EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2014/0008

IN THE MATTER OF AN INTERLOCUTORY APPEAL

BETWEEN:

[1] ELVIS WYRE (PERSONAL LEGAL REPRESENTATIVE OF THE ESTATE OFARNOLD WYRE, DECEASED)
[2] ELVIS WYRE

Appellants

and

[1] ALVIN G. EDWARDS
[2] LEON MAUNDY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CYRIL MAUNDY

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

On written submissions:

Dr. David Dorsett of Watt, Dorsett & Co. filed on behalf of the Appellants

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2014: September 3.

Civil appeal – Interlocutory appeal – Setting aside default judgment – Whether shareholder can file claim on behalf of company

Willoughby Bay Beach Resort Ltd. ("the Company") acquired real property in May 1990 registered as Parcel 112 Block 32 2884A St. Phillips South Registration Section ("Parcel 112"). The 1st respondent is a director and the owner of shares in the Company. The 2nd appellant is the son and personal representative of the Estate of the late Arnold Wyre, who also has shares in the Company.

The respondents alleged that Parcel 112 was purchased with monies obtained through a loan which was secured by two properties owned by the 1st respondent. The respondents alleged further that the 2nd appellant is in possession of the land certificate for Parcel 112

and that in November 1992, the authorised capital of the Company was increased and that this increase was confirmed by members of Mr. Wyre's family. The respondents filed a claim on 30th June 2011 against the appellants claiming inter alia monies allegedly owing to them by the Company, a declaration that they are entitled to a specified number of shares in the Company, and an order that the land certificate be delivered to the secretary of the Company.

The appellants, for the most part, have disputed the allegations within the claim and asserted that Parcel 112 was purchased by the late Arnold Wyre with proceeds derived from a loan which he (Arnold Wyre) alone repaid. They contend that the entire capital was issued to Arnold Wyre and the 1st respondent equally and denied that other shares had been issued.

The appellants made a request on 27th September 2011 for further information of the statement of claim. The information was not provided and on 2nd November 2011 the appellants filed an application for the requested information. Subsequent to an order by the master dated 4th April 2012 and an application dated 8th April 2013 filed by the appellants for an unless order, the respondents delivered the requested information to the appellants on 11th June 2013.

On 17th June 2013 the parties filed a consent order stipulating that the appellants were to file their defence within 28 days of the date of the order. The appellants did not file their defence within the agreed time and the respondents applied for and were granted judgment in default of defence in the same terms as the relief sought in the claim form and statement of claim. The appellants then filed an application to set aside the default judgment. The application was filed three weeks after the appellants became aware of the default judgment. The learned trial judge refused the application.

The appellants appealed the judgment on numerous grounds including that the learned judge erred in making the order without giving the 2nd appellant the alternative of paying the assessed value of the "good"; that the learned judge erred in awarding judgment in favour of the 2nd respondent who had not applied for same; and that the learned judge erred in finding that the respondents as shareholders in the Company have an interest in securing the Company's property.

Held: allowing the appeal; setting aside the default judgment and awarding costs to the appellants in the amount of $2,000.00, that:

1. The item that the respondents are seeking to recover is not "goods" in the traditional or any sense but a certificate of title which is only evidence of ownership of Parcel 112. The certificate has no intrinsic value. It follows that the 1st respondent was not asking for the return of a "good" under sub-paragraph 12.10(1)(c) of the Civil Procedure Rules 2000 ("CPR") but for "some other remedy" under sub-paragraph 12.10(4), and the application to determine the terms of the judgment was made under sub-paragraph 12.10(5). The learned judge was correct in proceeding under sub-paragraph 12.10(5) and it was not necessary for

the 1st respondent to serve a sub-paragraph 12.10(1)(c)(iii) application on the appellants.

