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

CLAIM NO. GDAHCV2008/0556

BETWEEN:

CHOO LOI POI
CHOO LIU YUE XIN

Claimants

and

DONALD FREDERICK

Defendant

Appearances:

Ms. Sabrita Khan for the Claimants
Ms. Cindy John for the Defendant

2009: May 26;
June 2

JUDGMENT

IN CHAMBERS

[1] MICHEL, J. (Ag.): By claim form filed on 14th November 2008 the Claimants, Choo Loi Poi and Choo Liu Yue Xin, commenced action against the Defendant, Donald Frederick, seeking an injunction, damages, specific performance and further or other relief. Also filed by the Claimants on that date was a statement of claim setting out the claim in full and several exhibits in support of the claim.

[2] On 9th January 2009 the Defendant filed a defence and counterclaim denying the Claimant's claim against him and claiming damages, an injunction, costs and further or other relief against the Claimants.

[3] On 12th March 2009, no defence to the Defendant's counterclaim having been filed by the Claimants, the Defendant filed a request for entry of judgment in default of defence to counterclaim.

[4] On 13th March 2009 the case came before a Judge in Chambers and it was ordered that the matter take its normal course pending the determination of the application by the Defendant for final judgment on the counterclaim.

[5] On 20th April 2009 the Claimant filed a reply and defence to counterclaim joining issue with the Defendant on his defence and counterclaim.

[6] Several issues of significance to this case took place between the filing of the defence and counterclaim on 9th January 2009 and the filing of the reply and defence to counterclaim on 20th April 2009. These included the filing on 4th February of a notice by Messrs R. C. Benjamin & Co. that they had ceased to act as attorneys for the Claimants in the matter, the filing of the request by the Defendant for entry of judgment in default and the entering of a final judgment in default of defence to counterclaim on 12th March, the appearance in the matter on 13th March of Messrs G. E. D. Clyne as Legal Practitioners for the Claimants and the filing by them on 20th April of notice of change of Attorney-at-Law.

[7] In the result, the reply and defence to counterclaim filed by the Claimants on 20th April is not now valid, having been filed nearly six weeks after the entry of a judgment in default of its filing.

[8] Against this background, on 8th May 2009 the Claimants filed a notice of application seeking an order that the default judgment entered in this matter on 12th March 2009 be set aside.

[9] The Claimants' application is supported by an affidavit by the Claimants and is accompanied by a draft of the order that the Claimants seek.

[10] The Claimants' application was heard in Chambers on 26th May 2009.

[11] Learned Counsel for the Claimants submitted that the application was brought under Part 13.3 (1) of the CPR, which requires that three conditions must be satisfied for the application to be granted. Counsel argued that the first condition was satisfied because the Claimants made the application to the Court as soon it

was reasonably practicable, having on 23rd April 2009 discovered that judgment was entered against them. According to the Claimants' affidavit in support of the application, the judgment in default was served on Counsel for the Claimants on 23rd April.

[12] Counsel referred to the BVI case of Earl Hodge v Albion Hodge[1] where Hariprashad-Charles, J. held that a delay of 13 days between service of a default judgment and the filing of an application to set it aside was reasonable and that the defendant in that case had therefore satisfied the threshold requirement of CPR 13.3 (1) (a).

[13] Learned Counsel reiterated paragraph 5 of the Claimants' affidavit wherein it was stated that the Claimants were previously represented by other Counsel in the matter and that differences arose between the Claimants and their Counsel.

[14] Learned Counsel submitted that the Claimants have a real prospect of successfully defending the Defendant's claim. The matter she says is really a dispute over land in respect of which both parties have conveyances.

[15] Counsel submitted that the defence which will be filed if the default judgment is set aside is the reply and defence to counterclaim filed on 20th April 2009 at a time that the Claimant was unaware that a default judgment had been entered.

[16] Counsel also submitted that there would be no prejudice to the Defendant if the Court were to set aside the default judgment since the Claimants' claim against the Defendant involving the same issues is still to be determined by the Court.

[17] The Defendant opposed the application to set aside the default judgment on two grounds. Firstly, that the Claimants' notice of application failed to disclose the ground or grounds for making the application and amounted to an abuse of the process of the Court and, on this basis, the application should be dismissed. Secondly, that the Claimants had not satisfied the conjunctive requirements of Part

[1] Civil Suit No. 0098 of 2007

13.3 (1) of the CPR for the setting aside of a default judgment and, for this reason also, the application should be dismissed.

[18] The Defendant's first ground of objection to the Claimant's application is unassailable. The Claimants' notice of application, having stated that the Claimants apply for an order that the default judgment entered on 12th March 2009 be set aside, then stated as follows: "The ground of the application is that the Court is empowered under Eastern Caribbean Supreme Court Civil Procedure Rules 2000 Part 13 to set aside default judgment." The reference to the power of the Court under Part 13 to grant the order sought is of course not the grounds on which the applicant is seeking the order as is required to be stated by Rule 11.7 (1) (a) of the CPR.

