THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2016

CLAIM NO. SKBHCV2009/0214

BETWEEN:

HOWARD ENGINEERING INC.

Claimant

and

LA VALLEE DEVELOPMENT CORPORATION

1st Defendant

FRIGATE BAY DEVELOPMENT CORPORATION

Applicant/2nd Defendant

Appearances:-
Ms. Leonora Walwyn of Counsel for Claimant
Mr. Terence V. Byron, with Ms. Talibah Byron, of Counsel for Applicant/2nd Defendant

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2016: 19th February

REASONS FOR DECISION

[1] **CARTER J.:** This court gave its decision on the 19th of February 2016 on the applicant/2nd defendant's application to strike out the claim against the applicant/2nd defendant filed on 19th October 2015. The application was determined on written submissions. These are the reasons for that decision.

[2] The applicant/2nd defendant's application to strike out the claim was premised upon an argument that the default judgment entered on the 9th day of April 2010, a judgment in default of defence, against the 2nd named defendant was wrongly entered. There are therefore two issues for the court's consideration.

The Default Judgment

[3] Rule 12.5 states as follows:

> *"**Conditions to be satisfied – judgment for failure to defend***
> *12.5 The court office at the request of the claimant must enter judgment for failure to defend if –*
> *(a) (i) the claimant proves service of the claim form and statement of claim; or*
> *(ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;*
> *(b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;*
> *(c) the defendant has not –*
> *(i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or*
> *(ii) (If the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or*
> *(iii) satisfied the claim on which the claimant seeks judgment; and*
> *(d) (if necessary) the claimant has the permission of the court to enter judgment."*

[4] The applicant/2nd defendant's argument with regard to the default judgment were succinctly set in the submissions filed in support of the instant application and are reproduced here:

> *"…the claimant's request for entry of default judgment applies to the 1st defendant which on 29th September, 2009 filed an acknowledgement of service but that it could not apply to the 2nd defendant, which has never filed any acknowledgment of service, especially since there is no statement on it that evidence of service of the claim form and statement of*

claim is filed with the form, as required by Form 7 for the case of default of acknowledgement of service.

Furthermore, this is not a request for entry of judgment in default against the 2nd defendant. The claimant's request is directed throughout in relation to "the defendant" and the 2nd defendant objects that is not a reference to the 2nd defendant, even though the heading of the matter shows two (2) defendants.

There is not only one single request for entry of judgment in default described above, but also there is only one single judgment entered in this matter, filed on 9th April, 2010…Again, the judgment is not a reference to the 2nd defendant. The 2nd defendant repeats that the Court Office has been aware at all material times that an acknowledgement of service was filed on behalf of the 1st defendant, and that the Court Office must be taken in the circumstances of the claimant's request to have excluded from its consideration any reference to the 2nd defendant, which has not filed an acknowledgment of service.

It is submitted that no judgment exists against the 2nd defendant as the claimant has elected to make a request for entry of judgment in default by excluding any reference to failure to file acknowledgment of service."[1]

[5] The applicant/2nd defendant further submitted that according to rule 12.5(a)(ii), if an acknowledgement of service has been filed by the defendant against whom judgment is sought, the Court Office must enter judgment for failure to defend. By contrast, rule 12.4(b)(i) states that if the defendant has failed to file an acknowledgment of service, the Court Office must enter judgment for failure to file an acknowledgment of service. On examination of rule 12.5 (a) (ii), there is no provision for the Court Office to enter judgment for failure to defend if a defendant has not filed an acknowledgement of service. On the facts, the conditions precedent for the entry of judgment in default under rule 12.5(a)(ii) against the applicant/2nd defendant were not present at the time that judgment in default of defence was entered against the applicant/2nd defendant.

[1] Submissions of applicant/2nd defendant in support of strike out application, filed on 25th November 2015, para. 18-21, pg. 5

[6] A court has the authority to set aside a default judgment that has been wrongly entered. Part 13 of **CPR 2000**:

> ***Cases where court must set aside default judgment***
> *13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –*
> *(a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or*
> *(b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.*
> *(2) The court may set aside judgment under this rule on or without an application"*

[7] In his submissions the claimant admitted as follows:

> *"In the case at bar the claimant cannot deny that the applicant/2nd defendant did not enter an acknowledgment of service, being a requirement for the entry of judgment in default of defence. The judgment therefore entered against the applicant/2nd defendant's was therefore* wrongly *entered. The applicant/2nd defendant's* must *therefore apply to set aside the judgment entered against it pursuant to CPR Rule 13.9"*[2] *[single line spacing]*

[8] The **Civil Procedure Rules 2000** do not contain a provision "CPR Rule13.9". The court can only take this reference to mean **CPR** 13.3 which states the conditions to be satisfied if a court is to exercise its discretion to set aside a judgment entered under Part 12.

