

ANGUILLA

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE

(CIVIL)

A.D. 2009

CLAIM NO. AXAHCV2008/0020

BETWEEN:

CUTHWIN WEBSTER

Claimant

PRESTON BRYAN

Defendant

Appearances:

Mrs. Tara Ruan instructed by Caribbean Juris Chambers for the Defendant/Applicant

Mr. Anthony Astaphan, Mr. Collin Meade with him, instructed by Astaphan's Chambers for  
the Claimant/Respondent

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2009: May 28, July 7  
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*Civil Procedure Rules 2000 (CPR 2000) – Application to set aside judgment obtained in  
default of defence – Good explanation for failure to file defence – Real prospect of  
successfully defending the claim.*

JUDGMENT

- [1] SMALL DAVIS, J (Ag): Before the Court is an application to set aside a default judgment entered on 17<sup>th</sup> April 2009. The application filed on 14<sup>th</sup> May 2009 is supported by an Affidavit sworn by Preston Bryan and filed on the same date. The Claimant opposed the application and filed evidence in opposition.

### **The Claimant's claim**

[2] The brief background to the matter is as follows. The Claimant initiated these proceedings against the Defendant by Claim Form and Statement of Claim filed on 7<sup>th</sup> May 2008 seeking relief by way of specific performance of an oral agreement by which the Claimant alleges that the Defendant agreed to lend him US\$25,000 to be secured by three parcels of land which the Claimant owned registered at Registration Section East Central Block 89218B Parcels 210, 223 and 225 of the Register Book of Titles. The security was effected by way of a transfer of the titles of the said parcels to the Defendant. The further terms of the oral agreement were that the sum of US\$38,000, which comprised the sum borrowed plus agreed interest, was to be repaid as and when the Claimant was able to do so. The Claimant asserts that he repaid US\$14,000 whereupon the Defendant re-transferred Parcel 219 to him but that when he was ready, willing and able to repay the balance of US\$24,000 the Defendant refused to complete the agreement to re-transfer the remaining two parcels to the Claimant, instead, now asserting that the two parcels had been purchased by him. Hence the claim.

[3] An Acknowledgment of Service was filed on behalf of the Defendant on 9<sup>th</sup> June 2008 in which he did not admit the claim and indicated his intention to defend the claim. The Defence was therefore due by 25<sup>th</sup> June 2008. No Defence was filed by that date. On 16<sup>th</sup> September 2008 the Claimant made a request for the entry of judgment in default of defence. Three days later, on 19<sup>th</sup> September 2008, a Notice of Change of Solicitors as well as an Application for extension of time to file defence and a supporting affidavit were filed on behalf of the Defendant. On 23<sup>rd</sup> September 2008 a Defence was filed without leave of the court or consent of the Claimant.

### **The Defence**

[4] The Defence constituted a complete denial of the claim. The Defendant set out a different factual matrix. The Defence was detailed in the statement of facts and the supporting documentation were exhibited. The Claimant was in financial difficulties and offered three parcels of land for sale in order to raise capital. The Defendant agreed to purchase the parcels and the transactions were concluded on 19<sup>th</sup> April 1996, 29<sup>th</sup> May 1996 and 4<sup>th</sup> October 1996. The total sum paid for the three parcels

was US\$43,000. The Defendant exhibited proof of payment of stamp duty and registration fees for each transfer. In fact, the parcels had to be subdivided in order to create new parcels which were transferred to the Defendant. In January 2003 the Claimant asked to purchase and the Defendant agreed to sell back Parcel 219, which was immediately adjacent to the Claimant's residence. Then in 2005 the Claimant sought to purchase either of the two remaining parcels. The Defendant indicated that he would be willing to sell back Parcel 223 at the current market value but the Claimant took issue with that proposal, asserting instead that the purchase price should be the same as he had sold it to the Defendant for in 1996. No agreement was reached. In October 2006 the Defendant received the Claimant's solicitors' letter before action demanding specific performance of an oral agreement along the lines set out in paragraph 2 above.

