BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(DIVORCE)

Claim No. BVIHCV2009/0384

BETWEEN

ANJU DHAR
KAPIL DHAR

Claimants

-and-

GLENFORD DAVID
PAMELA SERAPHINE
INTERNATIONAL (BVI) MOVERS LTD

Defendants

Appearances:

Mrs. Tana'ania Small-Davis of Farara Kerins for the Claimants
Mr. Patrick Thompson of McTodman & Co for the First and Second Defendants

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2011: July 14
2011: July 19

Civil Practice and Procedure – Part 13 - Civil Procedure Rules 2000 – Setting aside or varying Default Judgment – CPR 12.5 - Conditions to be satisfied for failure to defend – Does minor procedural defect in certificate of truth render claim form a nullity – Whether lack of service of certified claim form – Whether judgment wrongly entered for a specified sum of money instead of damages to be assessed – Whether judgment wrongly entered for arbitrary sum of interest

In November 2009, the claimants brought an action for damages against the defendants for their failure to deliver their goods to their address in India. The sum claimed was itemized in the Statement of Claim. Invoices were attached. Counsel for the defendants acknowledged service and indicated an intention to defend. No defence was filed. Upon request for entry of default judgment, it was discovered that the Claim Form lacked a certificate of truth. The claimants filed and served an Amended Claim Form with a certificate of truth. There was no response by the defendants.

On 11 May 2010, the Master entered Judgment in Default of Defence for the sum claimed. The Default Judgment was served on the firm of McTodman & Co who are the registered agent for the third defendant and Counsel for the first and second defendants.

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Subsequently, the claimants filed a Judgment Summons which was duly served on the three defendants. On 25 May 2011, the first and second defendants ("the applicants" in these proceedings) applied to set aside the Judgment in Default of Defence under CPR 13.2 on the grounds that (1) the certificate of truth affixed to the Amended Claim Form was defective in that it referred to the "Claim Form" and not the "Amended Claim Form"; (2) the Amended Claim Form had not been served upon the applicants; (3) the Judgment in Default of Defence for a specific sum of money was wrongly entered because the claim was for breach of contract and the Default Judgment should have been entered for damages to be assessed; and (4) the Default Judgment was wrongly entered for interest which was not based on any contract but was arbitrarily selected by the claimants.

HELD:

1. The purpose of a certificate of truth is to eliminate claims in which a party had no honest belief: Clark v Marlborough Fine Art (London) Ltd (No 2) [2002] 1 WLR 1371. There has been no change whatsoever in the facts alleged or the relief sought and there is no inconsistency between the Claim Form and the Amended Claim Form. The omission of the word "Amended" before the words 'Claim Form' in the certificate of truth attached to the Amended Claim Form is a very minor omission which does not necessitate striking out or re-service of another Amended Claim Form.

2. A default judgment for failure to defend must be set aside if a defendant proves that the claimant failed to serve the claim form upon him: CPR 13.2(1)(b) and CPR 12.5(a)(i). In this case, there is sufficient documentary evidence to demonstrate that the firm of McTodman & Co. was served with the Amended Claim Form on behalf of the applicants on 30 March 2010.

3. Default Judgment for a "specified sum of money" may be entered where a Claim Form or Statement of Claim is accompanied by receipted bills evidencing the sum claimed. In this case, the Master entered the Default Judgment. She had the jurisdiction to assess the damages upon the material before the court. In the circumstances, the court declines to vary the default judgment order to require damages to be assessed by the court.

4. The claimants claim for interest is a smaller amount than what is provided for in CPR 12.8(2)(b). The court will vary the default judgment to award interest at the statutory rate of 5% from the date of claim to the date of judgment.

JUDGMENT

[1] HARIPRASHAD-CHARLES J: On 11 May 2010, the claimants obtained a Default Judgment against the first, second and third defendants (collectively "the defendants") for damages in the sum of $8,152.85 plus interest of $63.08 and costs of $1,509.60.

[2] Subsequently, the claimants served a Judgment Summons on the defendants.[1] The hearing of the Judgment Summons was fixed for 30 May 2011 but before that hearing materialized, the first and second defendants ("the applicants" in these proceedings), on 25 May 2011, filed a Notice of Application seeking, in the main, to set aside the Judgment in Default pursuant to Part 13.2 of the Civil Procedure Rules 2000 ("CPR 13.2").