[9] The court notes that Part 13.3(1), states that:

> ***"If Rule 13.2 does not apply****, {emphasis added} the court may set aside a judgment entered under Part 12 only if the defendant –*

[2] Paragraph 12 of claimant's submission in response filed on 3rd December 2015

(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 acknowledgement of service or a defence as the same case may be; and
(c) Has a real prospect of successfully defending the claim."

[10] The court has also considered the evidence on affidavit filed by the claimant[3] wherein the claimant addressed the fact that "*the claimant company has already obtained a judgment against the 2nd Defendant and in the circumstances this Court is cannot exercise any further authority as the 2nd Defendant has never appealed the judgment in default entered against it*."

[11] The applicant/2nd defendant has not made an application to set aside the default judgment of 9th April 2010. However, the language of Part 13.2 is mandatory. The applicant/2nd defendant is entitled to have the default judgment be set aside as of right.[4] Taking into consideration all of the above, and especially the acknowledgment by the claimant that the default judgment was wrongly entered, the court exercises its power pursuant to **CPR** 13.2 (2) to set aside the default judgment against the applicant/2nd defendant.

The Application to Strike Out the Claim

[12] In relation to the instant application to strike out, rule 26.3(1) outlines the following:

"26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim."

[3] Affidavit In Opposition to Strike Out Claim Against the 2nd defendant filed on 18th November, 2015
[4] SVGHCV2011/0466 - Kenlyn Pamela Clouden et al v Phil Culzac, delivered on 2nd June 2014 by Actie, M (Ag.)

[13] In **Tawney Assets Limited v East Pine Management**[5] Mitchell JA (Ag.) noted that: *"The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial."*

[14] In **Partco Group Ltd v Wragg**[6] Potter LJ prescribed some of the instances where striking out would be appropriate. Those included: (a) where the statement of case raises an unwinnable case so that continuing the proceedings is without any possible benefit to the defendant and would waste resources on both sides (b) where the statement of case does not raise a valid claim or defence as a matter of law;(c) if the facts set out do not constitute the cause of action or defence alleged; or (d) if the relief sought would not be ordered by the court.

[15] The applicant/2nd defendant argues that the claim form and statement of claim do not disclose any basis for a judgment against the applicant/2nd defendant, that there is no pleaded basis for a claim by the claimant against the applicant/2nd defendant because:

> "1. The claim is stated to be against the 1st Defendant.
> 2. The claim is based on an agreement between the 1st Defendant and the 2nd Defendant.
> 3. The claim is based as well on an Agreement between the 1st defendant and the claimant."

[5] BVI High Court Civil Appeal No 7 of 2012
[6] [2002] EWCA Civ 594, [2002] 2 Lloyd's Rep 343

[16] Blackstone's Civil Practice 2004 at paragraph 33.7 states that applications to strike out a claim may be made on the basis that the statement of case under attack fails on its face to disclose a claim or defence which is sustainable as a matter of law. On hearing such an application it will be assumed that the facts alleged are true.[7] A close examination of the claim form and statement of claim is therefore warranted on this application.

(i) The Claim Form

[17] The claim form details that:

> "*the claimant claims* ***against the 1st defendant*** [emphasis added]*…for money due and owing in respect of an agreement in writing contained in and evidenced by a Design/Build Agreement, dated 11th day of July 2003, between the 1st named defendant and the 2nd named defendant;*
> *…and a supplemental Agreement Conditions of Engagement for Golf Course Design and Construction between the 1st named defendant and the claimant for services as professional consultants for golf course operations, promotion and management and as construction manager."*

[18] The claim form further details that the relief that the claimant seeks is a declaration that the Design/Build Agreement was a valid agreement; a declaration that the representations made to the claimant on the date of the signing of the agreement that the claimant was the Contractor of the project was fraudulently misrepresented by the 1st Defendant and that in fact the claimant was approved as the sub-contractor of the project by the 1st named defendant.

