THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 47 of 1998

BETWEEN:

DOREEN LESLIE

Claimant

v

BRADLEY DAVIS
LEX CLAYTON DAVIS

Defendants

Appearances: Mr. Richard Williams for the Claimant
Mr. Emery Robertson for the Defendants

2005: November 10
2006: September 21

RULING

[1] **THOM, J**: This is an application to set aside a judgment in default of defence.

[2] On January 28, 1998 the Claimant filed a writ of summons in which she claimed the following reliefs:

(a) A declaration that the Plaintiff is a tenant in common of the said premises.

(b) An order cancelling the Possessory Title registered as 3153 of 1998.

(c) An order cancelling the Deed of Gift registered as No. 1199 of 1989.

(d) An order cancelling the Deed registered as No. 161 of 1994.

(e) An order partitioning the said parcel of land.

(f) Such further or other relief.

(g) Costs.

[3] The First named Defendant entered appearance on the 11th day of March 1998.

[4] On 19th day of March 1999 the Claimant filed a Motion for Judgment in default.

[5] Notice of hearing was filed on the 5th day of May 1999 for hearing of the matter on the 13th day of May 1999.

[6] On the 13th May the matter was adjourned sine die for settlement.

[7] On April 4, 2003 at Case Management Conference at which both Counsel for the Claimant and the Defendants were present, the Master ordered that the matter be removed from the Case Management Conference list.

[8] On the 27th day of July 2005 on the application of the Claimant the Court ordered that judgment in default of defence be entered.

[9] On the 20th day of August 2005 the Defendants filed an application seeking to set aside the judgment in default on the following grounds:

(a) The matter is deemed abandoned and incapable of revivor since 27th January 1999 in accordance with the Rules of the Supreme Court Order 34 Rule 11(1) of 1970, the Claimant having failed to comply with the provisions of Order 34 Rule 11 (1) (a) – (c).

(b) The judgment was entered irregularly since the action was incapable of revivor.

(c) The proceedings were old proceedings having been commenced before the Civil Procedure Rules 2000 and were not saved by the Transitional Provisions under CPR 2000 Part 73.3.

(d) The matter having come on irregularly for Case Management Conference before Master Brian Cottle on the 4th day of April 2003 an Order was made that the matter be removed from the Case Management Conference list.

(e) The application was made without notice to the Defendants or their Counsel and is contrary to law and wrong.

(f) Part 12:10 (4) of CPR 2000 is inapplicable to this instant case since the matter was non-existent.

(g) Before a Court grants a declaration it must hear evidence, the Order was therefore a nullity and ought to be set aside under Part 13.3 and under the inherent jurisdiction of the Court.

[10] I will deal with submissions (a), (b), (d) and (f) together since they are all based on the premise that the matter was abandoned.

[11] Learned Counsel for the Defendants submitted that the matter having commenced on January 28, 1998 the matter was automatically abandoned pursuant to Order 34 Rule 11 of the 1970 Rules of the Supreme Court. While learned Counsel for the Claimant submitted that the matter was not abandoned CPR 2000 applied and relied on the decision of the Court of Appeal in Rudolph George and Ivan Chimney; Cyril Ramsey v Lucia Penn and Calvin Penn Civil Appeal Nos. 14 and 15 of 2002 BVI.

[12] In the Rudolph George's case the Court of Appeal considered the issue whether a matter which was commenced prior to CPR 2000 and in which more than one year had elapsed since the last proceeding the matter was automatically abandoned pursuant to Order 34 Rule 11 of the 1970 Rules. The Court held that there was no automatic abandonment of a matter pursuant to Order 34 Rule 11 of the 1970 Rules. Redhead JA stated at paragraph 39:

> "In my considered opinion there would have been no suit in existence if there was an automatic dismissal of the suit on 27th July 1999 but from the authorities referred to above Frett v Davis (supra) Isaacs v Robertson the dismissal of the suit can only occur when the application is made for an order deeming the matter abandoned."

