THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A. D. 2015

CLAIM NO. SKBHCV2014/0150

BETWEEN:

ST. KITTS URBAN DEVELOPMENT CORPORATION LIMITED

Respondent/Claimant

- and -

THE MARINA VILLAGE LIMITED

Applicant/Defendant

Appearances:
Mr. Anthony Gonsalves, QC with Mr. Arudranauth Gossai for the Respondent/Claimant.
Ms. Dahlia Joseph Rowe for the Applicant/Defendant.

2015: February 06
March 13,18

DECISION

[1] **CARTER J.** The respondent filed a claim form and statement of claim in this matter on the 17th July 2014. The respondent served these pleadings on the applicant at its registered office on the 25th of July 2014. The applicant did not enter an acknowledgment of service to the claim within the time stipulated by Part

9.3(1) of the **Civil Procedure Rules 2000**. On the 14th of November 2014, upon request for entry of judgment in default of acknowledgment of service being filed, an order for judgment in default was granted. The judgment in default was entered for the respondent on the 19th day of November 2014. The applicant filed an acknowledgment of service and a defence on the 21st of November 2014. This application to set aside the default judgment of the 14th of November 2014 was filed by the applicant on the 2nd day of December, 2014.

Issue

[2] The issue that arises for the court's consideration is whether the court should set aside the Default Judgment.

Law

[3] Part 13.3(1) of **CPR 2000** provides that *the court may set aside a judgment entered under Part 12, only if the defendant:*

(a) applies to the court as reasonably practicable after finding out that judgment had been entered;
(b) gives a good explanation for the failure to file an Acknowledgment 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.

[4] The authorities are clear that the requirements of Part 13.3(1) of **CPR 2000** are in the conjunctive. A successful applicant is required to satisfy all three conditions as stated in that Part. Failure on the part of an applicant to meet the requirement of any of the subsections would result in this Court being barred from setting aside the Default Judgment.

[5] In **Kenrick Thomas v RBTT Bank Caribbean Ltd**. (Formerly Caribbean Banking Ltd.) (St. Vincent and The Grenadines)[1], Barrow JA set out thus:

> *"The appellant submitted that this provision (rule 13.3) specifies three conjunctive pre-conditions for setting aside. The submission is sound. "Only if" can only mean that if the three matters are not present then the court may not set aside a default judgment."*

Part 13.3 (1)*(a) "applies to the court as soon as reasonably practicable after finding out that judgment had been entered;"*

[6] Upon examination of the requirements of Part 13.3(1) of **CPR 2000**, it is clear that a court must seek to determine whether the applicant moved as soon as reasonably practicable in making the application to set aside. The relevant period from which this time is calculated, is the date on which the applicant first obtained notice of the Judgment in Default.[2]

[7] As stated above, in the instant case the default judgment was entered on the 19th November 2014. After the applicant had, seemingly unaware of this fact, filed a defence and an acknowledgment of service document on the 21st November 2014, the applicant was advised of the default judgment by letter from the respondents on the 24th of November and served with a copy of the said judgment on the 25th November 2014. On the 2nd December 2014, six (6) days after service of the default judgment, the applicant filed the application at bar. There are a number of authorities cited by the applicant in support of its submission that six (6) days is reasonably practicable in all the circumstances. Whether an applicant has acted reasonably practicably is clearly a matter to be determined on the facts

[1]Grenada, Civil Appeal number 3 of 2005

[2]Linda (Lindy) Tamn(dba Lindy Tamn Realty Listing) v The HE Fountain Beach and Tennis Club Limited, CLAIM NO.AXAHCV 0067/2009,

of the particular case. The respondent takes no issue with this limb of the application and the court has no difficulty in finding that in the circumstances of this case, and having regard to the authorities cited, that the applicant has satisfied the requirement of Rule 13.3 (1) (a) that the application to set aside the default judgment be made as soon as reasonably practicable after finding out that judgment has been entered.

Part 13.3(1)(b) "gives a good explanation for the failure to file an Acknowledgment of Service or a Defence, as the case may be;"

[8] Part 5.7(a) **CPR** provides that:

> *Service on a limited company may be effected*
> *(a) by leaving the claim form at the registered office of the company;*

[9] The claim form and statement of claim were served on the applicant by registered post at the registered office of the applicant. The address for the registered office for the applicantis listed as PO Box 824, Port Zante, Basseterre, Saint Christopher. In her submissions to the court, Counsel for the applicant quite rightly conceded that there was no issue with the service of the claim. The claim form was properly served. Accordingly, the applicant should have filed acknowledgment of service of the said claim form within fourteen (14) days after the 25th July, 2014.

