THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0005

IN THE MATTER of an interlocutory appeal

[1] DEIDRE PIGOTT EDGECOMBE

[2] NORDEL EDGECOMBE

Appellants

and

ANTIGUA FLIGHT TRAINING CENTRE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On Written Submissions:

Dr. David Dorsett of Watt, Dorsett & Co. for the Appellants
Mr. Anthony Greer of Greer & Co. Solicitors for the Respondent

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2015: June 26.

Civil appeal – Interlocutory appeal – Setting aside default judgment –Whether a person can bring a claim in his or her business name and obtain a default judgment

The respondent entered a default judgment against the appellants on the 21st August 2014 for a sum of money which was claimed as arrears of fees for flight and academic ground school training. The respondent is a business with the name Antigua Flight Training Centre Inc. which was, subsequent to the commencement of the claim, incorporated under the Companies Act of Antigua and Barbuda on 16th July 2014. The first named appellant is responsible for the payment of the fees, whilst the services are provided to the second named appellant.

The appellants applied for the default judgment to be set aside under rule 13.3(2) of the **Civil Procedure Rules 2000** (“CPR”). CPR 13.3(2) gives the court power to set aside a

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regularly obtained judgment if exceptional circumstances have been shown warranting the setting aside of the judgment. The exceptional circumstances advanced by the appellants is that the respondent is not a legal person and does not exist as a matter of law and therefore the judgment obtained by the respondent is contrary to law as the respondent not being a juristic person could not be a party bringing a claim and obtaining a judgment thereon. The application was denied.

With leave to appeal, the appellants appealed against the order dismissing the application to set aside the default judgement. The issue on the appeal was the same as that before the learned judge, that is, whether the claim fails, and a fortiori, the default judgment, where the name appearing on the claim form and judgment is not that of a juristic person.

Held: dismissing the appeal and awarding costs to the respondent fixed in the sum of $2,000.00, that, inter alia:

1. CPR 22.2 (b)(iii) allows a person to bring a claim if they were carrying on business in the jurisdiction when the right to claim arose, as "X.Y." followed by the words "a trading name". This case would no doubt fall to be considered under this sub rule. It is simply that the business name is not followed by the words "a trading name" so as to indicate that the claim is brought by a person using their trading name. An amendment of the claim would no doubt rectify this omission. However, this omission does not, without more, render the claim bad in law. Further, CPR 22.2(2) provides that "if a claim is made by or against a person in his or her business name, the rules regarding claims by or against partners apply as if that person had been a partner in a firm when the right to claim arose and the business name were the firm's name".

2. The rules regarding claims by or against partners are contained in CPR 22.1. CPR 22.1 provides that where partners sue or are sued in the firm's name, they must, on the request of any other party, deliver to that party and file, "a statement of the names and residential addresses of all the persons who were partners in the firm when the right to claim arose." If the request is not met, then the court, upon the application of the requesting party, may order the partners to provide the statement and certify it to the court. If the partners do not comply with the order within 21 days after service of the order, then their claim or defence will be struck out. The appellants did not request such a statement and neither did they assert that they were unaware of the person doing business under the trade name. In fact, they specifically referred to the certificate of truth endorsed on the statement of claim where it refers to Grace Norman as the Managing Director. It is accordingly reasonable to infer that the appellants were fully aware of the person trading under the named stated as the Claimant in this case. Furthermore, it is only upon failure to comply with an order for furnishing the requested statement disclosing identity that the claim is deemed to be struck out. The tenor of these rules suggests that the intent and purpose is not to treat a claim brought in a business name only, as an invalid claim or as one which fails ab initio.

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Lazard Brother & Company v Midland Bank Ltd. [1933] AC 289 at 296 distinguished.
Rule 22.1, 22.2(b)(iii) and 22.2(2) of the **Civil Procedure Rules 2000** applied.

3. The court has an inherent jurisdiction to set aside an irregular judgment or one which may be considered a nullity. The appellants brought their claim under CPR 13.3(2), however, in reality, the essence of their complaint is that the judgment should be considered as a nullity or one which is irregular and thus liable to be set aside *ex debito justitiae* pursuant to the Court's inherent jurisdiction. CPR 13.3(2) relates to the setting aside of a regular judgment under 'exceptional circumstances', rather than an irregular one. The appellants complaint does not engage the 'exceptional circumstances' consideration and neither does it warrant the exercise of the Court's inherent jurisdiction on the basis that the default judgment is irregular or a nullity.

