BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 238 OF 2006

BETWEEN:

MARBLE POINT ENERGY LTD.

Claimant

AND

MULTIPERILS INTERNATIONAL INC.

Defendant

Appearances:

Mr. Michael Pringle of Maples & Calder for the Claimant
Mrs. Tana'ania Small-Davis of Farara Kerins for the Defendant

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2006: November 17th, 21st

JUDGMENT IN CHAMBERS

(Civil Practice and Procedure – whether filing an acknowledgement of service late renders an application premised on a timely acknowledgement of service invalid – whether the forum challenge application should be declared invalid on the basis that the acknowledgement of service was out of time or whether court should declare it valid – Court's power to rectify irregularities – CPR 2000 Part 26.9)

[1] **Joseph-Olivetti, J.:** The primary issue here is whether the forum challenge application filed by the Defendant, Multiperils International Inc. ("Multiperils") is irregular and if so whether that irregularity can be cured under CPR 26.9 or whether the court should declare the application invalid. I delivered an oral ruling on the 17th November and now give my full written reasons.

Facts Pertinent to the Application

[2] These are gleaned from the application itself and Mr. Claude Cormier's affidavit in support both filed on the 27th October, 2006 and the other documents on the court file including the

Claim Form, the Particulars of Claim, and Mr. David J. Hall's first affidavit in support of the application for a freezing injunction.

[3] On the 27th September 2006, Marble Point Energy Ltd. ("MPE"), a Canadian company doing business in Canada, issued a Claim Form and Particulars of Claim against Multiperils, an international business company ("IBC") incorporated in the British Virgin Islands ("BVI"). MPE had prior to that, on the 25th September, 2006, instituted proceedings in Canada against Multiperils and others essentially seeking the same relief against Multiperils.

[4] On 27th September MPE applied ex parte for and obtained on the same date interim relief in the form of a freezing injunction and an order for disclosure. The disclosure had to be made by 7th October and the injunction was returnable on 20th October.

[5] The Claim Form and Particulars of Claim, Acknowledgement of Service Form and the interim order were served on Multiperils' registered office in the BVI as authorised by law on the 28th September.[1]

[6] On 5th October, Mr. Claude Cormier, Multiperils' attorney at law of Quebec, Canada wrote to the Registrar enclosing a copy of Mr. Rheal Bougie's affidavit referred to below and indicating that a copy had previously been faxed to Messrs. Maples and Calder, the BVI Attorneys for MPE.

[7] On the 6th October, Mr. Bougie, a Canadian citizen residing in Montreal, Quebec, Canada and the sole director and shareholder of Multiperils acting pro se filed an affidavit making, inter alia, disclosure about Multiperils' bank accounts in the BVI and indicating that neither he nor Multiperils had done any wrong and that they intended to **'contest vigorously'** the claim.

[8] On October 6th, in the Canadian proceedings, Mr. Cormier and MPE's Canadian counsel agreed that the freezing injunction should be continued until November 6th. Multiperils was under the impression that MPE had at the same time agreed to suspend these proceedings and therefore they did not retain local counsel.

[9] On 11th October, MPE's lawyers wrote to Mr. Cormier denying that any such agreement had been reached and that MPE would instruct its BVI counsel to take default proceedings in the BVI.[2]

[1] See affidavit of Ms. Marsh of 29/09/06.

[10] On 13th October MPE filed a request for default judgment for failure to file an Acknowledgement of Service.

[11] On 16th October MPE filed under CPR 12.10(5) an application to settle the terms of the default judgment.

[12] On 16th October the Court office acting, as it appears on the face of the judgment itself, on the request of 13th October and that of the 16th October entered judgment as follows:-

> "**Judgment is entered for the Claimant in such form as the Court considers the Claimant to be entitled to on the Statement of Claim dated 27th September 2006**."

[13] On 17th October, this default judgment was served on Multiperils[3] in the BVI.

[14] On 20th October, Messrs Farara Kerins, on behalf of Multiperils filed an Acknowledgement of Service indicating that they intended to defend the claim.

[15] On 20th October the matter came before the court. Both parties were represented. The court made an order to the following effect:-

- MPE's application of 16th October for the court to settle the terms of the default judgment under CPR 12.10(5) was adjourned to the 13th November;
- the interim order of 27th September was extended to midnight on 13th November;
- Multiperils were to file and serve an application to set aside the default judgment by 27th October.

[16] On 26th October Multiperils filed a "forum challenge" application with supporting affidavit. This is the application whose validity is being contested.

[17] On 27th October, Multiperils, in keeping with the order of 20th October, filed an application supported by the affidavit of Mr. Cormier to set aside the default judgment.

The Hearing of 13th November

[18] The matter came back before the court on the 13th November in accordance with the order of 20th October. That hearing was to address the 4 applications - to settle the terms of the

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[2] (See paras. 10 – 16 Francois Viau 6/11/06.)

