EASTERN CARIBEAN SUPREME COURT
IN THE COURT OF APPEAL

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2105/0012

THE MARINA VILLAGE LIMITED

Appellant

and

ST. KITTS URBAN DEVELOPMENT CORPORATION LIMITED

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On written submissions:

Mr. Gerard St. C Farara QC, with him, Mr. James Morrin for the Appellant
Mr. Anthony Gonsalves QC, instructed by Mr. Arudranauth Gossai
and Ms. Liska Hutchinson of Gonsalves Parry for the Respondent

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2016: May 19.

Interlocutory appeal – Default judgment – Setting aside default judgment –Whether the learned trial judge properly exercised her discretion in refusing to set aside default judgment – Rule 13.3 of the Civil Procedure Rules 2000

The respondent entered into an agreement with a company, Namdar Brothers Realty Limited, for the sale and purchase of land situate at Port Zante belonging to the respondent. Namdar Brothers Reality Limited later assigned its interest under the agreement to the appellant. The respondent alleges that the appellant has failed to pay the full purchase price and that there is an outstanding balance of US$4.5 million. Consequently, the respondent instituted proceedings against the appellant seeking several

reliefs. On 24th July 2014, the respondent sought and obtained an order to serve the claim on the appellant by prepaid post at P.O. Box 824 Port Zante Basseterre St. Christopher, the address stated as the registered office of the appellant. The respondent served the appellant by prepaid post on 25th July 2015.

The appellant failed to file an acknowledgement of service within the time prescribed by the Civil Procedure Rules 2000 ("CPR"). The respondent consequently sought and obtained judgment in default which was entered on 19th November 2014. The appellant subsequently filed its acknowledgement of service and defence on 21st November 2014 and made an application on 2nd December 2014 to set aside the judgment in default. The learned judge refused the appellant's application. The learned judge reasoned that the appellant failed to give a good reason for failing to file its acknowledgment of service within the prescribed time; the appellant had no real prospect of success on the claim; and there were no exceptional circumstances for setting aside the default judgment. The appellant appealed against the learned judge's decision.

Held: dismissing the appeal; and ordering the appellant to pay the respondent costs in the sum of two-thirds of the costs awarded in the court below, that:

1. CPR makes specific provisions for service of a claim form on a party that is a limited company. This includes sending the claim by prepaid post addressed to the registered company as provided for by CPR 5.7. In this case, the method of service used by the respondent was a permissible method of service under Part 5 of CPR. The claim form was served at an address stated by the appellant's director to be the address of the registered office of the appellant. Further, the method of service was made pursuant to an order of the court and the court's order was not set aside nor had application been made to set it aside. Accordingly, there was no basis on which the learned judge could conclude that the claim was not properly served.

   Rule 5.7 of the **Civil Procedure Rules 2000** applied.

2. CPR 13.3(1) requires that an applicant who seeks to engage the discretion of the court to set aside a default judgment must give a good explanation for failing to file an acknowledgment of service or defence. In the present case, the appellant by its own deliberate action did not ensure that there were adequate administrative arrangements in place to access correspondence sent to it in a timely manner. Accordingly, the appellant cannot rely on the consequences of their own deliberate action as a good explanation. Therefore, the learned judge was correct in finding that the appellant had no good explanation for failing to acknowledge service of the claim.

Rule 13.3(1) of the **Civil Procedure Rules 2000** applied.

3. CPR 13.3(1) also requires that an applicant who wishes the court to exercise its discretion to set aside a default judgment must have a real prospect of successfully defending the claim. In this case, based on the appellant's defence, the sum of US$4.5 million was never paid to the respondent as part of the purchase price for the respondent's lands at Port Zante. In the circumstances, the learned judge was correct in her finding that the appellant had no reasonable prospect of success in defending the claim.

   Rule 13.3(1) of the **Civil Procedure Rules 2000** applied.

4. CPR 13.3(2) provides for a court to set aside a default judgment if there are exceptional circumstances for doing so. In this case, the factors relied on by the appellant to demonstrate exceptional circumstances neither singularly nor collectively amount to exceptional circumstances. This is not a case of unjust enrichment or a situation where a grave injustice would result if the default judgement is not set aside, nor does the claim raise any area of law in which there is a need for clarification. Accordingly, the learned judge was correct in finding that there were no exceptional circumstances to justify setting aside the default judgment.