CPR 13.2

[3] CPR 13.2 is in the following terms:

> "Cases where court must set aside default judgment
>
> (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
>
> (a) a failure to file an acknowledgement of service – any of the conditions in rule 12.4 was not satisfied; or
>
> (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.
>
> (2) The court may set aside judgment under this rule on or without an application."

[4] In summary, CPR 12.5 provides that judgment for failure to defend may be entered where the claimant proves:

- service of claim form and statement of claim; or that acknowledgment of service has been filed by defendant; and
- the period for filing a defence and any extension agreed by the parties or ordered by the Court has expired; and
- the defendant has not filed a defence or admitted liability for a specified sum and requested time to pay or satisfied the claim.

[5] The applicants attempt to set aside the Default Judgment on the following five grounds namely:

1. The claimants did not properly certify the Claim Form or the Amended Claim Form which makes the document a nullity.

[1] See Affidavit of Service upon 3rd Defendant of Andrea Spence Walters sworn 20 April 2011; and Affidavit of Service upon counsel for 1st and 2nd Defendants of Andrea Spence Walters sworn 20 April 2011; also Affidavit of Service upon 1st Defendant in person of Marvin Hendrickson sworn 20 April 2011.

2. The claimants did not serve the Amended Claim Form on them (the applicants).

3. The claimants' claim is for breach of contract and as such the default judgment should not have been entered for a specific sum of money but for damages to be assessed by the court.

4. The Default Judgment was entered for interest which was not based on any contract but was arbitrarily selected by the claimants.

5. The claimants have recently taken steps to enforce the judgment by issuing a judgment summons which is due to be heard on 30 May 2011.

Certification of Claim Form or Amended Claim Form

[6] The applicants who now attempt to dissociate themselves from the third defendant (although the first defendant is a shareholder and director of the third defendant) submit that the claimants did not properly certify the Claim Form or the Amended Claim Form and because of this procedural defect, the document is a nullity. Specifically, Learned Counsel for the applicants, Mr. Thompson argues that the certificate of truth affixed to the Amended Claim Form refers not to the Amended Claim Form but to the Claim Form and for that reason, it is irregular and a nullity.

[7] Mr. Thompson contends that pursuant to CPR 3.12(1), every statement of case must be verified by a certificate of truth. Subsection 3.12 (2) provides that the certificate of truth should be signed by the parties personally. Mr. Thompson states that the Amended Claim Form ought to be struck out as it is a nullity or alternatively, the claimants should be ordered to re-serve the Amended Statement of Claim with a proper certificate of truth.

[8] Mr. Thompson relies on the case of Komodo Holdings Ltd v VP Bank (BVI) Ltd.[2] In that case, the defendant applied to strike out a statement of claim for failure to include a certificate of truth. While the court did state at [25] that "there is no proper statement of case unless there is a verification of it by a certificate of truth", nowhere in the judgment is the word "nullity" used. Matthew J [Ag.] held at [23] and [28] – [29] as follows:

> "[23] The provisions of the Civil Procedure Rules are clear. Rule 8.7 (5) provides:

[2] British Virgin Islands Civil Suit No. 72 of 2002 (Matthew J [Ag.]) Judgment 31 May 2002.

"The statement of claim must include a certificate of truth in accordance with rule 3.12".

Rule 3.12 (1) states:

"*Every statement of case must be verified by a certificate of truth"*

They are mandatory.

[28] My judgment therefore should be such as would give effect to the mandatory requirement of having a certificate of truth included in the statement of case and yet try to save as much expense as possible.

[29] My order is that the Claimant must file and serve within 7 days a genuine certificate of truth and the Defendant is to file and serve its defence within 21 days thereafter."

[9] In the present case, the Claim Form filed on 6 November 2009 did not contain a certificate of truth. However, on 13 January 2010, there was an Amended Claim Form, amended specifically to include the certificate of truth. CPR 3.13 (1) gives the court a discretionary power to strike out a statement of case which has not been verified by a certificate of truth, however, unlike the Komodo Holdings case, there is a certificate of truth before the court.

[10] On the certificate of truth, the learned authors of The Caribbean Civil Court Practice[3] stated:

> "the purpose of a certificate / statement of truth is to eliminate claims in which a party had no honest belief and to discourage the pleading of cases unsupported by evidence in the which were put forward in the hope that something might turn up on disclosure or at trial: Clark v Marlborough Fine Art (London) Ltd (No 2)[4]. Accordingly where an amendment would result in a unified claim which in turn would result in the claimant making inconsistent statements of truth, permission would not be given to amend".