#### **The application for extension of time to file defence**

- [5] The Claimant filed an affidavit in opposition to the Defendant's application for extension of time to file a defence in which he asserted that there was no good explanation for the failure to file the defence within the time limited by the Rules and denied the truth of the "draft defence" filed on 23<sup>rd</sup> September 2008, challenged the viability of the defence and repeated his claim. The Defendant replied to the Claimant's evidence, giving further details of the reasons for the failure to file the defence within time, which the Defendant said was due to a breakdown within his former solicitors' office.
- [6] There is no note available to the court to explain what transpired on the hearing of the Defendant's application for extension of time to file a defence which came on for hearing on 21<sup>st</sup> November 2008. At the hearing of this application the court was informed that the learned judge directed the Registrar to enter default judgment and that the Defendant should then take the necessary steps to have it set aside.

#### **The entry of judgment in default**

- [7] The judgment in default of defence was entered on 17<sup>th</sup> April 2009 in the following terms:

"UPON IT APPEARING

- (1) That the Defendant has filed an Acknowledgment of Service
  - (2) That the period for filing a Defence has expired and that the Defendant has not filed a Defence or an Admission of Liability with a request for time to pay
  - (3) That the Defendant has not satisfied the claim against him in full
- AND UPON reading the affidavit of .....filed on.....pursuant to CPR 12.10.05

IT IS HEREBY ADJUDGED:

- (1) THAT Judgment is entered for the Claimant for terms to be decided by the Court and costs

TAKE NOTICE that the Court will determine the terms under this judgment on 14<sup>th</sup> May 2009 at 9 o'clock in the forenoon at the High Court of Justice."

[8] The Default Judgment was served on the Defendant's solicitors on 28<sup>th</sup> April 2009.

**The application to set aside**

[9] The present application to set aside the default judgment was filed on 14<sup>th</sup> May 2008 supported by the Second affidavit of Preston Bryan<sup>1</sup>. In seeking to satisfy the first of the three conjunctive requirements of CPR 13.3 which sets out the court's discretionary power to set aside a default judgment that is regularly entered, the Defendant's counsel submitted that the Defendant has applied to set aside the default judgment as soon as reasonably practicable after the Default Judgment was served upon him. The Defendant relied upon the cases of **Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v Antigua Commercial Bank**<sup>2</sup> and **Earl Hodge v Albion Hodge**<sup>3</sup> in which the respective courts found a period of fifteen days and thirteen days between being served with the judgment and the filing

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<sup>1</sup> The Defendant had filed an application to set aside the default judgment on 5 May 2009 which was dismissed for want of prosecution on 14 May 2009 as a result of no appearance by or on behalf of the Defendant.

<sup>2</sup> Antigua and Barbuda, ANUHCV1997/0115, 13<sup>th</sup> August 2007

<sup>3</sup> BVIHCV2007/0098, 12<sup>th</sup> March 2008

of the application to set it aside was reasonable. As further evidence of the promptitude of the Defendant's response to reverse or mitigate the failure to file the defence within time, his Counsel further adverted to the fact that the Defendant had sought to file his defence from 23<sup>rd</sup> September 2008, had made an application for extension of time to file a defence prior to entry of the default judgment and in acceding to the court's direction given on 21<sup>st</sup> November 2008, was then awaiting the formal entry of default judgment in order to apply to set it aside.

[10] The Defendant's counsel further submitted that the Defendant has given a good explanation for the failure to file a defence: he had reposed confidence in his former solicitors and believed that a Defence had been prepared on his behalf. It came as a surprise to him when he was contacted by them on 27<sup>th</sup> August 2008 with a request that he collect his file and seek alternate legal representation<sup>4</sup>. The Defendant retained his present solicitors on 29 August 2008 and a draft Defence was prepared and filed on 23 September 2008 which was the earliest opportunity given his counsel's absence from the jurisdiction during the legal vacation.