Saunders JA as he then was stated at paragraph 59:

> "I think the cases referred to by my brother Redhead JA illustrate that a matter was never automatically deemed abandoned. Neither the Court nor the litigant could assume that because a certain set of events had occurred, a matter was ipso facto abandoned. The matter was still alive up to the point in time a Court ordered that it had been deemed abandoned."

And at paragraph 60:

> "The new CPR 2000 having repealed the Old Rules, the opportunity to argue that a matter has been deemed abandoned pursuant to Order 34 has been thereby removed. There is now no rule in existence pursuant to which a litigant can ask a Court to deem a matter abandoned."

[13] Applying the above principles to this case no application was made under Order 34 Rule 11 prior to the coming into effect of CPR 2000 for the matter to be deemed abandoned. CPR 2000 having repealed the Old Rules the Defendants cannot now ask the Court to deem the matter abandoned pursuant to Order 34 Rule 11. I find that the matter was not abandoned on the 27th July when the Order was made for judgment in default of defence.

[14] The Defendants' submission at paragraph (c) that since the proceedings were commenced before CPR 2000 came into effect and were not saved by CPR 2000 Part 73.3 is without merit. Part 73.3 provides:

> "These Rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned."

[15] In this case no trial date was fixed prior to the coming into effect of CPR 2000. Indeed it is not disputed that no defence was filed.

[16] The Defendants' submission at paragraph (e) that the application was made without notice and is contrary to law and is wrong is also without merit. An application for judgment in default of defence may be heard without notice pursuant to CPR 2000 Part 12.10.5 which reads as follows:

> "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."

[17] The Defendants submitted in paragraph (g) that the Order is a nullity since it is a fundamental requirement of the law relating to declarations that there must be evidence upon which a Court must hear evidence before it could make a declaration. In support of this submission learned Counsel referred the Court to the case of Metzger v Department of Health and Social Security [1977] 3 AER p. 444 per Megarry J at 451 where he stated:

"The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument not merely after admissions by the parties. There are no declarations without argument: that is quite plain."

Learned Counsel for the Claimant in response submitted that the Court has jurisdiction to grant a declaration on an application for a default judgment, the rule against making a declaration without the hearing of evidence is a rule of practice and is not a rule of law. Learned Counsel referred the Court to the cases of Wallersteiner v Moir [1974] 3 AER p 217; Patten v Burke Publishing Co Ltd [1991] 2 AER p. 821; Aitbdaid Nime Times July 19, 1991; and Financial Services Authority v Rourke Chancey Division October 19, 2001.

[18] I agree with the submission of learned Counsel for the Claimant. The cases of Patten v Burke; and Financial Services Authority v Rourke illustrate that a Court can make a declaration on an application for default judgment.

[19] The Defendants in their application stated that the judgment ought to be set aside under Part 13.3 of CPR 2000 and under the inherent jurisdiction of the Court.

[20] Part 13.3 outlines the circumstances in which the Court may set aside or vary a default judgment. Part 13.3 reads:

"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 has 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."

[21] Part 13.4 sets out the procedure to apply to set aside a default judgment. Part 13.4 reads:

"(1) An application may be made by any person who is directly affected by the entry of the judgment.
(2) The application must be supported by evidence on affidavit.
(3) The affidavit must exhibit a draft of the proposed defence."

While this application is made by the Defendants and supported by evidence on affidavit of the First Defendant filed on the 25th day of August and on the 11th day of November 2005, a draft of the proposed defence is not exhibited to either of the affidavits.

[22] Returning to the requirements of Part 13.3(1) was the application to set aside made as soon as reasonably practicable? The First Defendant in his affidavit in support of the application dated 25th day of August stated at paragraph 7 that he was served with the Order on August 21, 2005. The application to set aside was filed on the 25th day of August 2005. The Claimant in her affidavit dated 17th day of October 2005 did not deny that the order was served on August 21, 2005. I find that the Defendants have satisfied Part 13.3(1)(a). The application was made as soon as reasonably practicable after they received notice that judgment had been entered.