2. The court has a discretion under rule 13.3(2) of the CPR to set aside a default judgment if the defendant satisfies the court that there are exceptional circumstances to so do. In this case there are exceptional circumstances –

    a. The default judgment gave judgment to the 2nd respondent even though he had not applied for judgment. As a matter of principle a default judgment that is entered on the application of one of several claimants granting relief in respect of that claimant should not include relief in respect of another claimant who is seeking separate relief on the pleadings but who has not applied for judgment. As such, the claims of the 2nd respondent for declarations that he owns shares in the Company and that the Company is indebted to him are divisible from those of the 1st respondent. The portions of the default judgment declaring his rights to the shares and the monies should not have been entered on the 1st respondent's application for judgment.

    b. As a matter of law shareholders of a company cannot pursue claims that belong to a company unless he is suing on behalf of the company in a derivative action. This claim in its present form is a derivative action. Accordingly, except in a derivative action, the Company is the necessary party to apply to the Registrar of Companies to amend its Articles and to apply to recover the land certificate.

Rule 13.3(2) of the Civil Procedure Rules 2000 applied; Foss v Harbottle (1843) 2 Hare 461 applied.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an interlocutory appeal against the order of the learned judge made on 17th February 2014 refusing an application by the appellants to set aside a judgment in default of defence entered against them on 24th October 2013 ("the Default Judgment").

Background

[2] The 2nd appellant, Elvis Wyre, brings this appeal as the personal representative of the Estate of his late father, Arnold Wyre, and in his own right. He is referred to in this judgment in both capacities as "the appellants" and in his own capacity as "the 2nd appellant".

[3] The first defendant in the court below, Willoughby Bay Beach Resort Ltd., is a limited liability company incorporated in Antigua and Barbuda on 17th January 1990 ("the Company").

[4] The 1st respondent, Alvin Edwards, is a director and the owner of shares in the Company.

[5] The late Cyril Maundy was the solicitor for the Company at the time of incorporation and the alleged owner of shares in the Company. The 2nd respondent, Leon Maundy, is the personal representative of Cyril Maundy.

[6] The respondents contend that the Company acquired real property in May 1990 registered as Parcel 112 Block 32 2884A St. Phillips South Registration Section ("Parcel 112") pursuant to a pre-incorporation contract. Further, that Parcel 112 was acquired with a loan for $300,000.00 from Canadian Imperial Bank of Commerce ("CIBC") secured by two properties owned by the 1st respondent. They repaid the loans with help from Arnold Wyre up to the time of his death in 1995. Following the death of Arnold Wyre, they secured a second loan from the Antigua and Barbuda Investment Bank ("ABIB") to pay off the CIBC loan which was then in arrears.

[7] The appellants' position is that Parcel 112 was purchased with monies borrowed from CIBC by Arnold Wyre which he alone repaid. They deny that the CIBC loan for $300,000.00 was used to purchase Parcel 112 and they have put the respondents to strict proof that Arnold Wyre was a party to any such loan.

[8] The statement of claim alleges that on 30th April 2008 the 2nd appellant retrieved the land certificate for Parcel 112 from ABIB. The 2nd appellant does not deny taking the certificate but pleads that the respondents are not entitled to the certificate because it belongs to the Company.

[9] The Company was set up with an authorised capital of $10,000.00 divided into 1,000 shares of $10.00 each. The appellants contend that the entire capital was

issued to Arnold Wyre and the 1st respondent equally and that no other shares have been issued. The respondents contend that in November 1992 the authorised capital of the Company was increased to $50,000.00 divided into 5,000 shares of $10.00 each, and that on 17th May 2008 at a general meeting of the Company attended by Mrs. Ethlyn Wyre, the widow of Arnold Wyre, her attorney Michael Archibald, and Joanne Walsh, the daughter of Arnold Wyre, it was confirmed that the shareholders of the Company were as follows:

Alvin Edwards	27,176 shares
Cyril Maundy	15,666 shares
Estate of Arnold Wyre	7,158 shares

[10] The meeting also confirmed that certain monies were due to the respondents from the Company as company related expenses such as paying off the CIBC and ABIB loans. The 1st appellant was not present at the meeting and makes no admission that the meeting took place or that the confirmations listed above were made. Further, Joanne Walsh who is alleged to have been present at the meeting has filed evidence denying that she was at the meeting or any similar meeting.