[10] With regard to the reasons for its failure to file, the court has considered the affidavit filed in support of the instant application of Mr. Ephraim Namdar, filed on the 02 December 2014. In his affidavit Mr. Namdar, a director of the applicant company stated as follows:

> *"The PO Box address listed as the Defendant's registered office is not manned on a regular basis as the defendant has no business in St.Kitts. I do not know how long the documents were sitting in the post office box in St. Kitts"*

[11] Further in his affidavit at paragraph 6, Mr. Namdar states:

"I knew that the claimant company was aware that my brother and I who are the directors and shareholders of the defendant company are based in New York and any document it wished to bring to my attention were historically always forwarded to my New York office so that to leave any documents at a PO Box in St. Kitts could not have been proper service. It has since been explained to me that the defendant has a registered office on record in St. Kitts. I maintain, however, that the claimant company at all times knew how to reach me and if it genuinely wanted the claim to come to the attention of the defendant the documents would have been forwarded to New York.

[12] Further at paragraph 11:

"The defendant has a good explanation for its failure to file an Acknowledgement of Service or a Defence within the time stipulated by the Civil Procedure Rules 2000, as amended. I did not become aware that the claim was filed against the defendant until on or about October 17, 2014 when I received a copy of the documents which were forwarded to me by Ms. Morton who checks the PO Box for the defendant company only periodically as the company does not ordinarily receive any mail at that address."

[13] Counsel for the applicant in her submissions to the court further contends that Mr. Namdar, subsequent to his receipt of the claim form on the 17th of October 2014, did all in his power to seek to address the claim with the utmost diligence and urgency and that his actions could not be characterized as indifference. She suggested that the relevant test of a good explanation for failure to file an acknowledgment of service was whether the applicant by its actions or inaction had demonstrated indifference to the risk of having judgment entered against him and referred this Court to the case of **Sylmord Trade Inc v Inteco Beteiligungs AG** in this regard.[3] Having considered that decision, this Court is not satisfied that any new test has been propounded with regard to a court's determination of whether an applicant has shown good reason for failure to file an acknowledgment

[3]BVIHCMAP2013/0003

of service within Part 13.3(1)(b). Clearly a court can consider whether an applicant has been indifferent or not to the risk involved in not filing the acknowledgment of service but it is not the definitive or conclusive consideration upon such an application.

[14] In the instant case there is no real issue as to what the applicant did after the 17th October 2014. The issue for the court's consideration and determination is rather what the applicant did after the claim was served, that resulted in the acknowledgment of service not being filed within the time stipulated by the Rules. This must be the relevant time period, given the clear requirement of 13.3 (1)(b) that the applicant/defendant *"gives a good explanation for the failure to file an Acknowledgment of Service*". The period after the 17th of October 2014 in this case is relevant in so far as the applicant could still have filed an acknowledgment of service before the application for entry of the judgment in default, but it is the period stipulated for the filing of the acknowledgment of service by Part 9.3(1) with which Part 13.3(1)(b) is concerned.

[15] It is noteworthy and unusual that a company would have a post office box as its registered office address. The applicant has not taken issue with service of the claim form and statement of claim on the applicant at the post office box, its registered office. This Court is unable to accept the applicant's submissions which in essence, seem to intimate that the fact that the registered office is a post office box should be viewed by this Court in some way as to obviate the need for the applicant to have filed an acknowledgment of service within the time stipulated by the rules, to ensure that the claimant did not obtain judgment in default of such filing. The applicant through Mr. Namdar, seeks to impress upon the court that the post office box was manned by an agent who worked only part time for the applicant, that this agent was in any event not an employee of the applicant; that this agent checked the post office box, the registered office, only periodically and that in any event the applicant company does not ordinarily receive any mail at that address.

[16] The court will not act to set aside a default judgment without careful consideration. This is reflected in the conjunctive and cumulative, "considered and deliberate"[4] requirements of Part 13.3(1). The court must consider whether the reasons advanced by the applicant show some good reason for the applicant's failure to file the acknowledgment of service as required by **CPR** 9.3(1) within the time stipulated under the rules.

[17] In the case of **Linda (Lindy) Tamn (dba Lindy Tamn Realty Listing) v The HE Fountain Beach and Tennis Club Limited,**[5] the registered office of the applicant company was located on hotel premises. A claim form and statement of claim had been filed by the respondent and properly served at the registered address of the company on 29th July 2009. When an acknowledgment of service was not filed within the stipulated time period the respondent obtained default judgment against the applicants. The default judgment was posted on the door of the hotel and only came to the notice of the applicants as a result of someone passing by the hotel and seeing the Judgment in Default notice posted on the door. On the 22nd September 2009 the applicant company filed an application to set aside the default judgment. The Managing Director and Shareholder of the company argued he has not been at the hotel for 2009 and that the hotel was non-operational. He stated that he did not reside in Anguilla and neither did his siblings and that he only became aware of the Default Judgment on the 19th August 2009. He says that no one was at the hotel at the time of the service of the Default Judgment. The court found that there having been proper service at the company's registered office that this was not good reason for failure to file an acknowledgment of service to satisfy Part 13.3 (1)(b) of the **CPR**.