[19] The claim form detailed that the claimant intends to show that the signature on behalf of the claimant appended to the Design/Build Agreement was secured by economic duress. The claimant in the claim form stated that by the Supplemental

[7] Morgan Crucible Co. plc v Hill Samuel and Co Ltd. [1991] Ch. 295 per Slade LJ.

Agreement the 1st defendant agreed to pay the claimant for its services in the amount of US$770,000.00; there is a claim for a sub-contractor fee and also claims for personal funds, and loans made to the 1st defendant. The claimant also claims for damages for breach of contract and interest thereon, special damages and costs.

[20] Analysis of the claim form therefore reveals that the 1st and 2nd defendants entered into a Design/Build agreement on the 11th July 2003. The claimant contends that the company was not a contractor to that agreement but only a sub-contractor approved by the 1st defendant as per the supplemental agreement between the company and the 1st defendant for services as professional consultants for golf course operation, promotion and management as construction manager. The claimant states the amounts that the company claims and then alleges damages for inter alia, breach of contract.

(ii) The Statement of Claim

[21] The first three (3) paragraphs of the statement of claim identify the parties. **Paragraph 3** of the statement of claim identifies the applicant/2nd defendant as a limited liability company and recites that the applicant's Board of directors appointed its Chairman and its Managing Director as Directors of the Joint Venture company La Vallee Greens Limited *"for the purpose of managing a 18 hole championship golf course project and its appurtenances, to be constructed on the lands commonly known as "La Vallee", Sandy Point, in the island of St. Kitts."*

[22] **Paragraph 4** identifies and describes La Vallee Greens Ltd as a company with limited liability and sets out the business in which that company is engaged.

[23] **Paragraph 5** of the statement of claim pleads an agreement made and entered upon on the 11th of July 2003, **between the claimant and the 1st defendant,** "*to design and build an eighteen-hole golf course and its appurtenances, including a clubhouse suitable for the service of the anticipated clientele, maintenance facilities, maintenance equipment, paved access and parking, utilities, complete with established turf for the use and benefit of the 2nd defendant …through its Joint Venture Company La Vallee Greens Ltd".* This in and of itself is not a pleading against the applicant/2nd Defendant.

[24] **Paragraphs 6 and 7** do not mention the applicant/2nd defendant at all. These paragraphs but recite that by the terms of a Supplemental Agreement the 1st defendant agreed to employ the claimant, and to compensate the claimant for its services.

[25] **Paragraphs 8-10** detail that the claimant carried out all contractual obligations under the contract. No mention is made of the applicant/2nd defendant.

[26] **Paragraph 11:** alleges that "*In breach of the agreement the 1st defendant La Vallee Development Corporation …has failed to meet its contractual obligations"* and that this failure has caused the claimant to suffer additional economic loss mainly due to their mismanagement of the project funds.

[27] **Paragraphs 12-15** set out the actions of the1st defendant that the claimant alleges point to breach of contract. The claimant details that the defendant did not serve a notice of variation or termination of the contract as required prior to termination as set out in the Agreement, and that by letter the claimant demanded payment of the outstanding contract sum of US$1,935,774.13. Also that the defendant has failed or neglected to respond to the said demand.

[28] **Paragraphs 16-18** details the amounts of the outstanding contract sum and the sub contractor's fee.

[29] **Paragraphs 19-20** state that the claimant made loans to the ***defendants*** which monies the claimants also seeks to recover. The claimant does not say that it is the applicant/2nd defendant that was loaned these amounts. Following on from the narrative of the foregoing paragraphs of the statement of claim, it appears to this Court that it must be the 1st defendant that is being referred to. That these sums were loaned to and recovery was being sought from the 1st defendant is clarified upon examination of Paragraph 23 of the statement of claim which outlined in detail the sums sought to be recovered and that the loans referred to were made to the 1st defendant, La Vallee Development Corporation by the claimant from the claimant as well as the personal account of Charles E and Martha J Howard.

[30] **Paragraph 21** recites that certain monies, US$547,500.00, were loaned and/or expended to the benefit of the 1st and 2nd defendants during a period when the project was suspended pending receipt of additional funding. Although the "project" is not described here by the claimant, the preceding paragraphs of the statement of claim point to this project being the subject of the Agreement, the professional planning, engineering construction and associated services for the golf course. No other project has appeared in the pleadings.

