

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2011/0427

BETWEEN:

ALVIN G. EDWARDS
CYRIL MAUNDY

Claimants

and

WILLOUGHBY BAY BEACH RESORT LIMITED
THE ESTATE OF ARNOLD WYRE, DECEASED
ELVIS WYRE
THE REGISTRAR OF COMPANIES

Defendants

Appearances:

Ms. E. Ann Henry QC for Claimants 1

Ms. Eleanor Clarke for Claimants 2

Dr. D. Dorsett for Defendants 2 and 3

No appearance for Defendants 1 or counsel

2014: February 17

Ruling

[1] **Cottle, J.:** The Second and Third Defendants apply to have a judgment in default of defence that has been entered against them, set aside. The judgment in default of defence was entered on 24th October, 2013. It was served on counsel for the defendants on 31st October, 2013. On 22nd November, 2013 an application to set aside was filed.

- [2] Rule 13.3, Civil Procedure Rules 2000 (CPR) reads as follows:
"13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –
- (a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
 - (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
 - (c) Has a real prospect of successfully defending the claim.
- (2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.
- (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."
- [3] Counsel for the defendants submit that they have applied to the court as soon as reasonably practicable after learning of the default judgment, that they have a good explanation for the failure to file a defence and they have a real prospect of successfully defending the claim. He also submits that the judgment is improper and ought not to be allowed to stand. Two reasons are advanced for the characterization of the defence as improper. Firstly, it is said that it gives judgment to the second defendant when the second defendant has not applied for judgment in default. The second complaint is that the judgment gives relief which could not be obtained at law. Specifically, the judgment orders the third defendant to deliver the property of a company, which has not applied for any such order.
- [4] It is convenient to deal with the submissions about the propriety of the order first. The claim was filed on 30th June, 2011 by both claimants jointly. They sought the following relief:
- (1) A Declaration that the Shares of the First Defendant are held by the First and Second Claimants and the Second Defendant and that the First Claimant holds 27,176 ordinary shares, the Second Claimant holds 15,666 ordinary shares and the Second Defendant holds 7,158 ordinary shares.
 - (2) An Order that the First Defendant be at liberty to file in the Registry of Companies Articles of Amendment to record the following increases made in the share capital of the Company,

namely, from 1,000 ordinary shares to 50,000 ordinary shares, pursuant to a special resolution passed by the Company in general meeting in the year 1992.

- (3) An Order that the First Defendant is indebted to the First Claimant in the sum of \$125,527.587.
- (4) An Order that the First Defendant is indebted to the Second Claimant in the sum of \$133,927.58.
- (5) An Order directing the Third Defendant to deliver to the Secretary of the First Defendant the Land Certificate for the lands of the First Defendant recorded and registered in the Registry of Lands, as follows, that is to say,

Registration Section:	St. Phillips South
Block:	32 2884A
Parcel:	112

within two (2) weeks of the making of the Order, failing which the Registrar of Lands shall be directed to cancel the existing Land Certificate and to issue a fresh Land Certificate.

- (6) Such further or other relief as to the Court seems just.
- (7) An Order that the costs of this action be borne by the Second and Third Defendants.

[5] Both claimants signed the claim form. Two years later it was ordered by consent, that the defendants file a defence within 28 days of 14th June, 2013. The defendants failed to file any defence and on 4th October, 2013, the First Claimant applied for judgment in default of defence and asked the court to determine the terms of the judgment. This was done on 21st October, 2013 and entered on 24th October, 2013.

[6] Against this backdrop can it be said that it is possible to sever the claimants and award judgment in default to one and not the other? It appears to me that the claim of the claimants cannot be dealt with separately. None of the relief sought is applicable to one claimant to the exclusion of the other. I find no merit in this objection to the judgment. Counsel for the defendants did not provide the court with any authority in support of his proposition. I decline to find the default judgment irregular on this basis.

- [7] Counsel also complained of the part of the order which directed the Third Defendant to hand the property of the First Defendant to the secretary of the First Defendant. As I understand it, the property of the company is not the property of the shareholders of the company. But the shareholders have an interest in securing the company's property. I find nothing irregular with an order requiring the property of the company to be returned to the secretary of that company. It is of no moment that the company has not applied for this order. The company did not appear and was not represented by counsel at the hearing. I can conceive of no good reason why returning the company's property to the company secretary should be a reason to say that the order is improper, especially where the company makes no complaint. Again no authority was provided to support counsel's position.
- [8] Turning to the application of Rule 13.3, of CPR 2000 to the facts of this case, I find that the passage of three weeks before the application to set aside is made cannot amount to the application having been made as soon as estimably practicable. Neither does the reason for the failure to defend resonate with this court. The reason advanced is that there were challenges experienced in obtaining documents necessary to avoid embarrassment in his defence. If the defendants have no information as to any facts upon which they rely to defend the claim, I cannot see how a search for facts which may or may not support a possible defence affords a good reason for failing to defend. Such defendants may never find the information they seek. For how long should the court and the claimants wait while such a search is carried out?
- [9] Under Rule 13.3 (1), the discretion of the court to set aside a default judgment, regularly obtained, only arises where the defendant can satisfy the court of the three matters listed at 13.3 (1) (a) (b) and (c). I find that the defendant has not so satisfied the court. Under Rule 13.3 (2), the court may now set aside a default judgment in any case were the defendant satisfies the court that there are exceptional circumstances.
- [10] The matters to which the applicants allude as establishing exceptional circumstances are those dealt with at the outset of this ruling. Neither of them appears to me to be exceptional, especially in light of the fact that two years after the claim was filed, a consent order allowing a further 28 days to defend was filed and still the defendants failed to file any defence.

[11] The application to set aside the default judgment is refused. The applicant will pay the costs of this application to be assessed on application if no agreement is reached as to quantum.

Brian Cottle
High Court Judge