[11] In Pacific Electric v Texan Management and ors[5], Lord Collins said that "in the pursuit of justice procedure is a servant not a master". I gratefully adopt the dictum in this case. It appears to me that in matters such as this one, the court must look to see whether the

[3] 1st ed. at Note 2.2
[4] [2002] 1 WLR 1371
[5] [2009] UKPC 46 at para. 1.

procedural defect is so grave that it warrants a setting aside of the Default Judgment or re-service on the defendants in order that the whole process is recommenced. Apart from the addition of the certificate of truth and the amended date of the Amended Claim Form, the substance of the claim is identical. There has been no change whatsoever in the facts alleged or the relief sought. The claimants have certified their belief in the alleged facts and there is no inconsistency between the Claim Form and the Amended Claim Form. In my opinion, the omission of the word "amended" before the words 'claim form' in the certificate of truth attached to the Amended Claim Form is a very minor omission. It does not necessitate striking out or re-service of another Amended Claim Form.

[12] In the premises, this ground fails.

Service of the Amended Claim Form

[13] The claimants served the defendants with the Claim Form and Statement of Claim on 16 November 2009. Mc Todman & Co filed an acknowledgment of service on behalf of "the defendants" stating that they did not admit the claim and intended to defend.

[14] The claimants filed the Amended Claim Form on 13 January 2010. This was served on the third defendant at its registered office, Macnamara Chambers, on the 21 January 2010.[6] The applicants claim that they were not served with the Amended Claim Form.[7] However, there is documentary evidence to demonstrate that the firm of Mc Todman & Co (who represented the defendants from the inception but now say that they represent only the applicants) was indeed served with the Amended Claim Form on behalf of the applicants on the 30 March 2010.[8] In addition, the registered address of the third defendant, is also the physical address of Mc Todman & Co. The Request for Judgment in Default and the Judgment in Default of Defence order were served on the firm of McTodman & Co on 14

[6] See page 11 of Exhibit TC1 in the affidavit of Tamara Cameron sworn to on 14 July 2011; See Affidavit of service of Natalee Laylor sworn and filed 12 February 2010.
[7] See Affidavit of Mishka Jacobs in support of application to set aside default judgment, sworn and filed 25 May 2011, at para. 9.
[8] See page 11 of Exhibit TC1 in the affidavit of Tamara Cameron sworn to on 14 July 2011: Affidavit of service of Kaiola Rymer sworn and filed 31 March 2010.

May 2010[9], although it is now asserted that such service was on behalf of the third defendant only and not the present applicants.[10]

[15] I am satisfied that McTodman & Co, represented the defendants and that firm was properly served with the Amended Claim Form on 30 March 2011.

[16] This ground also fails.

Claim for specified sum of money / interest

[17] In their Statement of Claim, the claimants have claimed US$8,152.85 which they say represent the expenses they incurred as a result of the breach of contract. The applicants say that the claimants' claim is for breach of contract; therefore, the default judgment should not have been entered for a specific sum of money but for damages to be assessed.

[18] CPR 2.4 provides:

> "a claim for a "specified sum of money" means –
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> (a) a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract; and
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> (b) for the purposes of part 12 (Default Judgment) … a claim for
>
> (iii) any other actual financial loss other than loss of wages or other income …
>
> claimed as a result of damage which it is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and copies of receipted bills for the amounts claimed are attached to the claim form or statement of claim."

[19] There is some authority that a plain reading of CPR 2.4 suggests that only sums referable to contracts or road traffic accidents fall to be considered within that definition.

[9] See Exhibits to the Affidavit of Tamara Cameron sworn 14 July 2011 at page 34; Also
[10] Affidavit of Mishka Jacobs in support of application to set aside default judgment, sworn and filed 25 May 2011, at para. 11.

[20] In Curtis Zimmerman v BVI Tourist Board[11] contracts for public relations and advertising agency services were agreed for a term of 24 months, and thereafter to automatically renew until terminated by 3 months notice in writing by either party. Seven months into the performance of the contract term the defendant gave 3 months notice of termination to the claimant. The claimant obtained a judgment in default of defence for $1.2 million for 16 months worth of fees, being 13 months remaining under each contracts along with the 3 month notice period. Bannister J [Ag.] said at para. 16,

> "The question is whether Zimmerman's claim is for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract. The second limb of the definition, dealing with judgments in cases arising out of road accidents is exclusively concerned with damages for the tort of negligence and throws no light on the first limb…."