[31] **Paragraph 22** – The claimant pleads that the applicant/2nd defendant through its joint venture company La Vallee Greens Ltd undertook to fully compensate the claimant with all outstanding monies and has been kept apprised of the developments during negotiations for settlement of the project default claims. This

is the only context in which the applicant/2nd defendant is presented in the statement of claim with respect to the breach of the Agreement.

[32] **Paragraph 23** - the claimant set out the outstanding amounts sought to be recovered. Each of the instances of loss arising from the alleged breach of contract and particularized in the statement of claim are attributed directly to the actions/breaches of contract by 1st defendant:

" 1) Golf Course design fee with interest $194,004.00

> By paragraph 6 and 7 of the Statement of claim the claimant alleged that "the 1st defendant La Lallee Development agreed to employ the Claimant to perform the professional planning, engineering, construction, and associated services. By virtue of Section IV of the said Agreement the 1st Defendant La Vallee Development Corporation through it Agent Donald G Blackman agreed to fully compensate the claimant for the gold course design, planning and constructions services a total fee of US$770,000.00. This fee is according to the statement of claim, the outstanding part of that contracted sum.

2) La Vallee Development fee with interest $291,006.00

> In paragraph 2 of the claim form the claimant alleged that he was approved as the subcontractor for the Design/Build Agreement by the 1st Defendant Frigate Bay Development Corporation. The claimant set out that this was a further 1% subcontractor's fee due from the 1st defendant.

3) Loans made to La Valle Development by Howard Engineering Inc with interest $726,669.86

4) Loans made to La Vallee Development from Charles E and Martha J Howard Personal Account with interest $176,594.27

5) Standby charges for Howard Engineer Inc.- Caterpillar Equipment $547,500.00

Grand Total US$1,935,774.13"

[33] The grand total sum of the loss to the claimant equates to the figure of US$1,935,774.13, the exact amount that the claimant seeks on this claim. There

is no amount claimed which has been attributed to the actions/default of the 2nd named defendant.

[34] In the statement of claim the claimant seeks:

> *"1. The sum of US$1,935,774.13*
> *2. Interest on the debt after Judgment;*
> *3. Costs;*
> *4. Such further or other relief as the Court deems just"*

Interestingly, there is no claim for damages for breach of contract, or for special damages as stated in the claim form.

[35] Apart from the instances set out above the claimant does not mention or make any other allegation as to the basis of any liability of the applicant/2 defendant for the relief that has been claimed and particularized in the claim form and statement of claim.

[36] The claimant's allegations of liability on the part of the applicant/2nd defendant arise through its association with La Vallee Greens Ltd only. However, La Vallee Greens Ltd is a separate legal entity in law. As recited in the statement of claim, it was *"was incorporated on the 2nd day of October, 2003 under the Companies Act (No.22 of 1996) as a Company with limited liability."*

[37] With reference to La Vallee Greens, the claim form discloses that:

> *"On the 23rd day of September 2003, a unanimous Resolution was passed by the 2nd defendant for its Chairman and Managing Director to be appointed as Directors for the Joint Venture Company known as La Vallee Greens Ltd, which was incorporated under the Companies Act (No. 22 of 1996) of St, Christopher and Nevis as a limited liability company for the sole purpose of the 2nd named defendant."*

[38] There is no allegation of a contractual relationship between the claimant and La Vallee Greens Ltd. The basis of any obligation of La Vallee Greens Ltd to honour the pleaded contract between the claimant and the 1st defendant has not been established. La Vallee Greens Ltd is not being sued on a promise to pay. There has been no nexus shown between a purported promise to pay, if the undertaking to compensate by La Vallee Greens Ltd. is taken at its highest, and the applicant/2nd defendant. Indeed La Vallee Greens Ltd is not a party to these proceedings.

[39] The bare statement that the applicant/2nd defendant through its joint venture company undertook to compensate the claimant is insufficient to establish a foundation for liability. The claim made is for damages for breach of contract founded upon an agreement with the 1st named defendant and for the return of monies loaned to the 1st defendant. The only contract pleaded and which has not been honoured is that between the claimant and the 1st defendant. The claimant has particularized that it is the 1st named defendant with whom it contracted and who was directly responsible for the breaches of contract alleged and for the resultant loss, directly and indirectly, resulting from these breaches.