[11] On 30th June 2011 the respondents filed a claim in the High Court seeking the following relief:

(1) A declaration that the shares of the Company are held by the respondents and the 2nd appellant with the 1st respondent holding 27,176 ordinary shares, the 2nd respondent 15,666 ordinary shares and the 2nd appellant 7,158 ordinary shares.

(2) An order that the Company 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 at a general meeting in the year 1992, together with all consequential filings.

(3) An order that the Company is indebted to the 1st respondent in the sum of $125,527.58.

(4) An order that the Company is indebted to the 2nd respondent in the sum of $133,927.58.

(5) An order directing the 2nd appellant to deliver to the secretary of the Company the land certificate for Parcel 112 within two (2) weeks of the court's order, failing which the Registrar of Lands shall be directed to cancel the existing land certificate and to issue a new 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 appellants.

[12] On 27th September 2011 the 1st appellant requested further information on the statement of claim from the respondents. The information was not provided and on 2nd November 2011 the appellants filed an application for the requested information.

[13] On 4th April 2012 the master ordered the respondents to provide the requested information within 21 days and the appellants to file their defence within 28 days of the receipt of the information. The respondents did not comply with the master's order and on 8th April 2013 the appellants applied for an order that unless the respondents provide the information ordered by the master within seven days the statement of claim be struck out.

[14] On 11th June 2013 the respondents delivered the requested information to the appellants.

[15] On 17th June 2013 the parties filed a consent order stipulating that the appellants were to file their defence within 28 days of the date of the order. The appellants did not file their defence within the agreed time and on 4th October 2013 the 1st respondent applied for judgment in default of defence.

[16] On 24th October 2013 the court entered judgment in default of defence against the appellants substantially in the same terms as the relief sought in the claim form and statement of claim.[1] The default judgment was served on the appellants on 31st October 2013. On 25th November 2013 they applied to set aside the judgment. The application was supported by affidavits by the 2nd appellant sworn on 25th November 2013 and of Jo-Anne Wyre-Walsh sworn on 15th January 2014.

[17] The application was heard and dismissed by the learned judge on 17th February 2014. He gave written reasons for his decision ("the Ruling").

[18] On 26th February 2014 the appellants applied to this Court for permission to appeal against the judge's order refusing their application to set aside the default judgment. The application is supported by the 2nd appellant's affidavit sworn and filed on 26th February 2014 and the second affidavit of Jo-Ann Wyre-Walsh sworn and filed on 3rd March 2014. Permission to appeal was granted on 15th April 2014.

[19] The appellants filed the notice of appeal on 17th April 2014 and written submissions on 22nd April 2014. The submissions incorporate their submissions filed on 26th February 2014 in support of the application for permission to appeal.

[20] The respondents have not filed a notice of opposition to the appeal nor submissions in reply. The appeal is therefore unopposed but we will proceed to consider it on its merits.

Grounds of Appeal

[21] The notice of appeal lists ten grounds of appeal some of which overlap. We deal with them below but not in the same order as in the notice of appeal.

Ground 1 – Order for delivery of goods

[22] Paragraph 1(iv) of the default judgment orders the 2nd appellant to deliver up to the secretary of the Company the certificate of title for Parcel 112. The appellants submit that the learned judge erred in making this order without giving the

[1] See para. 11 above.