[18] In **Ernesco Inc. v Bank of Saint Lucia Limited,**[6] a claim was filed and served on the applicant by leaving it with what was described as a menial employee at the Branch Office of the bank and not with any officer director or person of relevant

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[4] Supra note 1, per Barrow J.A
[5] CLAIM NO.AXAHCV 0067/2009
6 CLAIM NO. SLUHCV2009/0458. 18th March 2010. Georges J. (Ag.)

know how and authority to deal with the claim in a responsible manner. The bank contended that it had had no notice of the claim as it was customary and well known that, when and if, the bank was to be served with any documents or even a letter that all documents were delivered to the bank's corporate offices on the fifth floor of its premises.

[19] On an application by the bank to set aside a judgment obtained in default of the Bank filing an acknowledgment of service,the bank contended that it first had notice of the claim when an officer of the bank was served with a copy of a judgment in default some three (3) months after the judgment in default was entered and some eight (8) months after the claim had been served. The Learned Judge found that there had been proper service on the bank when the claim form was served on the bank's employee at its registered address notwithstanding that that employee was not an officer of the bank. In considering the requirements of Part 13.3(1)(b) the court found that: *"Failure by the Bank to file an acknowledgment of service within the prescribed period or permitted time is in my view plainly due to the absence or lack of proper or adequate internal supervisory/organizational and or administrative structures/mechanisms within the defendant's institution. It is my considered view that having regard to all the circumstances that the explanation proffered by the defendant for its failure to file an acknowledgment of service does not pass muster*."

[20] The matters referred to by Mr. Namdar, show a clear indication that the applicant had established no system or procedure by which the Post Office Box, its registered office, would be periodically checked. This, as the respondent submits, is not a case of a system having been established and then unexpectedly broken down. There was no system put in place through which the applicant could have had prompt notice of the service of the claim form and statement of claim. On these facts the applicant company has shown an absolute lack of attention to the applicant's registered office address.

[21] Having carefully considered the reasons advanced by the applicant on this application, and the authorities referred to above[7], the applicant's submissions on this point do not find favour with this Court. The reasons advanced by the applicants do not constitute good reason for failure to file an acknowledgment of service. The applicants have failed to satisfy Part 13.3(1)(b). The application must fail on this ground. Given the conjunctive nature of 13.3(1) the application fails on this ground alone. However the court will go on to consider the application in relation to 13.3(1)(c).

"Rule 13.3(1)(c) " has a real prospect of successfully defending the claim."

[22] In considering whether the applicants have a real prospect of successfully defending the claim, the court has in mind the principles as stated in **Swain v Hillman[8]** and applied in other cases in this jurisdiction.[9] The authorities establish that *"something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside".* It is the applicant who must convince the court that a defence has a reasonable prospect of success and is not a merely arguable defence. The court must consider the totality of the evidence that it has before it, in considering this aspect of the application.[10]

[23] This Court has heard Counsel for the parties and considered the affidavits in support of the application as well as the written legal submissions of both parties and the "defence" filed by the applicants on the 21st November 2014. The parties agree that the main issue that arises for determination on the claim is whether payment in full for the lands was ever made to the respondent. By agreement of sale dated 1st September 2008, between the respondent and a company called Namdar Brothers Realty Limited ("NBRL") (also referred to as "Namdar" in the

[7] See also Attorney General v Universal Projects Limited [2011] UKPC 37 per Lord Dyson at para 21 - 23
[8] [2001] 1 ALL ER 91.
[9] Louise Martin v Antigua Commercial Bank ANUHCV 2007/0115 and Earl Hodge v Albion Hodge BVIHCV2007/0098
[10] Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste SLUCVAP 2009/0008, per George-Creque JA

applicant's defence) the respondent agreed to sell to NBRL 1.18 acres of land ("the lands") belonging to the respondent upon terms and conditions set out therein.

