

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/011

BETWEEN:

GEORGE PIGOTT

Appellant

and

VIOLA BUNTIN

Respondent

Before:

The Hon. Mr. Dane Hamilton, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Ralph Francis for the Appellant

Ms. Debra Burnette for the Respondent

2008: August 26.

Civil Appeal – Breach of statutory duty – section 17 The Town and Country Planning Act, Cap 432 – does the section impose any duty on the appellant - default judgment – the validity of the default judgment - whether the court has an inherent jurisdiction to set aside the default judgment

The respondent filed a claim stating that the appellant was in breach of his statutory duty under section 17 of **The Town and Country Planning Act**, Cap 432. The applicant failed to file a defence and the appellant obtained a default judgment against him. The respondent sought to set aside this default judgment on the grounds that it was not obtained in accordance with CPR 12.10(4).

Held: allowing the appeal and setting aside the default judgment and making no order as to costs as agreed to by both parties.

1. That the appellant has a real prospect of successfully defending the claim against him which is on an alleged statutory duty which arises under a provision of a repealed Act.
2. **The Town and Country Planning Act** was repealed by section 83 of **The Physical Planning Act 2003** which vests land control and development in the Development Control Authority.

DECISION

- [1] On the 13th August, 2007 Viola Buntin filed a claim in the High Court of Justice Antigua claiming a declaration that George Pigott was in breach of his statutory duty imposed under section 17 of **The Town and Country Planning Act**, Cap 432, in respect of a parcel of land which he sold to her on the 21st December, 2001 at Jennings in Antigua. This land is registered at the Land Registry as Parcel 126; Block 53 1587C Registration Section: Jennings. She claimed an order that he be made to forthwith comply with his statutory duty.
- [2] The record showed that the claim form along with a statement of claim was served on George Pigott on the 21st September, 2007. George Pigott filed an acknowledgement of service. On 31st October, 2007 no defence having been filed by George Pigott, Viola Buntin requested and obtained a default judgment signed by the Registrar. This judgment as entered by the Registrar merely followed the wording of the claim in the claim form. It required compliance by George Pigott in rectifying the breach of his statutory duty within three months and ordered costs to be paid in an amount of \$6,300.00 in accordance with Part 65 Appendix C of the **Civil Procedure Rules 2000** (CPR).
- [3] On the 16th November, 2007, the Registrar signed another default judgment which is a variation of the first in that it provided only for judgment against George Pigott in accordance with Part 12.10(4) of the **CPR** with the terms of the judgment to be determined by the court on application. This rule reads:
- “(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.”
- [4] CPR Rule 12.10(5) provides:
- “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.”

Rule 11.5 merely dispenses with the need to serve on the other party a copy of the application and affidavit after disposal by the court of the application.

- [5] Counsel for George Pigott challenges the entry of both these judgments. With regard to the judgment entered on 31st October, 2007 he submitted that it was not applied for in accordance with CPR Rule 12.10(4). Further, that the terms of the judgment was not determined by a master or judge. Ms. Debra Burnette on behalf of Viola Buntin on the other hand submitted that rule 12.10(4) allows the court to make an order in such form as the court considers the claimant entitled to on the statement of claim. That the judgment of 31st October, 2007 was properly entered by the Registrar who may exercise the functions of the High Court as permitted by CPR rule 2.5(1)(b). She further submitted that the judgment by the Registrar on the 16th November, 2007 is null and void as the court was *functus officio* after the entry of the judgment on 31st October, 2007, a conclusion which Master Mathurin reached in refusing to set aside the judgment of 31st October, 2007.
- [6] Rule 42.8 of the **CPR** states that a judgment takes effect from the date it was given or made. In my view the judgment of October 31st 2007 was clearly made within the terms of Rule 12.10(4) in that Viola Buntin's claim form clearly stated the terms of the order she required the court to make and this was incorporated into her statement of claim. When the Registrar purported to effect changes to the judgment by entry of a substituted judgment on the 16th November, 2007, he was *functus officio*. Rule 12.10(4) does not mandate as a condition precedent that the applicant for a judgment proceeds only by way of application supported by affidavit evidence, nor did Viola Buntin require the permission of the court under Rule 12.3 to enter judgment in default of defence.
- [7] In any event this is not the end of the matter as will be evident from my conclusion set out in the latter part of this judgment. George Pigott's application was for Master Mathurin to set aside the default judgment of 31st October, 2007 and for a stay of proceedings. He advanced other grounds in support of his application. All of these grounds were dismissed by the Master. His appeal against that decision alleges three grounds on which he urges the court to set aside the default judgment:
- (i) Ground 1 is that the judgment is contrary to law, that is to say, Section 3 of **The Town and Country Planning Act** Cap. 432.

- (ii) Ground 2 allege an error by the Master in holding that the application to set aside the judgment failed to satisfy **CPR 2000** rule 13.3(1).
- (iii) Ground 3 allege that because of special circumstances the Master ought to have set aside the default judgment pursuant to the court powers under **CPR 2000** rule 26.1(6).