[11] Coming to the matter of the merits of the Defence, the Defendant's Counsel submitted that he has a reasonable prospect of succeeding on his defence and pointed to the following as tending to show that his defence was more than merely arguable:

- (a) the precision with which his statement of the facts of the commercial transaction is set out and supported by documentation as opposed to the Claimant's reliance on an oral agreement and failure to produce any evidence of proof of payments or other documentary evidence to support his claim as required by CPR 8.7(3);
- (b) the absence of a time period within which the alleged agreement to re-transfer the parcels was made;
- (c) the unusual features of the commercial transaction which the Claimant puts forward, in particular the absence of the more usual protective measures such as the lodging of a restriction on the properties pending his repayment of the debt.

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<sup>4</sup> This was apparently due to significant internal changes within the legal practitioners' office which had nothing to do with the Defendant.

- [12] On behalf of the Defendant it was submitted that the court ought to exercise its discretion in the Defendant's favour as no prejudice will ensue to the Claimant if the default judgment is set aside, whereas the prejudice to the Defendant will be significant if the default judgment remains and terms of judgment are determined with the effect of depriving the Defendant of the property which he has purchased and holds in his name without an investigation into the merits.
- [13] In opposing the application, submissions were made by the Claimant's counsel rejecting the explanation given for the failure to file the defence within time. The Claimant's counsel characterized the Defendant's failure as "crass negligence" and exhibiting a pattern of irresponsibility and recklessness and pointing out that notwithstanding any issues with his former solicitors, the burden is on him as the litigant to check up on his own matter.
- [14] The Claimant's Counsel described the Defence as unrealistic. He pointed to the unlikelihood that Parcel 219 could have been bought for US\$8,000 and sold back to the Claimant for US\$5,000 as evidenced by the Instrument of Transfer dated 27<sup>th</sup> January 2003. The Claimant's Counsel asked the court to conclude that the transactions more likely took place as the Claimant put forward, that the parcels were used as security for a loan from the Defendant to the Claimant on the agreement that upon repayment the Defendant would return the properties, rather than as the Defendant put forward, that the transaction was a purchase and sale of the parcels further to the Claimant's need to raise money.
- [15] As a result of an inquiry raised by the court during the hearing, the parties agreed to file further evidence which would explain the use of Parcels 223 and 225 as security for loans of US\$25,000 each from Caribbean Commercial Bank (Ang) Ltd. as recorded in the Incumbrances Section of the registered titles. The parties through their respective solicitors each conceded that the outcome of this enquiry would be a strong influence on the exercise of the discretion whether to set aside the default judgment in that, if the Charges were the Defendant's transactions, this would tend to show that the Defendant was acting in a manner fully consistent with his full authority

over and beneficial interest in the properties. If the Charges were transactions by or for the benefit of the Claimant, this would tend to support his argument that he retained a beneficial interest in the properties and the Defendant would have acted consistent with that knowledge by facilitating his use of the properties as securities for loans for himself notwithstanding that the properties are registered in the Defendant's name.

- [16] The Claimant filed a further affidavit exhibiting the registered Charges and admitted that the two transactions in question were entered into by the Defendant. However, he seemed to have recanted from the position taken by his counsel and maintained in his second affidavit that the application to set aside the default judgment ought to be dismissed because the Defendant had exercised rights of absolute ownership without his knowledge and agreement. The Claimant also exhibited documents to show his own two transactions with the same bank in 2003 after Parcel 219 had been transferred back to him.

#### Consideration of the application

- [17] I must now consider the application, bearing in mind the parameters of the court's discretion. That discretionary power is unconditional. The purpose of the power is to avoid injustice which could result from a claim being determined other than on its merits. At the same time, this must be balanced against the fact that the defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained<sup>5</sup>.