[24] In pursuance of this agreement on 18 December 2008, the respondent and the applicant executed five (5) memoranda of partial transfer whereby the respondent transferred to the applicant five (5) parcels of land comprising the lands the subject of the Agreement for Sale. The lands, some 1.18 acres at Port Zante were purchased from the respondent at a price of US$7,755,000. The respondent on the basis of this agreement has brought the a claim seeking payment of the sum of $4,500,000.00 being the balance of the purchase price which the respondent contends is due, on the five (5) memoranda of transfer.

[25] The applicant's proposed defence to the claim is on the basis that they do not in fact owe the respondent. The applicant states that in 2007, the applicant through its affiliated company NBRL advanced monies to the government of St. Christopher and Nevis ("the government") in the amount of US$4.5 million. The monies so advanced were acquired by NBRL by means of a loan from First Caribbean International Bank ("FCIB"). This loan was secured by means of Treasury Bills issued by the government. To be clear, the proceeds of the loan from FCIB were the monies advanced to the Government. The applicant states that this was an advance to the government whereby the government agreed to take all necessary steps to secure the transfer of lands at Port Zante to NBRL or its affiliated company.

[26] In submissions before the court, Counsel for the applicant contended that the applicant had made payment in full to the respondent. Specifically at paragraph 14 of the filed "defence" the applicant states:

> "*The Defendant further states that in exchange for advancing the US$4.5 million to the Government, the government agreed to take all necessary steps required to secure the transfer lands at Port Zante to the value of*

the US$4.5million to Namdar or its affiliated company. The defendant was aware that the government owned the lands at Port Zante through the claimant company, in which the government, as a result of the US$4.5million loan advanced by Namdar, was the 100% shareholder. The defendant also states that in discussions with the government, it agreed that Namdar would purchase additional lands so that the total value of lands to be transferred to Namdar would be US$7,755,000 million. Namdar having advanced US$4.5 million to the Government, the balance of US$3.25 million was paid to the claimant company to complete the purchase price of the 1.18 acres of land as per the agreement for the sale dated the 1st day of September 2008. The defendant further states that the total price of $7,755,000 was advanced to the UDC and the Government upon closing of the land purchase agreement and the lands were duly transferred to the defendant company."

[27] The applicant's reply to the claim is therefore that the advance to the shareholders (the government) was really a payment to the respondent for the $4.5 million, the balance of the purchase price for the lands.

[28] The respondent in answer to these arguments submits that the respondent/claimant did believe that there had been payment of the $4.5 million before they transferred the lands to NBRL. The respondent's position is that the respondent was aware that the government had issued treasury bills upon receipt of the $4.5 million from NBRL but that the respondent was not aware that these treasury bills were encumbered. The respondent was not aware that the treasury bills had been transferred to FCIB as security for a loan and therefore subject to being recalled by FCIB. Essentially, the respondent says that the advance by NBRL of the $4.5 million as partial payment for the transfer of the lands was illusory only, for once NBRL defaulted on the loan from FCIB, FCIB was in a position to call in the security and seek to have the government honour the issued

treasury bills in the amount of $4.5 million dollars, which in fact happened in this case.

[29] The respondent further states that the claim is based on the realization that the $4.5 million which was understood at the time of transfer of the lands to have been advanced to the government was in essence only a loan to government. The respondent contends further that this loan could never have been evidence of part payment of the agreed purchase price for the lands. The respondent states that the treasury bills were never transferred to the respondent as payment for the lands. In any event once the Treasury bills were called in by FCIB, the advance, the purported part payment was no longer available to the respondent and that as a result the respondent has not been paid the outstanding balance of the purchase price for the lands in the amount of $4.5 million dollars as claimed.

[30] Having read the available pleadings and having heard the submissions of Counsel, it is clear to this Court that there existed some agreement between NBRL and the government by which NBRL advanced funds to the government in the amount of $4.5 million dollars in 2007. The pleadings show that the funds were acquired by NBRL from FCIB in the form of a loan. The government facilitated the loan by providing treasury bills to secure the loan. The treasury bills the government provided as security for the said loan were cashed by FCIB in about 2010. The government paid FCIB the value of the treasury bills in the amount of $4.5 million dollars. In 2011, the applicant submitted a proposal to government to return two (2) undeveloped lots to the government in satisfaction for the government having had to honour the treasury bills.

