

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

CLAIM NO. GDAHCV2006/0438

BETWEEN:

THE RESORT MANAGEMENT COMPANY LIMITED

Claimant

and

LIBERTY CLUB LIMITED

Defendant

Appearances:

Dr. Francis Alexis, Q.C. for the Claimant

Ms. Dia Forrester for the Defendant.

2009: May 19
August 28

JUDGMENT

[1] **MICHEL, J. (Ag.):** By Claim Form and Statement of Claim filed on 13th September 2006 the Claimant claimed against the Defendant the following:

1. The sum of \$140,363.73;
2. Damages for breach of contract;
3. Interest;
4. Such further and other relief as to this Honourable Court may seem just.

[2] The Defendant filed an Acknowledgement of Service on 18th September 2006 and on 21st September 2006 filed a Request For Further Information on the Statement of Claim under CPR 34.

- [3] By Notice of Application filed on 13th October 2006 the Defendant applied to the Court for an extension of time within which to file its defence on the grounds that it had made a request for further information which information was necessary to prepare its defence and that its lawyer had written to the Claimant's lawyer requesting an extension of time to file its defence but had received no response.
- [4] On 24th October 2006 the Claimant filed a document in response to the Defendant's Request For Further Information, but failed and/or declined to respond to three of the four questions posed by the Defendant.
- [5] Upon this matter coming up for case management on 10th November 2006 before Master Brian Cottle (as he then was) and with no appearance of the Claimant or Counsel for the Claimant, the following order was made:
- Application dated 13th October 2006 by the Defendant is granted.
 - The Claimant to supply the requested information within 14 days of service of this order.
 - Should the Claimant fail to provide the requested information the statement of claim to be struck out.
- [6] On 13th September 2007, no other information having been supplied by the Claimant, the Defendant filed a Request for Entry of Judgment Without Trial After Striking Out Pursuant to CPR 26.5 on the basis of the Claimant's non compliance with the Order of Master Cottle.
- [7] On 30th October 2008 a judgment dated 13th September 2007 was entered for the Defendant striking out the Statement of Claim for non compliance by the Claimant with the Order of Master Cottle dated 10th November 2006. The default judgment also awarded costs to the Defendant to be determined by the Court upon application.

- [8] By Notice of Application filed on 9th December 2008 the Defendant applied to the Court for the determination of the costs pursuant to the judgment dated 13th September 2007 and entered on 30th October 2008. This application was scheduled to be heard before the Judge in Chambers on 16th January 2009 but was adjourned to 6th February 2009.
- [9] By Notice of Application filed on 7th January 2009 the Claimant applied to the Court to set aside the judgment dated 13th September 2007 on the grounds that the judgment is irregular, that the Claimant had no notice of the case management conference of 10th November 2006 and the order made by the Master on that day was never served on the Claimant, and that the Claimant had on 24th October 2006 supplied the further information requested by the Defendant. This application was also scheduled to be heard on 16th January 2009 but was also adjourned to 6th February 2009.
- [10] The Claimant filed Written Submissions together with a List of Authorities on 14th January 2009, while the Defendant filed Written Submissions together with authorities on 26th January 2009.
- [11] The applications were heard in Chambers by Cumberbatch J. on 6th February 2009 and the Learned Judge ordered that the application of the Defendant dated 9th December 2008 for an order that costs be determined pursuant to the judgment dated 13th September 2007 and filed on 30th October 2008 is granted and that the default judgment dated 13th September 200[7] is set aside.
- [12] It is passing strange that the Learned Judge set aside the judgment but at the same time granted an order for the determination of the costs pursuant to the same judgment that he set aside.
- [13] By Notice of Application filed on 20th February 2009 the Defendant applied to the Court for leave to appeal the order of Cumberbatch J. setting aside the default judgment dated 13th September 2007 and filed on 30th October 2008. The application

was scheduled to be heard on 21st April 2009 but was adjourned to 12th May 2009, on which date the Claimant applied for a further adjournment. The matter was then adjourned to 19th May 2009 with cost for the day to the Defendant to be assessed if not agreed.

[14] On 19th May 2009 the Court heard an oral submission and received a List of Authorities from Counsel for the Defendant and heard an oral submission and received written Skeleton Arguments with authorities attached from Counsel for the Claimant.

[15] The submission of Counsel for the Defendant was essentially that the Defendant was entitled to a grant of leave to appeal because the Defendant has a realistic prospect of succeeding on appeal if leave is granted. Learned Counsel contended that the Defendant has good grounds for appeal in that the Learned Trial Judge erred in law -

(i) By failing to take into account that the effect of Rule 26.7 (2) of the CPR is that once there is non compliance with the Master's Order the sanction imposed in the Order is of immediate effect.

(ii) By failing to consider that there were only three remedies available to the Claimant, none of which was applied for, namely, (1) to appeal the Master's Order, (2) to apply for an extension of time and relief from sanctions for failure to comply with the Master's Order and (3) to have the entry of judgment set aside for non compliance in accordance with Rule 26.5 (4) of the CPR.