- [18] The CPR mandates that all the criteria set out in Rule 13.3 must be satisfied. The conditions set out therein are conjunctive. See *Kenrick Thomas v RBTT Bank Caribbean Ltd.*<sup>6</sup> and *Doreen Leslie v Bradley Davis et al*<sup>7</sup>.

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<sup>5</sup> See Civil Procedure 2008, para. 13.3.1

<sup>6</sup> St. Vincent & Grenadines Civil Appeal 3 of 2005, 13<sup>th</sup> October 2005

<sup>7</sup> St. Vincent & Grenadines Civil Appeal 13 of 2006, 29<sup>th</sup> January 2007

[19] I am satisfied that the Defendant applied to set aside the default judgment as soon as reasonably practicable after he became aware of the default judgment. The application was filed sixteen days after the default judgment was served. There had been a previous application filed less than a week after the default judgment was served. More importantly, the Defendant had been directed by the court to await the entry of the default judgment and then seek to set it aside. The application filed 5 May 2008 suggests to me that the Defendant had probably had his application prepared at least in draft and was able to file it very promptly upon being served with the default judgment. I also take into account that the Defendant had been interested to take action prior to the entry of the default judgment and moved forward with two defensive actions: seeking an extension of time to file the defence and actually filing the defence very shortly after being aware that the Claimant had made his request for default judgment. I am satisfied that the Defendant has cleared the threshold requirement of CPR 13.3(1) (a).

[20] The Defendant has given an explanation for the failure to file the Defence within time. Whilst I agree with the Claimant's counsel that litigants are to take an interest in their matters, I think that the Defendant's explanation is plausible and reasonable: he had given instructions on his defence to a lawyer at his legal practitioners' office, he was requested to come in and sign the defence some weeks later and when he got a draft for review he sent it back with his comments. Not having heard back from them but content with the positive experience he had with his representation he assumed that the defence had been filed. His explanation shows involvement in his litigation. A period of two months would have elapsed between the time when the defence was due to be filed and when he was contacted by the law firm and then discovered that the defence had not in fact been filed. I do not believe that this is an inordinately long period for a client not to have contacted his lawyer if he believed that he had done what was required of him. The fact that he knew he had not signed a Defence should have however been a source of interest for him to contact the office to see whether he needed to come in. All in all, I am prepared to accept his explanation.

- [21] I turn now to the prospects of defending the claim. The merits of the proposed defence are often of decisive importance on an application to set aside a default judgment regularly obtained.
- [22] The standard that the Defendant must achieve is that he has reasonable prospects of success. This has long been declared and applied as the appropriate test. See *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Company* and *ED & F Man Liquid Products Ltd v Patel and Another*. That test has been applied by our courts. See *Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v Antigua Commercial Bank* and *Earl Hodge v Albion Hodge*.
- [23] The Defendant here has set out with clarity and appropriate supporting documentation the defence he intends to mount against the claim. The position that he advances: that the transaction was an outright purchase of the land as evidenced by the subdivision of the property, the Instruments of Transfer and the payment of the requisite duties and fees due to the Government on such transfers and in addition his exercise of authority over the parcels consistent with a full legal and beneficial owner thereafter raises a defence to the claim that has a reasonable prospect of success. The Defence can by no means be described as hopeless or unwinnable. Given that the matter in dispute is an oral agreement on a transaction involving to real property, it is wholly appropriate that there ought to be a determination of the merits of the claim.

### Conclusion

- [24] In exercising the discretion the court's focus is not to punish a defendant for incompetence but to ensure that the overriding objective is met in dealing with cases justly. I am satisfied that the court should exercise its discretion in setting aside the default judgment entered on 17 April 2009. The Defendant is granted leave to file a Defence within seven days of the date hereof. Thereafter the matter shall proceed to

a Case Management Conference. The Claimant shall have his costs to be assessed if not agreed.

A handwritten signature in black ink, appearing to read 'Tana'ania Small Davis', with a long horizontal stroke extending to the left.

**Tana'ania Small Davis**

High Court Judge (Ag)