[3] See affidavit of Ms. Marsh filed 17th October para. 2.

default judgment, to set aside the default judgment, the forum challenge and the continuation or otherwise of the freezing injunction.

[19] Mr. Pringle, learned counsel for MPE, took issue with the validity of the forum challenge application. In brief, counsel submitted that that application was not properly before the court as the procedure laid down by CPR 9.7 for making such an application had been breached and that accordingly the court ought not to entertain it. The gravamen of his submission was that the application was dependent on an Acknowledgement of Service which was filed late and thus of no effect. Counsel urged that in commercial matters of this nature strict adherence must be paid to the rules of practice and procedure laid down by CPR 2000 and that the court ought not to exercise its discretion under CPR 26.9 to rectify the irregularity but instead should declare the forum challenge application invalid.

[20] First, however, counsel properly conceded that the default judgment was irregularly issued as the Court Office had no jurisdiction to grant that order and that accordingly the default judgment must be set aside. He referred to the Court Office's authority to grant default judgments under CPR Part 12.4 and indicated that the Court Office had clearly exceeded its jurisdiction in granting the default judgment as requested. Counsel also averted the court to the court's obligation to set aside a default judgment which had been wrongly entered whether or not an application to set aside had been made - CPR Part 13.2 (1) and (2). Of course, Counsel for Multiperils did not take any issue with this submission which must have come as a wholly unexpected godsend to them.

[21] The Court Office's power to grant default judgment under CPR 12.4 is restricted as submitted and could not cover the judgment sought in this case as clearly this claim before the court is not one for a specified sum of money only as MPE is also seeking other relief including declarations. Therefore, the court must, in the interests of justice, set aside the judgment **ex debito justiciae** as we would have said in pre-CPR 2000 days and I so order. This of course takes care of Multiperils' application to set aside the default judgment as in the face of that concession there is no need to deal with it. However, I note in passing that that irregularity point seems not to have been taken by Multiperils. I must commend Counsel for MPE for his candour.

[22] I also consider that the judgment was irregular for another reason. The request made on the 13th October for judgment in default of Acknowledgement of Service was premature as

the time for acknowledging service had not yet expired. CPR Part 9.3(1) stipulates that the general rule is that Acknowledgement of Service must be filed 14 days after the date of service of the Claim Form. Part 3.2 deals with computation of time. Part 3.2(2) provides that all periods of time expressed as a number of calendar days are to be computed as clear days. "Clear days" means that in computing the days, the day on which the period begins and the day on which it ends are not included – see Part 3.2 (3). And for the avoidance of doubt illustrations are given.

[23] By my reckoning, as service of the claim form was effected on the 28th September, the time for filing Acknowledgement of Service would have expired on the 13th October. Therefore, the Court could not have properly entertained a request for default judgment for failure to file Acknowledgement of Service until at the earliest the 14th October, as that was a Saturday the next working day would have been Monday, the 16th October. Therefore, the default judgment issued as a result of the request filed on the 13th was irregular and likewise cannot stand.

[24] Before we leave this it is pertinent to consider the effect of MPE's application for the court to settle the terms of the default judgment as it too was filed prior to the Acknowledgement of Service. If it stands alone then one can argue that no effect should be given to the Acknowledgement of Service and to the subsequent forum challenge application as the right to make such an application would have been lost by the earlier request for judgment. The application could not be considered unless and until the request for judgment was dealt with.

[25] On consideration of the application it is clear that it was premised on the default judgment of 13th October and thus it cannot stand alone as a separate application for default judgment. It too must suffer the same fate as the default judgment.

Was the forum challenge application irregularly issued?

[26] What is the procedure for making an application to dispute the court's jurisdiction? CPR Part 9.7(1) provides that a defendant who wishes to dispute the court's jurisdiction or to argue that the court should not exercise its jurisdiction may apply to the court for a declaration to that effect. He must do two things, he must file an Acknowledgement of

Service containing a notice of intention to defend and he must file an application within the time limited for filing a defence. See 9.7(2) 2 and 9.7(3) respectively.

[27] Having regard to the first requirement, this must mean that the Acknowledgement of Service should have been filed within the time stipulated by Rule 9.3(1) - 14 days. Blackstone's Civil Practice 2000 supports this as it states at para.19.1 – "To dispute or to argue that the Court should not exercise any jurisdiction which it may have, the defendant must file acknowledgement of service **within the usual time".**

[28] However it gives no guidance on the situation where the Acknowledgement of Service is late although the application itself is filed within the prescribed time which is the factual situation with which we are now faced.