[21] At paragraph 17 his Lordship added:

> "From the time when the Board's repudiation was accepted, however, which on the material before me appears likely to have been no later than 17 August 2009, when Zimmerman's lawyers wrote their letter before action, the parties' primary obligations under the agreement ceased. The Board thereafter became liable to Zimmerman for damages for breach of contract, damages which it would be for Zimmerman to prove. It is true that the Board's liability to pay damages sprung from the contract, but it would be a misuse of language to describe that liability as consisting of a sum that was 'ascertained or capable of being ascertained as a matter of arithmetic and due under a contract' within the definition of a claim for a specified sum of money set out in CPR Rule 2.4. Such damages are an unspecified sum of money and the only default judgment which could lawfully be entered in respect of them is a judgment under CPR Rule 12.10(1)(b) for payment of an amount to be decided by the court."

[22] I entertain no doubt that Curtis Zimmerman was correctly decided on its own facts. However, there is also authority to suggest that the practice of this court is that a claim for a specified sum may be properly made as long as the Claim Form or Statement of Claim is accompanied by receipted bills evidencing the specific sum claimed: see Stephine Emanuel v Clyde Jenson Lecointe[12] where the learned Master had this to say:

[11] BVIHCV 2009/388 (Bannister J [Ag.]), Judgment 30 July 2010.
[12] DOMHCV 2009/0166 (Master Lanns), Judgment 10 February 2011 at para. 3.

> "…the Registrar failed to appreciate the definition "claim for a specified sum of money" set out in Rule 2.4, and as such, erroneously entered judgment in the sum of $69,249.29 although neither the claim form nor statement of claim was accompanied by any receipted bills evidencing the $69,249.29."

[23] In the instant case, the defendants' obligation under the contract was to deliver the goods to the stipulated address in India. Upon failure to fulfill the contractual obligation, the defendants became liable to the claimants for damages suffered as a result of the breach of contract. The claimants particularized the expenses which they incurred and tendered contemporaneous documentary evidence. In my opinion, the claim was simply for a sum that had been ascertained. If, for the sake of argument, the Default Judgment had been entered under CPR 12.10(1)(b) for the payment of an amount to be decided by the court, this claimant was clearly in a position to prove the amount of damages sought. Further, nothing in CPR 16.2 on the assessment of damages after default judgment requires the court office to notify the defendant of a date fixed for the assessment. Finally, upon perusal of the court's file, the Default Judgment was ordered by the learned Master who properly had jurisdiction to assess the damages upon the material before her. This is not apparent on the face of the order because it is poorly drafted.

[24] In the circumstances, I decline to vary the order to require damages to be assessed by this court.

Interest

[25] CPR12.8 (2) states as follows:

> "A claimant who claims a specified sum of money together with interest at an unspecified rate may apply to have judgment entered for either the sum claimed –
>
> (a) and for interest to be assessed; or
>
> (b) together with interest at the statutory rate from the date of the claim to the date of entering judgment.

[26] The applicants say that the Default Judgment was entered for interest which was not based on any contract but was arbitrarily selected by the claimants which was from the date of the claim. They say this is in breach of CPR 8.6 which provides that a claimant who

is seeking interest must include in the claim form or statement of claim details of the basis of entitlement.

[27] The claimants claim interest of $63.08. According to learned Counsel, Ms. Small-Davis who appeared for the claimants, this sum was calculated at the rate of 2% monthly from the date of the claim to the date of judgment. This is an even smaller amount than is provided for in CPR 12.8(2)(b). Therefore, I will vary the order to cure this irregularity by awarding interest at the statutory rate of 5% from the date of claim to the date of entering judgment pursuant to CPR12.8(2)(b).

[28] It is my considered opinion that the applicants have not adduced any cogent grounds as to why the court should set aside the Default Judgment under CPR 13.2. Learned counsel has conceded that there was no intention of making the application under CPR 13.3. In the circumstances, I will dismiss the application to set aside the Default Judgment entered in this claim with costs of $1,000 to the claimants.

[29] The Judgment Summons will be heard on 26 July 2011.

Indra Hariprashad-Charles
High Court Judge