(iii) By failing to consider that the Defendant was entitled to make the application for judgment under Rule 26.5 of the CPR as a consequence of the Claimant's non compliance with the Master's Order.

[16] Learned Counsel for the Defendant also submitted that the Court can grant an application for leave to appeal if the Court takes the view that the case raises an issue

on which the law requires clarification and that there are issues in this case requiring clarification.

[17] Learned Counsel cited the following cases in support of the submission on behalf of the Defendant:

- (a) **Othneil Sylvester v Faelleseje A Danish Foundation**¹;
- (b) **Marcan Shipping (London) Ltd. v Kefalas and another**² ;
- (c) **Smith v Cosworth Casting Processes Ltd.**³; and
- (d) **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited et al**⁴.

[18] Learned Queen's Counsel on behalf of the Claimant accepted the submission of Counsel for the Defendant that the Court can grant an application for leave to appeal if the Court takes the view that the case raises an issue on which the law requires clarification, but Counsel contended and the Court agrees that there are no such legal issue requiring clarification in this case.

[19] Learned Queen's Counsel also accepted the submission of Counsel for the Defendant that the Defendant has to show that it has a realistic prospect of success in the appeal if leave to appeal is to be granted, but contends that the Defendant does not have a realistic prospect of success in an appeal against the judgment of Cumberbatch J. Learned Queen's Counsel sought to distinguish the cases cited by Counsel for the Defendant from the present case on the basis that in the cases cited there had been no compliance at all with the court's order whereas in the present case there is evidence that the Claimant did file a response to the request for information by the Defendant. Learned Queen's Counsel submitted that if the

¹ Civil Appeal No.5 of 2005

² [2007] 3 All ER 365

³ [1997] 1 WLR 1538

⁴ Civil Appeal No.15 of 2003

Defendant was saying that there was no response by the Claimant to the request for information then this was clearly wrong, but if the Defendant was saying that the Claimant's response constituted a refusal and neglect to provide the information requested then this required the exercise of a judicial discretion. Counsel stated that one would have to read the Master's Order, read what had already been submitted by the Claimant even before the Order had been made and then decide whether what had already been submitted complied with what was required by the Order. This he contends entailed the exercise of a judicial discretion which could not have been exercised without affording the Claimant an opportunity to be heard. Yet, he contends, the Deputy Registrar entered judgment on the basis of a request for judgment by the Defendant without affording the Claimant an opportunity to be heard. No court, Learned Queen's Counsel submitted, and certainly not the Court of Appeal, can uphold a judgment entered in these circumstances.

[20] Learned Queen's Counsel cited the case of **The Attorney General of Grenada et al v Andy Redhead**⁵ in support of his submission.

[21] The basic premise of the argument by Dr. Alexis - who was Counsel for the Claimant/Respondent in the application before the Court - appears to be unanswerable, especially having regard to his unchallenged account of what transpired before Cumberbatch J. prior to the setting aside of the default judgment of 13th September 2007. And to that extent, and even though I might have reached a different conclusion from Cumberbatch J., there does not appear to be a realistic prospect of the Defendant succeeding on an appeal against his decision. However, there is still the Order of Master Cottle dated 10th November 2006, which required the Claimant to supply certain information within 14 days of service of the Order and provided that if the Claimant should fail to provide the requested information the Statement of Claim is to be struck out. The evidence is that the Order was served on the Claimant on 23rd November 2006 but that no information has since been provided to the Defendant by the Claimant. This means that, in accordance with Rule 26.7 of

⁵ Civil Appeal No.10 of 2007

the CPR, since no application has been made by the Claimant for relief from sanctions, the Statement of Claim in this matter is struck out. This would mean that the Defendant's only interest in the matter would be its legal costs. But, in the same judgment by Cumberbatch J. setting aside the judgment of 13th September 2007, Cumberbatch J. ordered that costs be determined pursuant to the judgment which was being set aside, which is for prescribed costs appropriate to the stage that the proceedings had reached.

[22] It would seem therefore that, notwithstanding the setting aside of the judgment of 13th September 2007, at this stage the Defendant in this matter need not answer to any case - the Claimant's Statement of Claim having been struck out - and the Defendant can simply quantify its legal costs, as per the Order of Cumberbatch J., and claim them from the Claimant.

[23] In respect of this application, however, there is no order as to costs.

[24] If anyone has come to the conclusion that this is a confusing judgment, then I can only offer that the genesis of the confusion is in the confusing build up of the facts of the case and the confusing judgments or orders which they spawned, by the Learned Deputy Registrar, the Learned Master and the Learned Judge.

[25] In so far as this judgment can be said to have added to the confusion, at least no one ought to complain about the company that I keep.

Mario Michel
High Court Judge (Ag.)