2nd appellant the alternative of paying the assessed value of the "good", in this case the land certificate, as required by rule 12.10(1)(c)(iii) of the Civil Procedure Rules 2000 ("CPR"). CPR 12.10 provides that -

> "12.10 (1) Default judgment on a claim for –
>
> (a) a specified sum of money – must be judgment for payment of that amount or, a part has been paid, the amount certified by the claimant as outstanding –
>
> (i) if the defendant has applied for time to pay under Part 14 – at the time and rate ordered by the court; or
>
> (ii) in all other cases – at the time and rate specified in the request for judgment;
>
> (b) an unspecified sum of money – must be judgment for the payment of an amount to be decided by the court;
>
> (c) goods – must be -
>
> (i) judgment requiring the defendant either to deliver the goods or pay their value as assessed by the court;
>
> (ii) judgment requiring the defendant to pay the value of the goods as assessed by the court; or
>
> (iii) (if the court gives permission) a judgment requiring the defendant to deliver the goods without giving the defendant the alternative of paying their assessed value.
>
> (2) An application for permission to enter a default judgment under paragraph (1) (c) (iii) must be supported by evidence on affidavit.
>
> (3) A copy of the application and the evidence under paragraph (2) must be served on the defendant against whom judgment has been sought even though that defendant has failed to file an acknowledgement of service or a defence.
>
> (4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.
>
> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply."

[23] The basis of the 2nd appellant's submission is that the default judgment was entered under sub-paragraph 12.10(1)(c)(iii) above and the judge could have proceeded under this sub-paragraph only if the court had given permission. An application for permission to enter judgment under sub-paragraph 12.10(1)(c)(iii) must be served on the defaulting defendant. No such application was made and

served in this case. This submission would have been well-founded if the judge had proceeded under sub-paragraph 12.10(1)(c)(iii). In fact the judge did not say which paragraph he was proceeding under and the statement of claim does not specifically claim relief under sub-paragraph 12.10(1)(c)(iii). It simply asks for delivery of the land certificate for Parcel 112.

[24] Sub-paragraph 12.10(1)(c)(iii) comes into play when the only relief that the claimant is seeking is delivery of goods and not their assessed value. In cases such as the present where the pleadings are silent on this point the judge can order the delivery of the goods or their assessed value under such part of rule 12.10 as he thinks is appropriate.

[25] The item that the respondents are seeking to recover is not "goods" in the traditional or any sense but a certificate of title which is only evidence of ownership of the underlying asset: Parcel 112. The claim does not seek delivery of the land itself. The certificate has no intrinsic value. It follows that the 1st respondent was not asking for the return of a "good" under sub-paragraph 12.10(1)(c) but for "some other remedy" under sub-paragraph 12.10(4), and the application to determine the terms of the judgment was made under sub-paragraph 12.10(5). The learned judge was correct in proceeding, as he must have, under sub-paragraph 12.10(5) and it was not necessary for the 1st respondent to serve a sub-paragraph 12.10(1)(c)(iii) application on the appellants.

[26] This ground of appeal fails.

Grounds 6 and 7 – Delay

[27] CPR 13.3 sets out the conditions that must be satisfied for a court to set aside a default judgment that is properly entered. Rule 13.3 provides:

> "(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 has been entered;
>
> (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the 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."

The three conditions in sub-rule (1) are conjunctive and prior to 2011 the applicant had to satisfy all three conditions to succeed on a set aside application.[2] Rule 13.3 was amended in 2011 by the addition of sub-rule (2) which gives the court a discretion to grant a set aside application in exceptional circumstances.[3]

[28] The learned judge found at paragraph 8 of the Ruling 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 reasonably practicable. Neither does the reason for the failure to defend resonate with the 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?"

The appellants were in default of filing their defence by 2½ months of the agreed filing deadline when the default judgment was entered. They could have applied for a further extension of time to file the defence. The delay was exacerbated when they waited for just over three weeks to apply to set aside the default judgment after becoming aware of it. The appellants submit that there was no evidence disputing the reasons given for not filing their defence within the agreed time and later taking over three weeks to apply to set aside the default judgment. But this is not enough to dispose of the issue of delay. The learned judge examined the reasons proffered to see if they satisfied him that the appellants provided a good explanation for their failure to file their defence on time and for not applying to set aside the default judgment as soon as reasonably practicable.

