but a reference may be made thereto in such volume and shall be sufficient.
>
> "4. Repeal: The Rules of the Supreme Court (Revision) 1970 are repealed, subject to the transitional provisions contained in Part 73 of the Schedule hereto.
>
> "5. Commencement: These Rules are deemed to have come into effect in each of the Member States and Territories of the Eastern Caribbean Supreme Court n 31st December 2000.

For the avoidence of doubt, let me at once point out that the retrospective effect of Rule 5 is provided for in section 22 of the Interpretation Act and indeed no challenge to retrospectivity was discerned by the Court.

[14] The focal issue is that of publication. The Defendant's argument as rehearsed in similar proceedings relied substantially on the requirements of section 21 of the Interpretation Act which enacts:

> "All subsidiary legislation shall, unless it is otherwise expressly provided in any written law, be published in the Gazette and shall come into operation on the day of such publication or, if it is enacted either in the subsidiary legislation or some other day, on that day, subject to annulment where applicable."

[15] Section 16 of the Interpretation Act deals with the repeal of earlier legislation. It is relevant to the issue at hand. Section 16 states:

> "Where any written law wholly or partly repeals any former written law and substitutes provisions for the written law and substitutes provisions for the written law repealed, the repealed written law shall remain in force until the substituted provisions come into force."

The expression "written law" is defined in section 3 of the Interpretation Act as including "subsidiary legislation for the time being in force". It is upon section 16 that the Defendant relies in support of its contention that the Rules of the Supreme Court 1970 remain in force. Put another way, Rule 3 and reference to a Schedule of SI No. 3 of 2001 do not amount to publication of SPR 2001 within the meaning of section 21 of the Act.

[16] As I see it, section 21 by the use of the verb 'shall' is mandatory in its terms and prescribes that every piece of subsidiary legislation must be published in print in the Gazette. It is apparent that Rule 3 purports to address the question of publication and seeks to obviate the need to set out the complete text of the Rules verbatim by stating that the schedule embodying the said text need not be included in the annual volume of the laws of a Member State. The practical basis for this device can be readily understood in the light of the extensive volume of the text and the attendant cost implications.

[17] In examining whether the scheme employed amounts to publication the dictionary definition of 'publication' or of its roots 'publish' provides guidance. The Concise Oxford Dictionary of Current English (8th ed) defines publish as 'to make generally known' and 'publication' as 'the act or an instance of making something publicly known'. In sum, publication connotes the act of making generally known to all persons likely to be affected.

[18] Can it be said that the legislative technique resorted to in SI3 of 2001 fulfils the ordinary definition of publication? In answering this question, to which the Defendant has issued a resounding 'no', it cannot be gainsaid that any person reading SI No 3 of 2001 is left with no guidance as to where the text of the Rules can be found for perusal. The schedule states that the Rules are published by the Caribbean Law Publishing Company Ltd. It is not difficult for an

ordinary reader to be left in a quandary as to where to look should he or she wish to peruse the Rules. I have been unable to find any instance where a comparable legislative approach has been taken to the publication of legislation in Grenada. In fairness to the Claimant, it was acknowledged that publication is mandatory and that no written law has provided that the Rules shall not be published in the Gazette.

[19] Learned Counsel for the Claimant turned up the case of R v Sheer Metalcraft Ltd. [1954] 1Q.B 586 and highlighted the duty to publish a statutory instrument. Steatfield, J adopted the approach encapsulated in his dictum where he states (at p 590): -

> "It is then upon the Crown to prove that, although it has not been issued, reasonable steps have been taken for the purposes of bringing the instrument to the notice of the public or persons likely to be affected by it."

[20] On a view, the combined effect of Rule 3 and the schedule to the Rules operated to alert any discerning reader to the existence of the Rules and placed him or her on the qui vive to berret out a copy of the text. This is a view to which I find myself unable to subscribe as there is no forward indication as to where the text is made available for perusal. Notwithstanding the marginal note to section 21, it seems to me that the requirement of publication in the Gazette is separated by the conjunctive 'and' from the coming into force of the subsidiary legislation, the latter not being in contention unlike the former. I therefore hold that SI3 of 2001 falls short of the requirement of publication set out in section 21 of the Act.

[21] This conclusion however, has been overtaken by events in that by SI No 1 of 2003, the entire text of the Rules has now been printed and published by the Government Printery of Grenada in the Official Gazette of January 13, 2003. Accordingly any defect in publication not complying with section 21 has been substantially cured. The body of the later Statutory Instrument reads:

> "Whereas by Statutory Instrument No. 3 of 2001 the EASTERN CARIBBEAN SUPREME COURT CIVIL PROCEDURE RULES 2000 were published by reference to the Schedule therein mentioned.
>
> AND WHEREAS it is desirous and expedient that the said Rules be printed and published by the Government Printery.

> NOW THEREFORE it is hereby ordered that the Rules referred to in the said Schedule are hereby published and are deemed to have come into effect in each of the Member States of the Territories of the Eastern Caribbean Supreme Court on 31st December 2000."

The issue of publication which has driven the Defendant's argument has therefore been rendered moot and ought not to be entertained further by this Court.

[22] Addressing, the first ground of the Notice of Application, I am unable to draw any conclusion that the Registrar was aware at the date of entry of judgment that it was the Defendant's intention to defend the matter. Indeed, the entry of appearance, albeit not indicative of an intention to defend, was in any event tendered after judgment.

[23] The second ground of the Defendant's application can be taken shortly. The Claimant furnished to the registrar proof of service in the form of an affidavit sworn to and filed on May 22, 2002. Further, the time allowed for the filing of a Defence elapsed on May 21, 2002 ahead of the date of entry of judgment. For the record, it was not until June 10, 2002 that an entry of appearance was offered for filing. The conditions for the entering of judgment for failure to defend were therefore satisfied as per Rule 12.5 of CPR 2000.

[24] The Defendant has tacitly sought to impugn the cogency of the Claimant's appointment of its own Attorney-at-Law as the sole arbitrator. It seems to me that this complaint is of no moment save to provide the Court with a complete picture of the events informing the litigation and the basis for the claim for $5,000. The Statement of Claim sought to recover amounts awarded in judgments of this Court against the Claimant, for which the Claimant seeks to be indemnified. The cause of action is one of breach of contract as contained in specified policies of insurance and not for the enforcement of any arbitral award. For the court to embark upon an examination of the appointment of Mr. Clouden as sole arbitrator it would be an unwarranted excursion into a collateral matter.

[25] The application by the Defendant to set aside the judgment of My 23, 2002 is accordingly. Having regard to the foregoing, in its discretion, the Court declines to order costs. Each party shall therefore bear its own costs.

[26] It is only remains for the Court to give directions for the hearing of the Judgment Summons filed on behalf of the Claimant and to order that the same be heard in open court on March 10, 2005.

Kenneth Benjamin
High Court Judge