[8] The issues for the determination of this appeal are:

- (i) The validity of the default judgment of 31st October 2007. This of course involves a consideration of Viola Buntin cause of action and the issue of the default judgment's regularity, the latter of which is already dealt with in the proceeding paragraphs of this decision.
- (ii) Whether the court has an inherent jurisdiction to set aside a judgment which is entered contrary to law in the interest of justice.

[9] The thrust of George Pigott's submissions is that:-

- (i) The respondent sued under the provisions of Section 17 of **The Town and Country Planning Act** Cap. 432 of the Laws of Antigua and Barbuda which does not impose any duty on George Pigott to carry out any of the provisions – in particular to provide a roadway access and water to the land which was sold by George Pigott to Viola Buntin. This duty is imposed on the Central Housing and Planning Authority (CHAPA) by Section 3 of the Act.
- (ii) That the Master erred in the exercise of her discretion in refusing to set aside the default judgment entered against George Pigott.
- (iii) That the court had an inherent jurisdiction to correct its record by setting aside an order to prevent grave injustice as George Pigott was never in breach of any statutory duty, in particular, the duty which arose under Section 17 of **The Town and Country Planning Act**.

[10] George Pigott prayed to his aid broad statements of legal principle made in:-

**Dipcon Engineering Services Ltd v. Gregory Bown and Attorney General of Canada¹
and St. Christopher Club Ltd v St. Christopher Clubs Condominiums et al²**

[11] Viola Buntin in reply submitted:

- (i) The exercise of the court's inherent jurisdiction is limited by the **Civil Procedure Rules 2000**. **Braithwaite & Henderson v Potter³** (Grenada) was cited for the proposition that this was a discretion the **CPR** does not permit the court to exercise.
- (ii) That the applicant failed to satisfy rule 13.3 of **CPR 2000** in that all the requirements must be read together and be satisfied in order for the court to set aside a default judgment. He failed to give the court a good explanation for not filing a defence within the time specified in the **CPR**. That his reason for so doing was that he formed the opinion that the proper course of action was to apply to strike out the claim.
- (iii) His application to strike was filed five months after the defence was due and outside of the time limited for filing a defence.
- (iv) He had no real prospect of successfully defending the claim as the second schedule which is incorporated by section 17 of **The Town and Country Planning Act** paragraphs 5 and 6 enable the Central Authority to impose the duty of reserving land for road construction on the owner of land as a condition of his developing such land.

[12] It is unnecessary to decide many of the arguments raised by either George Pigott or Viola Buntin as Viola Buntin sued under and by virtue of Section 17 of **The Town and Country Planning Act** whose provisions provide for the development of land to which a scheme applies. The duty of preparing any scheme in relation to land in Antigua and Barbuda is vested by Section 5 of the Act in the Central Authority subject to the approval of the Minister (Section 6 of the Act). The Central Authority is indeed the Central Housing and

¹ [2004] U.K. PC 18

² Civil Appeal No. 4 of 2007 (Saint Christopher and Nevis), delivered January 15, 2008

³ Civil Appeal No. 18 of 2002 (Grenada), delivered September 20, 2004.

Planning Authority as submitted by George Pigott. There is no allegation in the pleadings that the Central Authority required George Pigott as a condition of selling land to Viola Buntin the duty of reserving land for road or constructing such road or contributing to the costs of such road construction.

[13] In any event, **The Town and Country Planning Act** Cap. 432 was repealed by Section 83 of **The Physical Planning Act 2003**. This Act vests land control and development in the Development Control Authority, a body corporate specifically created for this purpose by the Act whose chief executive officer is the Town and Country Planner. It is the Town and Country Planner who is charged with the duty to design development plans and submit such plans to the Minister. It is the duty of the Development Control Authority to regulate land development in accordance with policy instructions of the Minister. Under the Second Schedule to that Act development plans may make reservation of land for roads.

[14] Further, Viola Buntin has not pleaded in the statement of claim that Pigott's obligation to provide road arises as a matter of contract when he sold to her that particular parcel of land. She rather hinged her claim on breach by Pigott of Section 17 of the repealed **Town and Country Planning Act** Cap.432.

[15] In the circumstances it is my view that the applicant, George Pigott has a real prospect of successfully defending the claim of Viola Buntin based as it undoubtedly is on an alleged statutory duty which arises under a provision of a repealed Act. The default judgment must accordingly be set aside. At the oral hearing on August 26th 2008 both parties agreed that there should be no order as to costs. The claimant Viola Buntin in the light of this decision may wish to reconsider the wisdom of continuing with this claim. I say no more.

[16] The Order of the Court is:

- (i) The judgment in default entered by the claimant on the 31st October 2007 is hereby set aside.
- (ii) That there shall be no order as to costs as agreed to by the parties

Dane Hamilton, QC
Justice of Appeal [Ag.]