[31] This agreement is separate from the agreement upon which the claim is founded. The applicant seeks to marry the two by claiming that the agreement with the government to advance what is essentially a loan to the government was to represent part payment of the purchase price of the lands from the respondent. The government was not a party to the agreement between the applicant and the respondent. This Court has carefully considered this argument. The applicant's

position is unchanged even when confronted with the fact that the treasury bills issued as security by the government were called in by FCIB in 2010, there having been no assignment of the said treasury bills to the respondent in the interim. The applicant maintains in its defence that *"it had no agreement with the claimant concerning the assignment of any treasury bills to the claimant in exchange for lands at Port Zante as the lands at Port Zante were paid in full by the defendant upon closing of the land purchase agreement dated September 1, 2008."*

[32] This Court is unable to perceive how the applicant can maintain this position in the face of the fact that the respondent never received the value of the treasury bills. The respondent does not deny that upon the sale of the lands that the funds advanced by NBRL were being held by government beneficially for UDC. What the respondent denies is having received the treasury bills or having knowledge that they were encumbered by being liable to be called in by FCIB. Interestingly the applicant does not plead that the government is at fault in honouring the treasury bills once called in by FCIB. However it maintains that*"there are outstanding issues between the defendant and the government in relation to the loan of US$4,500,000.00 … in that the treasury bills the Government provided as security for the said loan were cashed by FCIB in about 2010."*

[33] It appears that the applicantin seeking to marry the two agreements,one between itself and the government and the other between itself and the respondent, has failed to have sufficient regard to the fact that the government even as 100% shareholder of the respondent was not the owner of the lands. The respondent was the owner of the lands. As the respondent asserts in submissions filed on this application, *"A shareholder of the company is not an owner of any of the assets of that company. On incorporation, the corporate property belongs to the company and the members have no direct proprietary rights in it but merely to their shares in the undertaking...The claimant company is a separate legal entity and was the legal owner of the land and on any sale of its assets was entitled to the consideration for same."*

[34] This Court is in agreement with the submissions of Counsel for the respondent that the applicant's allegation that it has paid the full consideration for the purchase of the lands from the respondent is a fallacy. There has obviously been a failure of consideration in all the circumstances. The applicant has not shown a realistic prospect of success in answer to the claim. The application to set aside the default judgment also fails on this ground.

Rule 13.3(2) Exceptional circumstances

[35] The applicant has also asked this Court to consider whether this is a case in which the court should exercise its discretion under Part 13.3(2) of the rules, if the court considers that there are exceptional circumstances why the default judgment should be set aside.

[36] The meaning of this rule has been considered before by these courts. In **Raelene Lazarus v Advocate Publishers (2000) Inc.**[11] Cenac- Phulgence (M. Ag.) referred to the cases of **Graham Thomas v Wilson Christian trading as Wilcon Construction,**[12] and the south African case of **Thulani Sifeso Mazibuko, Ambrose Simphiwe Cebekhulu v The State**[13] for guidance on the meaning of exceptional. In the latter case, RallA J stated:

> *"[14] I am in respectful agreement with the approach adopted in the Mohamed case. In my opinion, in order to give a meaning to the phrase "exceptional circumstances" it is essential to ascribe a meaning to "exceptional", and a good starting point is the dictionary meaning or meanings of the word.*

11GDAHCV2010/0382
12ANUHCV2011/0629 (delivered 13th July 2012, unreported).
13(8774/09) [2009] ZAKZPHC 61; 2010 (1) SACR 433 (KZP), 19th November 2009.

It was held by Comrie J in Mohammed's case, that "exceptional" has two shades or degrees of meaning. It can either mean unusual or different, or markedly unusual or specially different. Although Comrie J held that it was not necessary to plump for one or the other of the two shades of meaning, he appeared to place the emphasis on the degree of deviationfrom the usual. This is apparent from the following statement at page 515 of the judgment:

> *"So the true enquiry, it seems to me, is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release. And "sufficiently" will vary from case to case."*

[37] The court notes the submissions of Counsel for the applicant on this point, that the applicant company has made substantial investments at Port Zante and by extension in St. Kitts and Nevis. The applicant submits further on this point that *"it would be grossly unfair to the defendant if the claimant would be permitted to sell lands on which the defendant has made substantial investments based on a default judgment…"* By this statement the applicantseems not to fully appreciate the full import of a default judgment being set aside. An order to set aside the default judgment effectively deprives the respondent of a regular judgment which the respondent has validly obtained in accordance with Part 12 of the Rules. This is no trifling matter.

[38] There are no exceptional circumstances shown in this case to justify the default judgment being set aside. The only matter that may outwit the norm in this case, is the decision to have a post office box serve as the registered office of a company without ensuring that the post office box was routinely checked, so as to ensure that as in this case, the receipt of any legal process would be readily discovered. The fact of the applicant company having substantial investments in

St. Christopher and Nevis is not an exceptional circumstance to cause this Court to exercise its discretion under 13.3(2) of the **CPR**.

Order

[39] The application to set aside the default judgment entered on the 19th of November 2014 is dismissed.

[40] Costs on the application to the respondent in the amount of $1500.00

Marlene I. Carter
Resident Judge