[19] In fact, that the applicant is moving the Court under Part 13 of the CPR should, in a properly-drafted application, be reflected prominently on the face of the notice of application, such as in the top left corner of the notice, as in the forms contained in the Appendix to the CPR. Maybe if this practice was being followed then the non compliance with Rule 11.7 (1) (a) might not have occurred here.

[20] Learned Counsel for the Defendant cited the case of Beach Properties Barbuda Limited et al v Laurus Master Fund Ltd. et al[2] decided by the Court of Appeal of the Eastern Caribbean Supreme Court in support of her submission on this issue. In that case Barrow, J.A., delivering the judgment of the Court of Appeal, stated that the practice of not stating the grounds of the application on the notice of application is: "a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences."

[21] In her response to Learned Counsel for the Defendant on this issue, Learned Counsel for the Claimants sought to distinguish the Beach Properties Barbuda Limited case from the present case on the basis that in the previous case the appellants had said that the grounds of the application were to be found in the affidavit, but Barrow, J.A. could not find them in the affidavit, whereas in the

[2] Civil Appeal No. 2 of 2007

present case the grounds are clearly stated in the affidavit. Well they are not, and if they are to Counsel for the Claimants then this is a case of clearly – like beauty – being in the eyes of the beholder or maybe in the eyes of the draftsman of the affidavit. In any event, the rules require that the grounds of the application must be stated in the application.

[22] The Defendant's second ground of objection to the Claimants' application – that the Claimants had not satisfied the conjunctive requirements of Rule 13.3 (1) of the CPR for the setting aside of the default judgment – was argued by Counsel for the Defendant attempting to show that none of the three requirements of Rule 13.3 (1) had been satisfied. In fact, the failure by the Claimants to satisfy any one of the three requirements would be sufficient to defeat the application. This is the clear effect of Rule 13.3 (1) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 and, in this regard, the citation of English authorities is unhelpful since the English rules are materially different to ours on this issue. In particular, the English rules do not circumscribe the discretion of the court to set aside default judgments as is clearly done by our rules.

[23] So that whereas I am not convinced by the submission of Learned Counsel for the Defendant that the Claimants reply and defence to counterclaim fails to show that the Claimants have a real prospect of successfully defending the Defendant's counterclaim, and I prefer the submission of Learned Counsel for the Claimants on this issue, I do not regard this requirement as having any primacy over the other two requirements of Rule 13.3 (1). The Court may only set aside a default judgment if and "only if" all three requirements in Rule 13.3 (1) have been satisfied.

[24] I am not convinced that the requirement in Rule 13.3 (1) (a) of the CPR has been satisfied by the Claimants in that they applied to the Court as soon as reasonably practicable after finding out that judgment had been entered. Counsel for the Claimants counts 15 days from the service of the judgment in default on her Chambers – as alleged in the Claimants' affidavit – to the date on which the

Claimants' application to set aside the judgment was filed, and submits that this is reasonable having regard to the finding by Hariprashad-Charles, J. in the case of Earl Hodge v Albion Hodge that 13 days was reasonable. But, on the facts of the present case, both the Claimants and the Legal Practitioner appearing for them then and now knew as of 13th March 2009 that application had been made by the Defendant for final judgment on the counterclaim, yet it was not until 20th April 2009 – over five weeks later – that the Claimants sought to put in a defence to the counterclaim which had been filed since 9th January 2009, some three and a half months before, and only sought to move the Court on 8th May 2009, nearly three months after the default judgment had been entered and virtually the same period after the Claimants and their Legal Practitioner would have been cognisant of at least the fact of application having been made for judgment in default of defence to the Defendant's counterclaim.

[25] I cannot under these circumstances be convinced that the Claimants had applied to the Court as soon as reasonably practicable after finding out that judgment had been entered.

[26] I am also not convinced that the Claimants have given a good explanation for their failure to file a defence to the counterclaim in time to avert the entry of judgment in default. It is true that in their affidavit in support of the application to set aside the default judgment the Claimants allege that differences arose between them and Legal Counsel representing them at the time of the filing of the defence and counterclaim. But the aforesaid Legal Counsel filed notice of having ceased to act for the Claimants since 4th February 2009, which notice was directed to the Claimants among others, yet over five weeks elapsed after that before a request for judgment in default was filed by the Defendant, with no defence to the counterclaim having been filed by the Claimants. In fact, it was not until 20th April 2009 that the Claimants sought to file a defence. No good explanation has been given for these delays which impresses this Court.

[27] The rules of court must be taken seriously and this Court will not use its discretionary powers, bend them even, to facilitate litigants who disregard its rules and to liberate them from the consequences of their default.

[28] Inasmuch as this Court considers that, based on the reply and defence to counterclaim filed by the Claimants on 20th April 2009, the Claimants appear to have a real prospect of successfully defending the Defendant's counterclaim, the Court will not set aside the default judgment entered in this matter on 12th March 2009 because the application to the Court did not comply with Rule 11.7 (1) (a) of the CPR and because the Claimants did not satisfy the conjunctive requirements of Rule 13.3 (1) of the CPR which gives the Court the power to set aside default judgments regularly obtained.

[29] The Claimants' application is accordingly dismissed with costs in the sum of $1,000.00.

Mario Michel
High Court Judge (Ag.)