[40] The applicant/2nd defendant submits that the court should look to see whether in fact the actions of the applicant/2nd defendant in appointing its Chairman and Managing Director to act as Directors of La Vallee Greens Ltd for the purpose of managing the golf course project were ultra vires the Act which established the applicant/2nd defendant. The applicant/2nd defendant contends that the Directors' liability would not then be attributable to the applicant/2nd defendant. While this may an attractive argument, it would appear to this Court that on this application such an examination would only become relevant if the court were to find that there was a basis for a claim against La Vallee Greens Ltd on the face of the

pleadings. As has been set out at paragraphs 36-39 herein, this Court is unable to so find.

[41] In order to defeat an application to strike out a claim, there must be a sufficiency of pleadings that, on their face, give rise to a cause of action.[8] Significantly, on this application to strike out the claim, the claimant's submissions to the court are somewhat inadequate to answer the applicant/2nd defendant's arguments. The claimant's submissions focus entirely on the effect of the default judgment. The claimant states that *"it is trite law that upon entry of a judgment, the court is functus having addressed the merits of the substantive claim or the criteria to grant judgment. As a judgment has now been obtained this Honourable Court cannot entertain a striking out application*."[9]

[42] Further that *"throughout these proceedings the applicant/2nd defendant has never advanced to this Honourable Court that the judgment entered against it was wrongfully entered. The defendant has throughout demonstrated to this Honourable Court its intention to settle the judgment debt. The applicant/2nd defendant has further never appealed the decision of this Honourable Court to enter judgment in default against it. The applicant/2nd defendant has through its conduct demonstrated that it admits the claim against it. To now come with a second application with the aim to re-litigate these proceedings is an abuse of process."*[10]

[43] This Court has carefully considered the stage of the proceedings at which this application to strike out has been made. This matter has not reached the stage of

[8] Per Blenman J at pg 15 in ANUHCV 2005/0443 - Jannis Reynolds-Greene v The Bank of Nova Scotia
[9] Paragraph 14 of claimant's submission in response.
[10] Paragraph 17 of claimant's submission in response.

case management. While the court notes that the applicant/2nd defendant has been in discussions with the claimant with a view to settling the matter, the claimant has presented this Court with no authority to suggest that these discussions precludes this Court from considering the instant application, especially in light of the court's finding and the claimant's concession that the default judgment was wrongly entered.

[44] It is the law that when the court exercises its jurisdiction on the basis that the statement of claim discloses no reasonable ground for bringing the claim this includes statements of case which are unreasonably vague, unsustainable, incoherent, scurrilous or ill-founded and other cases which do not amount to a legally recognizable claim. This is so, also, when the court exercises its inherent jurisdiction.[11]

[45] In **Greene** Blenman J highlighted that "n*o reasonable grounds for bringing or defending the claim",* CPR 26.3(1)(b) addresses two situations*:*

"(1) Where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or
(2) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law."[12]

[46] The court agrees with the applicant/2nd defendant that:

1. The claim is stated to be against the 1st Defendant;
2. The claim is based on an agreement between the 1st Defendant and the 2nd Defendant to which the claimant is not a party; and
3. The claim is based as well on an Agreement between the 1st defendant and the claimant for which the applicant/2nd defendant is not liable for its breach.

After a detailed consideration of the foregoing, this Court is persuaded that this is the only conclusion that can be reached. Even if each and every factual allegation

[11] Antigua and Barbuda, Claim No. ANUHCV2007/0277; See also: Spencer v The Attorney General of Antigua and Barbuda Civil Appeal No. 20A of 1997.
[12] ANUHCV2005/0488 delivered on 20th November, 2008 at para. 69

contained in the statement of claim is proved the claimant cannot succeed against the applicant/2nd defendant.

[47] For these reasons the court's order is as follows:

1. The default judgment entered on 9th April, 2010 against the applicant/2nd defendant is set aside.
2. The claim against the applicant/2nd defendant filed on 11th August 2009 is struck out on the ground that it does not disclose any reasonable ground for bringing the claim against the applicant/2nd defendant.
3. Costs of this application and of the action to the applicant/2nd defendant to be assessed if not agreed.

Marlene I Carter
Resident Judge