[23] Did the Defendants give a good explanation for the failure to file a defence? The First Defendant in his affidavit filed on the 25th day of August in support of the application deposed in effect that the matter is abandoned, the Court cannot make a declaration without first hearing evidence and that they have been in occupation of the property for over forty years. In his affidavit filed on November 10, 2005 the First Defendant deposed that the application to set aside was made promptly and the Defendants had a real prospect of success.

[24] Having considered the affidavits I find that the Defendants have not given a good explanation for failure to file a defence. Further the Claimant deposed in her affidavit and she was not contradicted that on two occasions her solicitor wrote to learned Counsel for the Defendants that the defence in this matter was not filed and exhibited two letters bearing dates 20th February 1999 and 22nd April 2005.

[25] Do the Defendants have a real prospect of successfully defending the claim? As stated earlier no draft of the proposed defence was exhibited to the affidavit in support of the

application. The purpose of exhibiting a draft defence is to enable the Court to determine whether the Defendant has a real prospect of successfully defending the claim.

[26] I will however consider the affidavits filed in support to determine whether the Defendants have a real prospect of successfully defending the claim.

[27] The only paragraph in the affidavit of the First Defendant dated 25th August 2005 which bears some relevance to the issue is paragraph 12 which reads as follows:

> "I am advised by my solicitor Mr. Emery W. Robertson and verily believe the same to be true that should the Plaintiff pursue any further action in another suit we have a good defence to any such action since we have a good title and title deeds for our respective properties and we have always been in continuous and uninterrupted and exclusive possession for a period in excess of forty years under the Limitation Act Cap. 90 Section 17(1) to defeat any claim that the Plaintiff may have had (if any) as well as to extinguish any right if any under Section 19 of the Limitation Act Cap. 90."

[28] In the affidavit dated November 10, 2005 in addition to the claim that they were in possession of the property in excess of fifty (50) years the First Defendant deposed at paragraph 2 (iii):

> "our titles have been registered years ago and constitute notice to the whole world that we are the owners of the property. See 5 (1) of Cap. 93 of the Registration of Documents Act and Cap. 93 Section 5 (3) our title deeds rank in priority to that of the alleged Claimant."

[29] In effect the Defendants are claiming that they are in possession and have been in possession of the property in excess of fifty (50) years and they have registered their title to the property since 1988 and before the Claimant acquired any interest in the property by the indenture registered as No. 1182 of 1993.

[30] In International Finance Corporation v Utes Africa SPRL [2001] Commence 1361, the Court in considering Part 13.3(1)(a) of the UK CPR which is in the same terms as Part 13.3(1) (c) stated at paragraph 8 that:

> "The fact is that in ordinary language to say that a case has no realistic prospect is generally much the same as saying that it is hopeless; whereas to say that a case

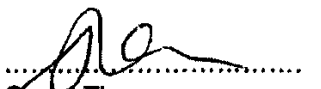
has a realistic prospect of success carries the suggestion that it is something better than merely arguable. That is clearly the case in which the expression was used in The Saudi Eagle and in my view is also the sense in which it is used in rule 13.3(1)(a). There are good reasons for that. A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the judgment aside. In my view therefore Mr. Howe was right in saying that the expression "realistic prospect of success" in this context means a case which carries a degree of conviction."

[31] Having reviewed the affidavits of the First Defendant, I find that the Defendants have satisfied the requirement that they have a real prospect of successfully defending the claim.

[32] While the Defendants have not provided a good explanation for their failure to file a defence, the application to set aside was made promptly and they have satisfied the requirement that they have a real prospect of successfully defending the claim.

[33] In view of the above and having taken into consideration the overriding objective of CPR 2000 I find that this is a case where the Court should exercise its discretion and set aside the judgment.

[34] The application to set aside is granted. The Defendants do have leave to file a defence on or before September 29, 2006. The Defendants must bear the cost of this application. The Defendants shall pay the Claimant costs in the sum of $2,000.00.



Gertel Thom
HIGH COURT JUDGE