[29] Undoubtedly, the Acknowledgement of Service was filed late - 7 days or 5 working days after the time mandated. Does that by itself render it invalid? CPR Part 9.3(4) provides that a defendant may file an Acknowledgement of Service **"at any time before a request for default judgment is received at the court office."** This to my mind envisages the late filing of an Acknowledgement of Service and therefore a late filing does not automatically render an Acknowledgement of Service invalid or ineffective for all purposes. As this rule makes clear, once an Acknowledgement of Service is entered **before a request for default judgment is made** one cannot simply ignore it because it is filed outside the time limited for so doing and entertain a subsequent request for judgment in default of Acknowledgement of Service. From this it would appear that the court can in the proper circumstances cure any irregularity in the filing of an acknowledgment of service if the claimant suffers no prejudice thereby. But, we need to examine all the circumstances to see whether this is a fit case to employ this approach.

[30] We therefore must consider the second requirement, was the application itself flied within the time stipulated for filing the Defence? There is no dispute that the application itself was made within the requisite period. The only irregularity in the application then is as a result of the late acknowledgement of service. Can this be cured?

[31] First, the rules permit an Acknowledgement of Service to be filed at any time before a request for default judgment is made and therefore it seems to me as I have already intimated that a late Acknowledgement of Service is not invalid per se. In fact, CPR does not have any specific provision to that effect that I was adverted to. On the contrary, CPR

26.9(2) provides expressly that an error of procedure or failure to comply with a rule, practice direction, court order or direction does not render any step taken invalid unless the court so orders and CPR 26.9(3) gives the court a discretion to rectify matters.

[32] This strikes me as eminently sensible as although litigants are expected to comply with the provisions of CPR 2000 one is aware that the Rules aim to achieve substantial justice and that a mere irregularity in procedure does not automatically invalidate the proceedings. The court is mandated to give effect to the overriding objective when it interprets a rule or exercises any discretion given thereunder - See CPR Part 1.2. See also CPR Part 1.3 which makes it the parties' duty as well to assist the court in furthering the overriding objective.

[33] And in **St. Kitts Development Limited v. (1) Golfview Development Limited (2) Michael Simanic**[4] the Court of Appeal reiterated the Court's duty when dealing with procedural irregularities as "it is the duty of the Court in exercising any discretion or applying any rule to seek to give effect to the overriding objective of the Rules, which is not, as Counsel for the Respondent has urged, to comply with the Rules, but rather to deal with cases justly."

[34] Here the application itself was filed within the proper time and I cannot believe that the Rules require the Court to disregard an application of such moment merely because the Acknowledgement of Service is late. This is now the essence of this objection as MPE's attempt to obtain default judgment in reliance on Multiperils' failure to file a timely Acknowledgement of Service proved abortive. Thus, MPE cannot point to any other persuasive factor why this application should not be regularized.

[35] Having considered all the circumstances I am minded to exercise my discretion in Multiperils' favour. In particular I note that from the inception, Multiperils indicated to MPE's BVI lawyers that it intended to defend the action; the delay in filing the Acknowledgment of Service was not unreasonable and the acknowledgement itself indicated that Multiperils intended to defend the action. Further, Multiperils took immediate steps to retain BVI counsel when it realized that contrary to what it believed MPE had not consented to suspending this action and was intent on proceeding with this case as well as the action in Canada. I also remark that Multiperils conducts business in Canada and that if it did not have a registered office here it would have been regarded as a defendant

[4] Saint Christopher and Nevis Civil Appeal No. 2 of 2003

residing outside the jurisdiction and given 28 days to file acknowledgment of service rather than 14 days. In reality 14 days is really a short period for a defendant which for all practical purposes is outside the jurisdiction to take the necessary steps to retain local counsel. The reasons for the delay as set out in Mr. Cormier's affidavit of 27th October, 2006 are understandable. And, it is clear that the delay was not deliberate or vexatious. It is understandable that priority was given to the parallel Canadian proceedings and to making disclosure as ordered by this court on the 27th September. The application itself was made in time. Further, the application, prima facie, strikes me as having merit, although in saying this, I am mindful that I have not seen MPE's answer as yet.

[36] I have also considered the nature of the action, which is essentially based on fraud and the amount of money involved which is substantial. I am satisfied that it is in the interests of justice that Multiperils be afforded the opportunity to challenge the jurisdiction. No prejudice would result to MPE in declaring the forum challenge application valid that could not be compensated for by a costs order.

[37] With respect to costs, it was Multiperils' failure to comply with the Rules which led to this challenge which was not an unreasonable one in all the circumstances. Litigants are expected to observe the rules and to abide by the consequences of failing to do so.

[38] What now remains to be heard is the forum challenge application and the inter partes application for the freezing injunction. I will hear counsel on the necessary directions to be given to enable these matters to be heard as expeditiously as possible.

Conclusion

[39] In conclusion the court orders as follows:

(1) the default judgment of 16th October is irregular and it is hereby set aside;

(2) the forum challenge application of 26th October is valid;

(3) Multiperils is to pay costs of this application to MPE to be assessed upon application if not agreed.

Rita Joseph-Olivetti
Resident High Court Judge