[2] Kenrick Thomas v RBTT Bank Caribbean Limited, Saint Vincent and the Grenadines, High Court Civil Appeal SVGHCVAP2005/0003.

[3] Sub-rule (2) is dealt with in further detail below at paras. 32 - 34.

There is no basis on which this Court can say that in coming to his conclusion on the issue of delay the judge came to the wrong conclusion or exceeded the generous ambit within which reasonable disagreement is possible.

[29] Subject to our consideration of sub-rule 13.3(2) below[4] these grounds of appeal also fail.

Ground 8 - Reasonable prospects of successfully defending the claim

[30] The third condition in rule 13.3 is that the appellants must show they have a reasonable prospect of successfully defending the claim.

[31] The learned judge found at paragraph 9 of the Ruling that the appellants had not complied with the three conditions in sub-rule 13.3(1) which suggests that he was not satisfied that the appellants have a reasonable prospect of defending the claim. He did not make a specific finding on this issue. We have examined the pleadings and the evidence filed in support of the application to set aside the judgment, and we are satisfied that they disclose reasonable prospects for defending the following issues in the claim:

(a) The issue of new shares - paragraphs 3 and 13 of the draft defence dispute the amendment to the Articles that purport to effect an increase in the authorised capital from 10,000 shares to 50,000 shares, and the issue of additional shares to the 1st and 2nd respondents and the 2nd appellant. The allegations in the draft defence are that the Articles of the Company were not properly amended to increase the capital to 50,000 shares. Further, that the issue of additional shares was not properly authorised, or authorised at all, because: (a) the Articles were not amended to allow the issue of additional shares; and (b) the additional shares could not be issued without the approval of the 2nd appellant who is the personal representative of Arnold Wyre, one of the two shareholders and directors of the Company, and he (Elvis) was not aware of nor approved the increase in capital nor the issue of the new shares.

[4] See paras. 32 – 34.

(b) The respondents' status to make the claims for the Registrar of Companies to amend the Articles and for the 2nd appellant to return the land certificate to the secretary of the Company.

(c) The entry of judgment in favour of a non-applying party (the 2nd respondent). This applies to those parts of the default judgment awarding shares to the 2nd respondent and declaring debts owed to him by the Company.

(d) The claims that the Company is indebted to the 1st and 2nd respondents for $125,527.58 and $133,927.58 respectively. The appellants plead that Parcel 112 was purchased with monies borrowed from CIBC by Arnold Wyre which he alone repaid. They deny that a loan of $300,000.00 from CIBC was used to purchase the property and that the respondents paid monies into the Company to repay this or any other loan. Since significant portions of the money claims are for amounts for "cash injected (into the Company) for bank loans" by the respondents, the money claims are also seriously disputed by the appellants.

Ground 9 - Exceptional circumstances under sub-rule 13.3(2)

[32] As stated above the court has a discretion under sub-rule 13.3(2) to set aside a default judgment "[i]n any event… if the defendant satisfies the court that there are exceptional circumstances". The new rule was introduced in 2011 to give the court a flexible approach in dealing with applications to set aside default judgments. The new approach is illustrated by the judgment of Michel J in Graham Thomas v Wilson Christian trading as Wilcon Construction.[5] The applicant/defendant delayed 5½ months after the default judgment was served on him and approximately 8 weeks after an application to enforce the judgment was served, to apply to set aside the judgment. The learned judge found that the defendant/applicant had not applied as soon as reasonably practicable after finding out that the judgment had been entered. Prior to 2011 the judge would

[5] Antigua and Barbuda, High Court Claim No. ANUHCV2011/0629 (delivered 13th July 2012, unreported).