   Wyre v Edwards ANUHCVAP2014/0008 delivered 3rd September 2014 considered.

JUDGMENT

[1] **PEREIRA, CJ:** This is an interlocutory appeal pursuant to the grant of leave given 9th March 2015, from the dismissal of an application to set aside a default judgment entered by the respondent against the appellants on 21st August 2014 for a sum of money which was claimed as arrears of fees for flight and academic ground school training provided to the second named appellant and payable by the first named appellant. The application to set aside was made on 12th January 2015, and is said to have been made pursuant to CPR 13.3(2) which gives the court power, even if the conditions contained in CPR 13.3(1) are not satisfied, to set aside a regularly obtained judgment if exceptional circumstances have been shown warranting the setting aside of the judgment. It was not sought to invoke the inherent jurisdiction of the court although there can be no doubt that the court retains an inherent jurisdiction to set aside 'ex debito justitiae' an irregular judgment.

[2] The exceptional circumstance relied on by the appellants is that they say the respondent is not a legal person and does not exist as a matter of law and therefore the judgment obtained by the respondent is contrary to law as the

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respondent not being a juristic person could not be a party bringing a claim and obtaining a judgment thereon.[1] There is no challenge whatsoever to the underlying debt.

[3] The learned judge refused the application on 29th January 2015. No reasons for his decision have been given despite being requested. In any event the issue on the appeal is the same as that before the learned judge. That is whether the claim fails, and a fortiori the default judgment, where the name appearing on the claim form and judgment is not that of a juristic person.

[4] It bears note that the statement of claim which accompanied the claim form with the certificate of truth endorsed thereon stated as follows:

> "I Grace Norman Managing Director of the Claimant certify that:
> (a) The Claimant believes that the facts stated in the Statement of Claim are true
> (b) …"

There is therefore no doubt that the appellants knew the identity of the person doing business under the name Antigua Flight Training Centre.

[5] Counsel for the respondent relies on CPR 22.2. Part 22 of CPR contains various miscellaneous rules relating to parties. Part 22.2 specifically deals with a person carrying on business in another name. The full text is set out:

> "22.2 (1) A claim may be made **by** or against a person
> (a) carrying on business within the jurisdiction; or
> (b) who was carrying on business within the jurisdiction when the right to claim arose –
> (i) in that person's own name;
> (ii) in that person's own name, followed by the words "trading as X.Y.";
> (iii) **as "X.Y." followed by the words "a trading name";** or
> (iv) as "X.Y." followed by the words "a firm".
>
> (2) If a claim is made **by** or against **a person in his or her business name**, **the Rules about claims by or against partners apply as if that person had been a partner in a firm when the right to claim**

[1] A company with the name Antigua Flight Training Center Inc. was, subsequent to the commencement of the Claim, incorporated under the Companies Act, 1995 of Antigua and Barbuda on 16th July 2014.

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arose and the business name were the firm's name" (emphasis added)

[6] This case would no doubt fall to be considered under sub rule 2.2(1)(b)(iii) of CPR 22.2. It is simply that the business name is not followed by the words *"a trading name"* so as to indicate that the claim is brought by a person using their trading name. An amendment of the claim would no doubt rectify this omission. However this omission does not thereby render the claim bad in law without more. Sub rule (2) comes to the aid and directs, in such circumstances, that the rules about partners contained in CPR 22.1 apply. The relevant portion of CPR 22.1 is set out:

"22.1 (1) Persons claiming to be entitled, or alleged to be liable as partners may sue or be sued in the firm's name if –

(a) the firm's name is the name of the firm in which they were partners; and
(b) they carried on business in that name within the jurisdiction, when the right to claim arose.

(2) If partners sue or are sued in the firm's name, they must, if any other party so demands in writing, immediately –

(a) deliver to that party; and
(b) file; a statement of the names and residential addresses of all the persons who were partners in the firm when the right to claim arose.

(3) If they do not comply, the court on application by any other party may order them to provide such a statement and to certify it to the court.

(4) An application under paragraph (3) may be made without notice.

(5) The party making the application must –

(a) certify that the other party has not complied;
(b) certify that the party has made a demand in writing; and
(c) state the date of the demand.

(6) If the partners do not comply within 21 days after service of the order any claim or defence brought by them is deemed to be struc out."

[7] Of interest are sub rules 2 to 6 of rule 22.1 as it provides that where a suit is brought in the name of the firm [a trading name], the other party may demand the name and address of the person in essence in the firm (in this case the business).