   Rule 13.3(2) of the **Civil Procedure Rules 2000** applied.

JUDGMENT

[1] **THOM JA:** This is an appeal against the decision of the learned judge in which she refused to set aside the judgment in default made against the appellant.

Background

[2] The background to this appeal is that on 1st September 2008, the respondent entered into an agreement with a company, Namdar Brothers Realty Limited, for the sale and purchase of certain land situate at Port Zante and belonging to the respondent. The purchase price was agreed at US$7,755,000. On 26th

November 2008, Namdar Brothers Realty Limited, with the consent of the respondent, assigned its interest under the agreement to the appellant.

[3] The respondent contends that the appellant has failed to pay the full purchase price and that there is a balance of US$4,500,000 outstanding. Consequently, on 17th July 2014, the respondent instituted proceedings against the appellant in which it sought several reliefs including a declaration that the respondent is entitled to a lien on the lands which are the subject of the sale and an order for sale of the lands to satisfy the lien.

[4] On 24th July 2014 the respondent sought and obtained an order of the court made pursuant to rule 5.14 of the **Civil Procedure Rules 2000** ("CPR") to serve the appellant by prepaid post at P.O. Box 824, Port Zante, Basseterre, St. Christopher. The claim form and statement of claim were served on the appellant in accordance with the court order by prepaid post on 25th July 2014.

[5] The appellant having failed to file an acknowledgment of service within the time stipulated in CPR 9.3(1), the respondent applied for judgment in default on 14th November 2014. On 19th November 2014, judgment in default was entered against the appellant.

[6] The appellant filed its acknowledgment of service and defence on 21st November 2014 and upon being informed of the judgment in default, made application on 2nd December 2014 to set aside the default judgment. The learned judge heard submissions from both sides and refused to set aside the default judgment. Her reasons for doing so as outlined in her judgment are: (i) the appellant failed to give a good explanation for failing to file the acknowledgement of service within the

time prescribed; (ii) the appellant had no real prospect of successfully defending the claim; and (iii) there were no exceptional circumstances.

The Appeal

[7] The sole issue in this appeal is whether the learned judge erred in the exercise of her discretion under CPR 13.3 which permits a judge to set aside a default judgment where the judge is satisfied that an applicant has met the requirements outlined in the rule or there are exceptional circumstances which warrant that the judgment should be set aside.

[8] It is settled law that an appellate court will not interfere with the exercise of a judge's discretion unless it is satisfied that the learned judge erred in principle or he/she has omitted to take into account matters which should have been taken into account or took into account matters which should not have been taken into account and as a result exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong.

[9] The appellant contends that the learned judge erred in several respects in the exercise of her discretion. In its written submissions the appellant pursued seven grounds of appeal.

Ground 1: Service of the Claim Form

[10] Learned Queen's Counsel for the appellant contends that the learned judge erred in finding that there was no issue with the service of the claim form and that the claim form was properly served. I agree with the respondent's submission in response that the appellant misquoted the learned judge's statement. The learned judge stated at paragraph 9 of her judgment that: 'In her submission to the court,

Counsel for the applicant quite rightly conceded that there was no issue with the service of the claim'. The written submissions which were exhibited support the learned judge's finding.

[11] Learned Queen's Counsel next submitted that the learned judge erred when she found that the appellant's registered office was at P.O. Box 824 Basseterre when in fact the statutory statement filed by the appellant in September 2008 pursuant to the **Companies Act**[1] shows the registered address of the appellant to be c/o Thomas W R Astaphan P.O. Box 824 Basseterre St. Kitts. Further the order to serve on a P.O. Box address was contrary to Part 5 of CPR and the **Companies Act**. The claim form and statement of claim were therefore not served in accordance with CPR 5.7 and the learned judge had no alternative but to set aside the default judgment as it was irregular.

[12] The appellant also contends that the learned judge failed to give adequate regard to the course of dealing of the parties in relation to communication between them where communication was sent by the respondent to the appellant at the New York address of its directors as stated in the statutory instrument. The appellant also relied on clause 13 of the Agreement for Sale which states as follows:

> "Any notice under this Agreement must be given delivery or by registered mail (registered air mail if the Buyer resides outside of St. Kitts) and will be deemed to be served on the date of delivery or twenty one (21) days after it is posted and must be addressed to the party to whom it is sent at address given in this Agreement or such other address as either party may notify the other."