have been obliged to follow the decision in Kenrick Thomas v RBTT Bank Caribbean Limited[6] and dismiss the application for failure to comply with the three conditions in rule 13.3(1). However, the judge found that the defendant had a real prospect of successfully defending the claim and that there were exceptional circumstances related to the defendant's personal situation. He therefore exercised his discretion under sub-rule 13.3(2) and set aside the judgment. He commented on the court's new approach in paragraph 3 as follows -

> "It is reasonable to conclude that it was primarily to dilute the rigidity of our own Rule 13.3 (1) and to bring it more in line with the English Rule by providing greater latitude to our judges to find the justice of the case rather than merely to find the presence or absence of three set prerequisites that the new sub-rule (2) of Rule 13.3 was introduced. The amended Rule 13.3, after setting out the rigid provisions of 13.3 (1), then introduces a new 13.3 (2) which states that – "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"."

[33] Sub-rule 13.3(2) is a welcome addition to the court's powers in dealing with default judgments but it should not be seen as a panacea for defaulting defendants as is illustrated by the judgment of Bannister J in Inteco Beteiligungs AG v Sylmord Trade Inc.[7] The learned judge rejected the defendant's attempt to treat the filing of the claim in breach of an express arbitration clause in the loan contract between the parties as an exceptional circumstance.[8] The defendant's remedy was to apply to the court for a stay of the proceedings, not to stand by and allow a default judgment to be entered and then ask the court to set it aside. On appeal the Court of Appeal endorsed the judge's approach and dismissed the appeal.[9]

[34] In the case at bar the learned judge referred to sub-rule 13.3(2) and the matters that the appellants relied on to show exceptional circumstances, namely:

(a) that the default judgment gave judgment to the 2nd respondent even though he had not applied for judgment; and

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[6] Saint Vincent and the Grenadines, High Court Civil Appeal SVGHCVAP2005/0003.
[7] Territory of the British Virgin Islands, High Court Claim BVIHCM2012/0120 (delivered 9th May 2013, unreported).
[8] Para. 31 of the Ruling.
[9] Sylmord Trade Inc. v Inteco Beteiligungs AG, Territory of the British Virgin Islands High Court Civil Appeal BVIHCMAP2013/0003, paras. 37 – 40.

(b) the judgment gave relief that could not be obtained at law.

Having rejected both submissions earlier in the Ruling[10] it is not surprising that the judge found that they did not amount to exceptional circumstances within the meaning of sub-rule 13.3(2). We will now examine the two situations to see if they amount to exceptional circumstances.

Judgment to a non-applying party (Grounds 2, 3 and 9(a))

[35] The 2nd respondent did not join in the application for judgment and the appellants submit that the court cannot therefore enter judgment in his favour. The appellants have not provided the Court with any authority for this proposition. Dr. Dorsett submits in effect that it is a matter of applying the rules to the facts in each case.

[36] As a matter of principle a default judgment that is entered on the application of one of several claimants granting relief in respect of that claimant should not include relief in respect of another claimant who is seeking separate relief on the pleadings but who has not applied for judgment. By way of example, if two claimants claim individual shareholdings in a company or individual claims for monies due from the company they are asserting individual causes of action against the company. There is no reason why one claimant's application for judgment should benefit the non-applying claimant. By contrast, if two claimants claim joint ownership of a parcel of land on the same facts, the claim is indivisible and there would be no point awarding judgment in favour of one claimant only. A judgment awarding title to the property to both claimants on the application of one claimant would be regular and would have the effect of extinguishing the claim of the non-applying claimant.

[37] In this case the claims of the 2nd respondent for declarations that he owns shares in the Company and that the Company is indebted to him are divisible from those of the 1st respondent. The portions of the default judgment declaring his rights to

[10] Paras. 6 and 7 of the Ruling.

the shares and the monies should not have been entered on the 1st respondent's application for judgment.

