IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV2015/0090

BETWEEN:

NORMANDI INVESTMENTS CO. LTD.

Claimant/Respondent

and

ROYSTON ANDREW

Defendant/Applicant

Appearances:
Mr. Henry M. Shillingford for the Applicant/Defendant
Mr. Kevin Williams for the Respondent/Claimant

2015: September : 29
2016: March : 16

RULING

[1] **STEPHENSON J:** Before the court is an application to set aside a default judgment entered against the defendant. The application filed on 11th August 2015 is supported by an affidavit of Royston Andrew sworn and filed on 11th August 2015. The claimant opposed the application and filed their affidavit in opposition on 18th September 2015.

[2] The parties were ordered to file written submissions in support of their arguments and brief oral arguments were made on 29th September 2015 when I reserved my ruling. I now rule.

The Application

[3] The stated grounds of the application filed herein are as follows:

(1) "The defendant served an acknowledgment of service and intention to defend;
(2) The said judgment in default was gained without hearing and or without notice;
(3) The judgment was also not on the merits;
(4) The respondent/claimant was granted an injunction ex-parte on substantially the said claim in fact the claim itself is for an injunction and applicant/defendant has had to respond to that attack by serving an affidavit in opposition to the same.
(5) The applicant defendant has appeared on two occasions in the injunction application as proof that the applicant/defendant is interested in defending the claim and the respondent/claimant knows that well;
(6) The application for the injunction and the grant thereof ex-parte is the exact claim as the main fixed date claim which application has caused damages and great costs in time and effort on the applicant;
(7) The applicant has a very good defence."[1]

[4] In his affidavit in support, the applicant/defendant ("the applicant") stated that it is he who caused the claimant company "Normandi Investment Co Ltd" to be incorporated for the purpose of owning property which he had purchased from the National Commercial Bank. That he first became aware of the matter when he was served with an injunction order against him preventing him from accessing his company's property.

[5] Further, that when he was initially served he was served with only the injunction order and that he was not served with any other documents in the matter.

[1] Application to set aside filed by the defendant on the 11 August 2015

[6] The applicant further averred that he was advised by his attorney that this was not proper service and he should have been served with all documents that led up to the order. That on 27th May 2015 he was served with the documents by a police officer at the police station which 'he found odd'[2].

[7] The applicant further averred that he went to Guadeloupe regarding a contract of importance. He stated that his main concern was his property and his source of income which was taken from him. He further stated that as a result he did not consult his attorney until 12th June 2015 upon his return to Dominica.[3] That an acknowledgment of service was then filed and his attorney also prepared a response to the injunction application which was his primary concern.

[8] The applicant further states that his attorney filed an affidavit in response as the return date for the application was coming up and that he, (I understand him to be saying that his attorney) felt " had a strong case to have the injunction thrown out which would leave the main case without basis."[4]

[9] The applicant further averred that on the return date of 12th June 2015, the matter was called and the judge hearing the matter heard the matter even though his attorney was engaged before another court and in spite of his pleading with the court for the matter to wait for his lawyer to be present. The matter was called and the judge requested another counsel to hold the matter on behalf of his attorney and the matter was adjourned and the injunction continued. As a result of these events his attorney was befuddled and nonplussed and "for these reasons he must have had an oversight in respect of filing the defence"[5]

[2] See Paragraph 4 of the affidavit sworn in support of the application to set aside dated and filed on the 11 August 2015.
[3] Ibid paragraph 5
[4] Ibid paragraph 6
[5] Ibid paragraph 8

The Issue

[10] The issue that arises is whether the court should set aside the default judgment obtained by the claimant against the defendant.

[11] Rule 13.3 provides as follows:

(1) "If rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

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

(b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and

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

[12] In **St Kitts Urban Development Corporation Limited –v- The Marina Village Limited**[6]Carter J stated that

> "The authorities are clear that the requirements of Part 13.3(1) of Civil Procedure Rules 2000("CPR")are in the conjunctive. A successful applicant is required to satisfy all three conditions as stated. 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."

[13] In the case of **Yates Associates Construction Co Ltd –v- Brian Quammie**[7] Blenman JA stated that 'It is well established law that subsections (a), (b), (c) of rule 13.3 must be read compendiously'.

[6] SKBHCV2014/0150 at Paragraph 4
[7] BVIHCVAP2014/0005 at Paragraph 12

[14] In **Kenrick Thomas v RBTT Bank Caribbean Limited**. **(formerly Caribbean Banking Ltd.) (St. Vincent and The Grenadines),**[8] Barrow JA stated that 'Only if' can only mean that if the three matters are not present then the court may not set aside a default judgment.[9]

The Test

Promptness of application:

[15] The first requirement which the court ought to consider is whether or not the applicant made his application as soon as was reasonably practicable to make his application. The court is required to calculate the time from which the applicant was served with notice of the default judgment. In the case at bar, the defendant was personally served with the notice of the default judgment on 31st July 2015, and his application to set aside was filed on 11th August 2015.

[16] The issue then to be decided at this point is whether or not the 11 days was reasonable in the circumstances of the case for the defendant to make his application to set aside. Whether or not this is so, it is to be determined on the facts of this case.

The Reason for failing to file his defence:

[17] The second requirement to be fulfilled in this matter is whether the applicant gave a good explanation for the failure to file his defence in this matter?[10] I am, therefore, required to consider the reasons that the Defendant submitted for his failure to file his Defense on time.

---

[8] CIVIL APPEAL NO.3 OF 2005

[9] Ibid at Paragraph 7

[10] ***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;"***

[18] The explanation for the failure to file the defence should come from the (defendant) applicant[11]. The applicant in his affidavit in support of his application proffers what seems to be a number of reasons for his failure to file the defence.

[19] On the issue of a good reason and explanation having to be given, Learned Counsel for the applicant, Mr. Shillingford, did not address this in his written submissions filed in support of his application, and in his oral submissions he said, 'On the issue of that a good excuse has not been proffered, that is no longer a relevant item on its own limb for the court to consider.'[12]

[20] Learned counsel further submitted that "There is no rigid rule that the defendant must provide a reasonable explanation for delay in bringing the application but clearly is a factor to which the court will have regard in exercising its discretion to set aside a default judgment".[13]

[21] Learned Counsel Mr. Shillingford relied on the following authorities in his submissions:

(1) **Alpine Bulk Transport Co Inc –v- Saudi Shipping Co Inc**[14] where it was concluded that to arrive at a reasonable assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside.

(2) **Evans –v- Bartlam**[15] where it was held that unless and until the court pronounces a judgment upon the merits or by consent, it is to have the

[11] Re: IntelcoBeteiligungs AG –v- Sylmord Trade Inc BVIHCM(COM)120 of 2012 Per Bannister J at paragraph 16
[12] Taken from the Judge's note as to the oral submissions made by Counsel Mr H Shillingford.
[13] Page 1 Paragraph 4 of Mr Shillingford's written submissions filed on the 28 September 2015
[14] [1986] 2 Lloyds Rep. 221
[15] [1937] AC 437

power to revoke the expression of its coercive power where that had been obtained only by a failure to follow any of the rules or procedure; that the rules of court gave to the judge a discretionary power to set aside the default judgment which is in terms "unconditional" and the court should not lay down rigid rules which deprive it of jurisdiction; that the primary consideration is whether the defendant has a defence to which the court should pay heed and; there is no rigid rule that the defendant must provide a reasonable explanation for delay in bringing the application but clearly this is a factor to which the court will have regard in exercising its discretion to set aside a default judgment.

Learned Counsel also referred to:

(3) **McCollogh –v- BBC**[16]

(4) **Strachan –v-Gleaner Co. & Another**[17]

(5) **Dipcon EN. –v- Bowen & Another** [18]

[22] Learned Counsel Mr. Kevin Williams counsel for the respondent contends that the applicant has not provided the court with a good explanation as is required by the law. Learned counsel for the respondent submitted that it is the applicant's contention that the injunction proceedings which the applicant responded to was substantially the same as the substantive matter and yet he failed to file a defence which would have been substantially the same as the response to the injunction proceedings and therefore ought not to have taken any substantial extra time to prepare.

[23] Learned Counsel Mr. Kevin Williams for the Claimant/Respondent further submitted that the applicant in his affidavit stated and submitted to the court that

[16] [1996] NI 580
[17] (2005) UKPC 33
[18] (2004) UKPC 18

another reason why the defence was not prepared and filed was as a result of an oversight by his counsel due to his counsel being "*befuddled" and "nonplussed"* because the judge in chambers continued and adjourned the application to continue the injunction in his absence whilst he was engaged in another court, the judge having requested another counsel to hold for his lawyer in his lawyers absence and that his lawyer sought to write to the Registrar and Chief Justice on the matter. Mr. Williams contended that this reason is not good and sufficient reason for the failure on the part of counsel to do what he was required to do under the Rules.

[24] Mr. Kevin Williams cited the case of **Yates Associates Construction CO Ltd and Bran Quammie,**[19] In that case the applicant filed for a judgment obtained in default of defence to be set aside citing inadvertence as the reason to file the defence in time. Learned counsel relied on that which was held by the Court of Appeal in this matter.

> "… Oversight may be excusable in certain circumstances. However inexcusable oversight which includes and is not limited to administrative inefficiencies does not amount to a good explanation. Accordingly inadvertence on the part of Yates Construction cannot be a good explanation for the failure to file the defence and or an acknowledgement of service within time"

[25] The third requirement is that the applicant must show that he has a real prospect of successfully defending the claim[20]. In considering whether the applicant has a real prospect of successfully defending the claim, the court has to be mindful of the principles as stated in **Swain v Hillman**[21]and applied in other cases in this jurisdiction.(**Louise Martin v Antigua Commercial Bank** [22]and **Earl Hodge v**

[19] BVIHCVAP2014/0005

[20]Rule 13.3(1)(c) of CPR 2000

[21][2001] 1 ALL ER 91)

[22]ANUHCV 2007/0115 a

Albion Hodge[23]. The authorities establish that something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside.

[26] 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. **Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste**[24]

[27] This court has heard counsel for both of the parties and considered the affidavits in support of the application as well as the written legal submissions of both parties. I have also reviewed the "defence" filed by the applicants on 21st November 2014. It is clear that the main issue that arises for determination on the substantive claim is whether the claimant company is owned by the applicant as he claims or whether it is owned by Mr. Gary Isaac as is claimed by Mr. Isidore who swore the affidavit on behalf of the respondent.

[28] The applicant exhibited his proposed defence to the claim as is required and his claim is that he owns the claimant company. That he is the sole shareholder of the said company and that he has not given any authority for the claimant to bring the legal action. He further states that he is a contractor and tradesman by profession. Thereafter the applicant in his defence denies the various paragraphs of the statement of claim seriatim. He also denies that Stephen Isidore has or can have any valid power of attorney over the claimant company.

---

[23] BVIHCV2007/0098

[24] SLUCVAP 2009/0008, per George- Creque JA)

[29] In his written submissions Learned Counsel Shillingford submits that "… the primary consideration for the court is whether the defendant has a defence to which the court should pay heed"[25]. Thereafter, learned counsel submitted that the court has the jurisdiction to set aside the judgment and in so doing the court must form a provisional view of the probable outcome of the case and he cited **Alpine Bulk Transport Co Inc –v- Saudi Shipping Co Inc**[26] in support of his contention.

[30] Learned Counsel Mr. Shillingford also submitted also that what is for primary consideration is whether a defendant had merits justifying the matter going to trial, that, the proper approach is for the court to consider whether or not taking the facts as alleged by the defendant whether those facts could give rise to a meritorious defence.[27]

[31] Mr. Shillingford further submitted that the defendant has clearly shown an eagerness to defend the claim and in doing so he filed two affidavits in opposition to the interlocutory injunction that was filed which was the "main threat of that which was directly affecting him"[28] and also that his attorney prepared legal arguments to have the injunction removed. Further that the defendant prepared and made ready a defence as soon as he became aware of the judgment being entered against him.

[32] Mr Shillingford submitted that the primary consideration in this matter is whether the defence as presented merits justifying the matter going to trial, that the proper

[25] Page 1 of the written submissions filed for and on behalf of the applicant on the 28 September 2015
[26] [1986] 2 Lloyds Rep 221
[27] Counsel cited the cases of **Strachan –v- Gleaner** (2005) UKPC 33 and **Dipcon Eng –v- Bowen & Another** (2004) UKPC 18
[28] See page 3 of the written submissions filed on behalf of the applicant (op cit)

approach for the court to take is to consider whether or not taking the facts as alleged by the defendant give rise to a meritorious defence.[29]

[33] Learned Counsel Mr. Henry Shillingford also noted that two appearances of the defendant was thwarted by Act of God and by the length of the Court list which prompted "the unprecedented actions of the court" which undermined the substrata of the "mem"[30].

[34] Learned Counsel Mr. Kevin Williams submitted that the draft defence exhibited by the applicant is "empty, without purpose, value or substance and fails to answer any of the allegations in the statement claim; it gives only mere blanket denials. There is nothing for the court to consider as the degree of prospect of success of the claimant's case."[31]

[35] Mr. Williams made reference to Part 10.5 of CPR 2000 which addresses the duty of the defence to set out its case and states as follows:

> "(1) the defence must set out all the facts on which the defendant relies to dispute the claim;
> such statement must be as short as practicable;
> (2) in the defence the defendant must say which (if any) allegations in the claim form or statement of claim –
> (a) are admitted;
> (b) are denied;
> (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
> (d) the defendant wishes the claimant to prove.
> (3) If the defendant denies any of the allegations in the claim form or statement of claim
> (a) the defendant must state the reasons for doing so; and

[29] Counsel relied on the decisions in **Strachan –v- Gleanor** and **Dipcon Eng. –v- Brown and another** op cit.
[30] Ibid page 4
[31] Paragraph 10 of the written submissions filed for and on behalf of the respondent on the 28 September 2015

(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(4) If, in relation to any allegation in the claim form or statement of claim, the defendant does not –
   (a) admit it; or
   (b) deny it and put forward a different version of events; the defendant must state the reasons for resisting the allegation.

(5) The defendant must identify in or annex to the defence any document which is considered to be necessary to the defence.

(6) A defendant who defends in a representative capacity must say –
   (a) what that capacity is; and
   (b) whom the defendant represents.

(7) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12."

[36] Mr. Williams submitted that the proposed draft defence does not comply with the requirements laid out in the CPR 2000 and in law it does not amount to a defence but is a 'sheet of blank denials only' .Counsel further submitted that the applicant has failed to give his own version of events from that presented by the claimant. Mr Williams further submitted that the applicant is required to not merely deny but must state his reasons for so doing. Further, the Defendant must state which allegations he is unable to admit or deny because he does not know whether they are true as well as those allegations he requires the claimant to prove. Reference was made to the Court of Appeal decision in **Elwardo Lynch –v- Ralph Gonsalves**[32] where it was held that the defendant could not in the circumstances of that case admit the publication of the offending word uttered in a radio broadcast and that he could not claim not to know that he had published the words; That if he wanted to put forward a different version of events from that given by the claimant, he must state his version.

[37] Learned counsel further submitted that with merely a blanket denial and no submission of his own version of events the applicant does not have an iota of a chance for success far less a reasonable prospect of success.

[32] St Vincent & Grenadines Civil Appeal No 18 0f 2005

Analysis

[38] Part 13.3 of CPR 2000 sets out the powers of and the matters to be considered by the court in setting aside or varying a default judgment. The court will not act to set aside a default judgment without careful consideration of the evidence laid before it in support of the application and the requirements of the law. It is important that deliberate, conjunctive and cumulative consideration be paid to the requirements of Part 13.3(1) of CPR. The court must consider whether the application was timely, whether the reasons advanced by the applicant show some good reason for the applicant's failure to file the defence within the time stipulated under CPR and whether the defendant has a reasonable prospect of successfully defending the claim.

[39] In the case at bar, I hasten to say that the question as to the timeliness of the application is not in issue as the applicant made his application 11 days (after the Default judgment was served on him, and the respondent takes no issue in that regard and I so hold.