The appellant argues that under the Agreement, the appellant's address is the address of its director; therefore, the claim should have been served at the

[1] Cap. 21.03, Revised Laws of Saint Christopher and Nevis 2009.

address of its director. Further, when the respondent made the application to the judge to serve the appellant at P.O. Box 824 Basseterre, the respondent could not have reasonably believed that service by that method would bring the claim to the attention of the appellant.

[13] The respondent in its response submits that this ground has no merit. I agree. Contrary to the contention of the appellant, the annual return of the appellant which was signed by Mr. Namdar in his capacity as director of the appellant and dated 15th December 2013, states the appellant's address of its registered office to be P.O. Box 824, Port Zante, Basseterre.

[14] CPR makes specific provisions for service of a claim form on a party that is a limited company. In CPR 5.7 several methods are listed by which service could be effected on a limited company. It reads thus:

> "Service on a limited company may be effected –
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> (a) by leaving the claim form at the registered office of the company;
> (b) by sending the claim form by telex, fax or prepaid post or cable addressed to the registered office of the company;
> (c) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim;
> (d) by serving the claim form personally on any director, officer, receiver, receiver manager or liquidator of the company; or
> (e) in any other way allowed by any enactment.

[15] The method of service used by the respondent was a permissible method of service under Part 5 of CPR. The claim form was served at an address stated by the appellant's director to be the address of the registered office of the appellant. Further the method of service was made pursuant to an order of court which said order was not set aside. Indeed no application was made to set it aside.

[16] The claim form was not a notice under clause 13 of the Agreement for Sale. The Agreement stipulates the various instances in which notice is to be given. This provision is unrelated to court documents. This is not a situation where there was an agreed method of service of court documents. Also the fact that the respondent communicated with the appellant by using the New York address of the appellant's director is of no moment. Pursuant to the Agreement the director's address was the address to which all notices were to be sent.

Grounds 2 and 5: Good Explanation

[17] I will deal with these two grounds together as they both relate to the issue of whether the appellant had a good explanation for failing to file the acknowledgement of service within the time prescribed by CPR.

[18] The appellant contends that the following findings of fact made by the learned judge were against the evidence: (i) the appellant had no system in place for checking P.O. Box 824; (ii) there was no system in place by which the appellant could have prompt service of the claim form and the statement of claim and by which they could have been delivered; (iii) the appellant showed an absolute lack of attention to its registered office. The appellant argued that the evidence showed that it had an arrangement whereby a representative of Thomas W R Astaphan would check the P.O. Box. The learned judge therefore erred when she made the above findings of fact.

[19] The respondent submits in response that the evidence referred to by the appellant was not before the court below. The respondent referred to the evidence of the appellant's director Mr. Namdar at paragraph 3 of his affidavit

filed on 2nd December 2014 in support of the application to set aside the default judgment, the material part of which reads:

> "The PO Box address listed as the Defendant's registered office is not manned on a regular basis as the Defendant has no business office in St. Kitts. Consequently, the Claim Form and Statement of Claim reached our company's mail room in New York on October15, 2014 and came to my attention on October 17th, 2014. The documents were forwarded to me via Fedex by Ms. Vernice Morton who is a part time agent that handles VAT filing for Namdar and deposits rent cheques but is not an employee of Namdar or the Defendant. I do not know how long the documents were sitting in the post office box in St. Kitts."

[20] Also at paragraph 11 Mr. Namdar deposed:

> "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."

[21] The respondent contends further that there was no evidence that the appellant instructed the office of Thomas W R Astaphan as alleged by the appellant. I agree with the submission of the respondent. The learned judge made the findings in assessing the evidence to determine whether there was a good explanation for the appellant's failure to file the acknowledgment of service within the time prescribed by CPR. Having regard to the evidence that was before her, in particular the affidavit of Mr. Namdar on behalf of the appellant referred to earlier, it was open to the learned judge to make those findings. While "absolute" was a strong term since there was evidence of "periodic checks", it must be noted that no details were given as to how often checks were made. In my view there is no basis to interfere with the judge's finding.