Judgment gave relief not available as a matter of law or on the pleadings (Grounds 4 and 9(b) (ii) and (iii))

[38] Ground 4 of the notice of appeal complains that the learned judge erred in finding that the respondents as shareholders in the Company have an interest in securing the Company's property. The appellants disagree and submit that shareholders do not have an interest in securing the Company's property. This is the responsibility of the directors. Therefore they complain in grounds 9(b)(ii) and (iii) that the judge erred in entering judgment for the respondents regarding the Company's property. They submit that as a matter of law the respondents are not entitled to such relief because shareholders of a company cannot pursue claims that belong to the company. We accept the appellants' submissions.

[39] The CPR do not make specific provision for dealing with a default judgment that gives a claimant relief that is contrary to law or is not claimed in the statement of claim. However, as Dr. Dorsett submitted in his supplemental submissions, the court has an inherent jurisdiction, and duty, to set aside such a judgment. He relied on the decision of George Pigott v Viola Buntin[11] a decision of Dane Hamilton, QC sitting as a single judge of the Court of Appeal. The learned judge struck out a default judgment primarily on the ground that it was based on a claim that was made under a repealed statute.

[40] Relying on the George Pigott v Viola Buntin case, Dr. Dorsett submitted that some parts of the default judgment are contrary to law and should be set aside.

[41] Firstly, sub-paragraph 1(ii) of the judgment which gives the 1st respondent liberty to file in the Registry of Companies Articles of Amendment to the Articles of Association increasing the Company's authorised capital from 1,000 ordinary shares to 50,000 ordinary shares. The appellant complains that this relief is

[11] Antigua and Barbuda, High Court Civil Appeal ANUHCVAP2008/0011 (delivered 26th August 2008, unreported).

available to the Company only and based on the rule in Foss v Harbottle[12] it cannot be granted to a shareholder. There is no gainsaying that a shareholder cannot assert claims that belong to a company unless he is suing on behalf of the company in a derivative action. There is no suggestion that this claim in its present form is a derivative action. The right to amend the Articles is a shareholder's right which is exercisable by passing a special resolution. Paragraph 14 of the statement of claim states that the February 1993 financial statements of the Company confirm that the required special resolution was passed in November 1992. The Company must now apply to the Registrar of Companies under the relevant provisions of the Companies Act, 1995[13] to amend the Articles by filing Articles of Amendment on the basis of the resolution. It is not for an individual shareholder to apply to the Registrar to effect the amendment.

[42] Secondly, sub-paragraph 1(v) of the judgment orders the 2nd appellant to deliver the land certificate for Parcel 112 to the secretary of the Company within 2 weeks failing which the Registrar of Lands is directed to cancel the land certificate and issue a new one. This is clearly a right that belongs to the Company to recover its property and cannot be asserted by the 1st respondent as a shareholder except in a derivative claim. This is not a derivative claim and the 1st respondent was not entitled to the relief granted in sub-paragraph (v) of the default judgment.

[43] The issue of what amounts to exceptional circumstances within the meaning of sub-rule 13(2) will vary from case to case depending on the facts of each case. In this case we find that the two circumstances above that the appellants rely on are exceptional in that they go to the bases of the claim and if correct will result in the dismissal of most of the claim. The appellants have real prospects of successfully defending the claim and should be allowed to do so notwithstanding their delay in applying to set aside the default judgment.

[12] (1843) 2 Hare 461.
[13] Cap. 178, Laws of Antigua and Barbuda.

[44] Ground 10 asks the court to set aside the default judgment on the ground that it is just and equitable to do so. Having regard to our conclusions above it is unnecessary to deal with this ground.

Orders

[45] In the circumstances it is ordered as follows:

1. The appeal is allowed.

2. The judgment in default of defence dated 21st October 2013 is set aside.

3. The appellants shall file and serve their defence within 14 days of the date of this order.

4. Costs of the appeal in the amount of $2,000.00 to the appellants.

Paul Webster, QC
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal