**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**SAINT VINCENT AND THE GRENADINES**

**SVGHCV2012/0275**

**BETWEEN:**

**BANK OF SAINT VINCENT AND THE GRENADINES LTD**
**formerly THE NATIONAL COMMECIAL BANK (SVG) LTD** **CLAIMANT**

**-AND-**

**C & R ENTERPRISES LTD** **DEFENDANT**

Appearances: Mr Sten Sargeant for the Applicant/Claimant, Ms Maia Eustace for the Defendant/Respondent.

---

2016: Jan. 27
Feb. 17

---

## DECISION

## BACKGROUND

[1] **Henry, J.:** This is an application[1] by Bank of Saint Vincent and the Grenadines Ltd. ("the bank") to set aside an order dismissing its claim against C & R Enterprises Ltd. ("C & R"). It is supported by affidavit of Stephen Williams and is unopposed.

## ISSUE

[1] Filed on December 29, 2015

[2] The issue is whether the Order dismissing the Claimant's case for want of prosecution should be set aside.

**ANALYSIS**

**Issue – Should the court's order dismissing the claimant's case for want of prosecution be set aside?**

[3] For context, it is appropriate to set out what has transpired leading up to the order. The bank brought action by Fixed Date Claim Form ("FDCF")[2] against C & R to recover $2, 624, 262.76 being the unpaid amount due in respect of a loan made by the bank. C & R filed an acknowledgment of service in which it admitted the claim. At the 7th hearing,[3] the parties indicated to the court that they had an agreement regarding repayment of the loan. They invited the court to enter a consent order incorporating this agreement which it did.[4] No trial was conducted prior to or since the making of that order.

[4] The Civil Procedure Rules 2000, ("CPR") provide that claims commenced by FDCF may be disposed of only after a trial of the issues.[5] This can be effected in a summary manner.[5] To date, no such trial of the issues in the instant case has

---

[2] Filed on October 1, 2012.

[3] On April 16, 2014.

[4] By order dated April 16, 2014.

[5] See CPR 12.2, 15.3 and 27.2 (3) which state respectively:

"12.2 A claimant may not obtain default judgment if the claim is-
(a)…
(b) a fixed date claim;
15.3 The court may give summary judgment in any type of proceeding except-
(a)…
(b)…
(c) Proceedings by way of fixed date claim;
27.2 (3) The court may, … treat the first hearing as the trial of the claim if it is not defended or it considers that the claim can be dealt with summarily."

been conducted and no order made addressing the issues in the claim. At the adjourned hearing date,[6] some 8 months after the previous hearing, learned counsel Mr Julian Jack made an oral application for an adjournment on C & R's behalf. Mr Jack was at the time holding papers for learned counsel Ms Maia Eustace. Mr Jack indicated that the adjournment was being sought to enable C & R to present a proposal to the bank. Learned counsel for the bank, Mr Stephen Williams responded that he had no objections. In response to the court's query as to whether the bank intended to proceed to summary trial, learned counsel Mr Williams replied that he had agreed to accommodate C & R's request for an adjournment. The Bank's representative Mr Norman Robinson was present in court throughout.

[5] The court then pointed out to both counsel that the case was filed some 3 years before. Cognizant of its duty to expeditiously dispose of matters, the court was not minded to grant an adjournment and intimated this to both legal practitioners. Learned counsel Mr Williams then informed the court that he had another matter in the criminal jurisdiction of the High Court which was scheduled to commence at 10.00 a.m. It was then approximately 9.09 a.m. The court noting that the evidence could be adduced in less than 15 minutes, offered to stand the matter down until 9.30am to enable counsel to prepare his witness, Norman Robinson. The matter was accordingly stood down at 9.10am.

[6] When the case was recalled at 9.30am neither Mr Stephen Williams nor Mr Norman Robinson were present. The court clerk was asked to inquire of officers in the court office if either gentleman had left any messages. Neither had. In the absence of explanation for the bank's representative and its counsel's non-appearance, the court inferred that they willfully absented themselves from the proceedings in flagrant violation of the court's directions. The court

[6] December 16, 2015.

proceeded to dismiss the matter for want of prosecution. It is this order which the bank seeks to have set aside.

[7] The application is made pursuant to rule 39.5 of the Civil Procedure Rules 2000, ("CPR") and is supported by affidavit of learned counsel Mr Stephen Williams. Rule 39 empowers the court to set aside an order made in a party's absence on application made within 14 days.[7] Affidavit evidence must be filed in support, providing a good reason for the party's absence and showing that some other judgment would have been made if he had been present.[8] The bank's application was filed before the expiry of the 14 day period and is therefore timely. In compliance with the rule, an affidavit of learned counsel Stephen Williams accompanied it. Mr Williams deposed that he was beckoned by an urgent call of nature roughly 10 minutes before the matter was scheduled to be recalled and was therefore indisposed at that time.

[8] He explained that in the meantime Mr Robinson had left the court's compound to seek information regarding computation of interest on the principal sum claimed. Apparently, Mr Robinson thought it more practicable to travel to Mr William's chambers to contact the bank as opposed to making the query by phone or requesting a calculator at the court's office and computing the sum himself. Mr Williams asserts that he thought it would be too time-consuming to explain these

---

[7] See CPR 39.5 (1) and (2) which state:

> "(1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant."