[40] It is established law that the requirements as stated in Part 13.3 of CPR are conjunctive **and must all** be satisfied in order for the court to set aside a regularly obtained default judgment[33]. The discretionary power to set aside is unconditional. If the pre-conditions are not satisfied, the court has no discretion to set aside a regularly obtained default judgment. This rule is uncompromising and the application to set aside cannot be granted if these conditions are not all satisfied. *(Emphasis mine)*

---

[33]. See Kenrick Thomas v RBTT Bank Caribbean Limited op cit

[41] The purpose of the power is to avoid injustice as the defendant is seeking to deprive the claimant of a judgment properly obtained in accordance with Part 12 of CPR.

[42] Now what of the explanation for late filing of the defence offered by the applicant? Based on the evidence provided by the applicant, it is clear that the reason for the non-filing of the defence was due to counsel's inadvertence purportedly caused by his being "befuddled and nonplussed" by what he described as the judge's actions in adjourning and continuing the injunction in his absence whilst he was engaged in another court, the judge having taken the care to have another lawyer hold for him in his absence.

[43] Having carefully considered the reasons advanced by the applicant on this application, and the authorities referred to above, the applicant's submissions and authorities cited on this point do not find favour with this Court. The reasons advanced by the applicant do not, to my mind, constitute good reason for failure to file his defence on time.

[44] I am also of the view that this is not a good and sufficient reason for counsel's failure to file the defence particularly in view of the applicant's statement in his affidavit in support of the application that his defence to the matter before the court was the same as is defence to and opposition to the injunction obtained by the respondent. This, to my mind, amounts to a lack of diligence on the part of learned counsel for the applicant which the court has held is not good reason for delay and this accords with the "*…well established jurisprudence of this court".*[34]

[45] The court reiterates that the three requirements of Part 13.2(1) of CPR 2000 are conjunctive. If an applicant is to succeed in getting a Default Judgment set aside all three requirements **must** be satisfied. In the circumstances of this case, having found that the reason tendered is not satisfactory, the court need go no further.

[34] Yates Associates Construction Co Ltd (op Cit) at Paragraph 15

However, the court will nevertheless proceed to examine the second requirement: whether the defendant has provided the court with a draft defence that allows the court to assess whether or not the defendant has a defence which has a prospect of success.

[46] The defendant has attached to his application his draft defence as is required by CPR. Does the defence as attached provide this court with enough evidence upon which the court can consider whether or not the defendant has a reasonable prospect of success in this case? Learned Counsel Shillingford submitted that the primary consideration for the Court is whether the defendant has a defence to which the court should pay heed which would allow the court to come to a conclusion as to the probable outcome of the matter.

[47] On the other hand Learned Counsel Williams submitted that the draft defence presented by the defendant is incapable of assisting the court in deciding as to the prospect of success of the claimant's case. Counsel also asserts that the defence is grossly deficient and fails entirely to comply with this requirement of the Part 10.5 of the CPR. I have reviewed the draft defence submitted and I am in full agreement with Learned Counsel Williams' submissions in this regard. The defendant has failed to show by credible and particularised pleadings in his draft defence that he had met the threshold necessary to demonstrate to this court that he has a good defence with a reasonable prospect of success.

Conclusion

[48] I find that no argument can be made and upheld against the promptitude of the applicant's application. The applicant's application was in a timely manner in that his application to set aside the default judgment was filed within a reasonable time of his being served with the judgment.

[49] Having regard to the totality of circumstances, I am of the considered view that the explanation proffered by the applicant does not satisfactorily meet the stipulation

of Part 13.3(1) of CPR 2000. The defendant has not given a good explanation for its failure to file a Defence. The defendant has also failed to exhibit a defence upon which I can reasonably assess the possible merits of its proposed defence to conclude whether or not the defendant has a defence with a reasonable prospect of success.

[50] In the premises, and insofar as I have concluded that the defendant has failed to meet the threshold of both of the above mentioned provisions of Part 13.3(1) of CPR 2000, his application fails.

[51] I do not propose to go any further. It is therefore ordered that the application to set aside the Default Judgment is dismissed with costs to the claimant in the sum of $1,000.00

(Sgd). M.E.B. Stephenson
M E Birnie Stephenson
High Court Judge