[22] The appellant contends further that the learned judge erred in finding that it had not established that it had a good explanation for the failure to file an acknowledgment of service. The appellant relied on the following statement of Bannister J in **Inteco Beteiligungs AG v Sylmord Trade Inc**[2] as to what constitutes a "good explanation":

> "In my judgment, the expression 'good explanation' where it occurs in CPR 13.3(1), means an account of what had happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment…"Muddle, forgetfulness, an administrative mix-up are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."[3]

[23] The appellant contends that the evidence before the court did not show that the appellant was indifferent, but rather that the appellant acted immediately upon eventual receipt of the claim form and the statement of claim on 17th October 2014. Shortly thereafter counsel was instructed to file the acknowledgment of service and the defence. The learned judge did not approach the matter in the manner stated by Bannister J. Had she done so she would have concluded that there was a good explanation since there was no indifference to the risk that judgment might be entered.

[24] The respondent relied on the Privy Council decision in **The Attorney General v Universal Projects Limited**[4] and submitted that the affidavit in support of the application to set aside the default judgment disclosed no good reason for not filing the acknowledgment of service within the time specified in the rules. The

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[2] BVIHCM2012/0120 (delivered 9th May 2013).
[3] At para. 15.
[4] [2011] UKPC 37.

appellant's director Mr. Namdar acknowledged in his affidavit that there was no proper and systematic monitoring of the P.O. Box. The explanation of the appellant was at best inexcusable oversight and/or administrative inefficiency.

[25] CPR 13.3(1)(b) requires that an applicant who seeks to engage the discretion of the court to set aside a default judgment must give a good explanation for failing to file the acknowledgement of service or defence. The explanation given by the appellant as set out in the affidavit of its director is essentially that it was not aware of the claim form and statement of claim. The reasons advanced why it was not aware of the claim are: (i) the P.O. Box was not manned regularly, rather periodic checks were made by one Ms. Morton who was not an employee of the appellant; (ii) the respondent was aware that the appellant's directors and shareholders are based in New York and in the past they communicated with the appellant by sending correspondence to the New York address; (iii) on receiving the claim form and statement of claim on 17th October 17 2014, the appellant immediately sought assistance from counsel in St. Kitts to deal with the claim but was only able to get assistance on 19th November 2014 and the acknowledgement and defence were filed on 21st November 2014.

[26] The learned judge having considered the explanation found it was not a good explanation. She found the reason why the appellant did not become aware of the claim form until October 2014, was in effect due to its own administrative inefficiency.

[27] Every company incorporated in St. Kitts is required by law to have a registered office in St. Kitts and whenever there is a change in the address of the registered office, the company is required to notify the Registrar of Companies of its new address. The registered office is the official place at which the public is able to

communicate with the company. It is the place at which service of legal process may be effected on the company. CPR 5.7 specifically states that:

> "Service on a limited company may be effected –
> (a) by leaving the claim form at the registered office of the company;
> (b) by sending the claim form by telex, FAX or prepaid post or cable addressed to the registered office of the company."

The appellant by its own deliberate action determined not to ensure that there were adequate administrative arrangements in place to access correspondence sent to it in a timely manner. The appellant cannot rely on the consequences of its own deliberate action as a good explanation. In these circumstances, I find that there is no merit in this ground of the appeal.

Grounds 3, 4, and 7: Realistic Prospect of Success

[28] I will deal with grounds 3, 4 and 7 together since they all relate to the issue whether the appellant's defence had a realistic prospect of success.

[29] The appellant contends that the documentary evidence including the various letters from the appellant's attorney at the time, Mr. Thomas Astaphan, clearly showed that the sum of US$4.5 million was listed as payment towards the purchase price. Further, the land was only transferred to the appellant after the payment of the balance of US$2,048,000 to the respondent. Further the learned judge noted at paragraphs 28 and 32 of her judgment that the respondent had accepted that the sum of US$4.5 million was paid as part of the purchase price.

[30] A critical issue between the parties on the claim was whether the sum of US$4.5 million was paid to the respondent as part of the purchase price of the lands.