[8] See CPR 39.5 (3) which provides:

> "(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing-
> (a) A good reason for failing to attend the hearing;
> (b) That it is likely that had the applicant attended, some other judgment or order might have been given or made."

matters to the court staff before venturing into the lavatory, hence his reasons for not doing so.

[9] I disagree that learned counsel would have expended a significant amount of time by telling those officers "*I am in the lavatory if the matter involving Bank of Saint Vincent and the Grenadines Ltd is recalled*". In fact, it would have taken no more than five seconds and would have been the courteous thing to do. Be that as it may, it appears that he has satisfactorily explained his and Mr Robinson's failure to appear at the time specified by the court. By supplying this reason, the bank has satisfied one of the pre-conditions for having the order entered in its absence set aside. Undoubtedly, if the bank was present when the matter was called, it is quite likely that Mr Robinson's testimony would have been recorded and in all probability the bank would have secured an order as prayed. I am satisfied that it is just in all the circumstances to set aside the order dated December 16, 2016 dismissing the bank's case for want of prosecution.

[10] The bank submits that dismissal of its case was disproportionate in view of CPR rule 1.1 (2) (c) (i). Rule 1.1 sets out the overriding objective of the rule. For context it is reproduced in its entirety. It provides:

> "*1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.*
>
> *(2) Dealing justly with the case includes-*
>
> (a) *ensuring, so far as is practicable, that the parties are on an equal footing;*
>
> (b) *saving expense;*
>
> (c) *dealing with cases in ways which are proportionate to the-*
>
> (i) *amount of money involved;*
>
> (ii) *importance of the case;*

(iii) *complexity of the issues; and*

(iv) *financial position of each party;*

(d) *ensuring that it is dealt with expeditiously; and*

(e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*"

[11] The bank cites the case of **George Allert et al v Joshua Matheson and Madeline Matheson**[9] as authority for its contention that the order dismissing the claim was disproportionate. In that case it was held that a court should consider whether there are more appropriate remedies which are more proportionate when imposing a sanction for non-compliance with an order. I agree with that sentiment. In line with that principle, dismissing a claim for non-appearance of a party would perhaps be disproportionate if the party inexplicably never presented himself or herself at court on the given day. In such circumstances the court would be prudent to await an explanation from the party on another occasion.

[12] Where as in the instant case, the bank was represented in court a mere 15 minutes earlier and disappeared with nary a backward glance or an "*if it please you…*", it is quite reasonable for the court to infer that the party's absence is intentional and without satisfactory reason. This is so particularly if the court had directed the parties to return to court in a few minutes and their disappearance cannot be attributed to some intervening act of God or other unusual occurrence. His or her non-appearance would be further exacerbated and worthy of a sanction if he made no attempt to communicate with the court his difficulties in returning.

[9] GDAHCVAP2014/0007

[13] Regrettably, the posture of counsel for the bank and his client on the morning of the hearing seemed to be one of total disregard for the court's function in entertaining an application for adjournment. The court was left with the impression that it was merely there to accede to an earlier agreement of the parties to once again, defer summary trial of the issue until a time convenient to the parties. It would be a sad commentary on the court's function in society if it is perceived and treated as a mere rubberstamp of agreements finalized in its corridors, particularly where the agreement relates to adjournment of proceedings. Regrettably, a frequent feature in civil proceedings in recent times involves litigants who seek to use the court as leverage to exact a favourable response from the opposite party; without necessarily being keen to cooperate with the court in seeking an expeditious outcome. The court often is used by the claimant as a battering ram or sword of Damocles to cast fear in the hearts of the defendant. In those instances, the claimant appears to have no real intention to pursue the claim to conclusion in an expedient manner and so bring finality to proceedings. This practice is nothing less than "*an abuse of the court's processes*" as it squanders limited resources.

[14] While the court has a duty to encourage litigants to use appropriate forms of dispute resolution, the process must be undertaken by all parties in a businesslike and timely fashion, in keeping with the court's duty to actively manage cases and take prompt action. The court cannot afford to be blinded by the value of a claim and lose sight of the many facets of the overriding objective including its duty to fairly and justly allot its resources among its many clients. Doing so would result in injustice. Legal practitioners must remain mindful that the court does not exist to endorse orders created outside its walls which achieve nothing more than wasting those scarce resources. This cavalier approach is to be discouraged at all costs. Although

the instant case was initiated two years before the impugned order, neither party had taken any concrete steps to expedite resolution of the issues. It seemed like they forgot about the matter and were "activated" only when the fixture came to their attention. The court cannot countenance such conduct and the accompanying disregard and failure to act with due dispatch.

[15] For those reasons, I do not agree with the bank that the order dismissing its claim was disproportionate. Having regard to the background against which the order was made, I am satisfied that it was appropriate.

**ORDERS**

[16] The Claimant having satisfied the requirements to have the order set aside, it is ordered:

1. The court's order dated December 16, 2015 is set aside.

2. No order as to costs.

**.....**
**Esco L. Henry**
**HIGH COURT JUDGE**