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There is no assertion that the appellants made any such request or that they were unaware of the person doing business under the trade name. Indeed the appellants specifically refer to the certificate of truth endorsed on the statement of claim where it refers to Grace Norman as the Managing Director. It is accordingly reasonable to infer that the appellants were fully aware of the person trading under the name stated as the claimant in this case. Furthermore, the rules following after making a demand for the identity of the person suing in the name of the firm or trade name, suggest that even where the demand is not complied with, this does not lead to automatic striking out of the claim. The person demanding must then seek an order of the Court and it is only upon failure to comply with an order for furnishing such information disclosing the identity that the claim is deemed to be struck out.

[8] The tenor of these rules leads me ineluctably to the conclusion that the intent and purpose is not to treat a claim brought in a business name only, as an invalid claim or as one which fails ab initio. The appellants not having made demand under CPR 22.1(2) cannot avail itself of treating the claim as being a bad one in law. The conjoint effect of CPR 22.2 and 22.1 makes allowances for matters such as this. CPR 8.5(1) is also instructive. It says in effect that as a general rule a claim does not fail due to non-joinder or misjoinder of parties.

[9] The appellants have sought to rely on the case of **Lazard Brother & Company v Midland Bank Ltd.**[2] where Lord Wright in answer to the question 'whether the order nisi should not be set aside as a nullity the said order nisi having been signed against a non- existent defendant, as the bank had ceased to exist as a juristic person before the date of the writ,' responded in these terms:

> "… a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently non- existent. …. If the Defendants cannot be before the Court, because there is in law no such person , I think by parity of reasoning the court must refuse to treat these proceedings as other than a nullity"

[2] [1933] AC 289 at 296.

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[10] In my view, **Lazard** is clearly distinguishable from the case at bar. In **Lazard,** there was clearly no juristic person who could be identified with the Bank. It had ceased to exist to all intents and purposes. Here it is clear that a juristic person, namely Grace Norman, was carrying on business under the trade name "Antigua Flight Training Centre." It is not said that Grace Norman who certified the statement of claim is not a juristic person. Furthermore, I would venture to say that the law has moved on since **Lazard** and the focus has shifted to preserving otherwise valid and meritorious claims which may be defective on the basis only of a misnomer.

[11] The appellants have also sought to rely on **Wyre v Edwards** [3]**,** a decision of this court which considered what may amount to special circumstances for the purposes of CPR 13.3(2). The **Wyre** decision does not assist the appellants in this case. Although the appellants claim to be invoking CPR 13.3(2), in reality the essence of their complaint is that the judgment should be considered as a nullity or one which is irregular and thus liable to be set aside ex debito justitiae pursuant to the Court's inherent jurisdiction as applied in **Lazard**. This would not be a matter of discretion but rather an imperative in much the same way as the imperative under CPR 13.2. This is quite different from setting aside a judgment which is considered to be regular under CPR 13.3 which assumes the existence of a regular judgment and requires the court to exercise a discretion, having regard to various factors, in determining whether or not to set it aside. CPR 13.2, in contradistinction to CPR 13.3, deals with default judgments which must be set aside for irregularity based on the non-fulfilment of the conditions set out in sub paragraphs (a) and (b) of sub rule (1). However, the mere fact that no mention is made of the court's power to set aside an otherwise irregular judgment or one which may be considered a nullity under rule CPR 13.2, does not mean that such a jurisdiction does not exist. It does not take away from the Court, its inherent jurisdiction, which it has always had and maintains for the purpose of protecting its process.

[3] ANUHCVAP2014/0008 delivered 3rd September 2014.

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[12] In any event, I do not consider CPR 13.3(2) to be apt for the resolution of this matter given the real nub of the complaint being made by the appellant. It does not, to my mind, engage the 'exceptional circumstances' consideration as contemplated under that rule which, as I said, is premised on the basis of a regular judgment rather than an irregular one. However, on considering whether the judgment ought to have been set aside under the Court's inherent jurisdiction on the basis that it is irregular or a nullity, I would decline to so hold for the reasons I have given above. In my view the matter is one which falls well within the bounds of CPR 22.2 and CPR 22.1. No other bases have been advanced either under CPR 13.2 or 13.3 for setting aside the judgment.

Conclusion

[13] For the above reasons I would dismiss this appeal with costs to the respondent fixed in the sum of $2,000.00

Dame Janice M. Pereira, DBE
Chief Justice

I concur. **Davidson Kelvin Baptiste**
Justice of Appeal

I concur. **Gertel Thom**
Justice of Appeal

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