[31] The appellant in the draft defence alleged that the US$4.5 million which it borrowed from First Caribbean International Bank ("FCIB") and which loan was secured by the Government by treasury bills was advanced to the Government for it to purchase the shares in the respondent held by the company, Matalon, so that the Government would become the sole shareholder of the respondent. The Government in return agreed to take all necessary steps to transfer the lands at Port Zante to the appellant. The appellant acknowledges that the Government was required to repay the sum of US$ 4.5million to FCIB but the appellant contends that the Government agreed that the appellant should return two undeveloped lots in satisfaction of the treasury bills.

[32] I agree with the learned judge's finding that the appellant has no realistic prospect of successfully defending the claim. It is trite law that a property owned by a company is not the property of the shareholder. Based on the appellant's defence, the sum of US$4.5 million was never paid to the respondent as part of the purchase price for the respondent's lands at Port Zante. Further, at the time when the Government took the loan from the appellant and agreed to take steps to transfer the land, the Government was not the sole shareholder of the company which owned the land. The fact that the appellant may have relied on this undertaking by the Government is a matter to be resolved between the Government and the appellant, as the appellant acknowledges in paragraph 17 of its defence. I also agree with the submission of the respondent that the fact that a memorandum of transfer states that the full purchase price was paid is not conclusive of the matter if there is evidence to the contrary as there is in this case, the vendor's lien is not excluded. This principle was explained by Millet LJ in **Barclays Bank PLC v Estates & Commercial Limited**[5] as follows:

[5] [1997] 1WLR 415.

> "As soon as a binding contract for sale is entered into the vendor has a lien on the property for the purchase money and a right to remain in possession of the property until payment is made. The lien does not arise on completion but on exchange of contracts. It is discharged on completion to the extent that the purchase money is paid…Even if the vendor executes an outright conveyance of the legal estate in favour of the purchaser and delivers the title deeds to him, he still retains an equitable lien on the property to secure the payment of any part of the purchase money which remains unpaid. The lien is not excluded by the fact that the conveyance contains an express receipt for the purchase money.
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> The lien arises by operation of law and independently of the agreement between the parties. It does not depend in any way upon the parties' subjective intentions. It is excluded where its retention would be inconsistent with the provisions of the contract of sale or with the true nature of the transaction as disclosed by the documents."[6]

Ground 8: Exceptional Circumstances

[33] The appellant relied on the following explanation of "exceptional circumstances" as stated by Bannister J in **Inteco Beteiligungs AG v Sylmord Trade Inc**: 'For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained.'[7]

[34] The exceptional circumstances identified by the appellant are: the large sums involved; the importance of the property to the tourist industry of St. Kitts; the respondent being wholly owned by the Government, the property is a matter of public interest; if the property were sold at a public auction then the integrity of the asset may be compromised; the course of dealing of the parties in the manner they communicated over the last 7 years was by using the director's New York

[6] At p. 419 - 420.
[7] At para. 31.

address; and the sum of US$4.5 million was paid to the Government. The appellant submits that all of the above factors when taken singularly or collectively demonstrate exceptional circumstances. The learned judge therefore erred in finding that there were no exceptional circumstances and the exercise of her discretion was wrong.

[35] The respondent submits in response that the exceptional circumstances must be relevant to the appellant's failure to file the acknowledgment of service. There was no evidence in the affidavit of Mr. Namdar on behalf of the appellant which amounts to exceptional circumstances.

[36] In my view when the factors relied on by the appellant to demonstrate exceptional circumstances are considered, they neither singularly nor collectively amount to exceptional circumstances. The learned judge was correct in finding that there were no exceptional circumstances. While the sum of US$4.5 million was paid to the Government, it is not disputed that the Government repaid the bank the sum. This is not a case of unjust enrichment on the part of the Government or a situation where a grave injustice would result if the default judgment is not set aside. Further, the claim does not raise any area of law in which there is a need for clarification. I also find that this ground of appeal is without merit.

Conclusion

[37] For the reasons outlined above, I am of the opinion that there is no basis to interfere with the learned judge's exercise of discretion not to set aside the default judgment entered against the appellant. The appeal is accordingly dismissed. The appellant shall pay the respondent costs in the sum of two-thirds of the costs awarded in the court below.

Gertel Thom
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]