EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: AXAHCV2015/0002

BETWEEN:

JENNY LINDSAY
(D.B.A. "JENNY LINDSAY & ASSOCIATES")

Claimant

and

THOMAS ARISTIDE FLEMING
(In a personal capacity and as Administrator of the Estates of the late Benjamin Fleming and Sarah Jane Connor a.k.a. Richardson, deceased)

First Defendant

SIMEON FLEMING
(In a personal capacity and as Administrator of the Estates of the late Sarah Ann Connor a.k.a. Richardson and Catherine Fleming, deceased)

Second Defendant

JOSIANE JUMINER
(In a personal capacity and as Administrator of the Estate of the late Drucilla Juminer, deceased)

Third Defendant

Before:
Eddy Ventose — Master [AG.]

Appearances:

Ms. Jenny Lindsay in person
Mr. Kerith Kentish for the Defendants

2016: November 16
December 8 (Reissued)

JUDGMENT

1. VENTOSE, M. [AG.]: The Defendants have applied to set aside the default judgment entered by the court office on 7 July 2016. The Claimant opposes the application for reasons, which will become clearer later.

Background Facts

2. On 5 January 2015, the Claimant, an Attorney-at-Law, brought a claim for outstanding legal fees against the three Defendants both in their personal capacities and as joint administrators of the estate of the late Drucilla Juminer in relation to legal services provided to the Defendants pursuant to various retainer agreements. The amounts outstanding on the retainer agreements are in excess of US$246,711.00. The retainer agreement with the Second Defendant is dated 14 December 2010 and provides for the scope of works to be completed, and the hourly rate in United States dollars for the fees. Another retainer agreement was signed on 16 June 2011. Appendix A to the retainer agreements contains general terms and conditions.

3. The retainer agreement with the Third Defendant is dated 8 October 2012, and the retainer agreement with the First Defendant was signed on the same date. Both of them contain similar provisions like the retainer agreement signed by the Second Defendant and also contain the same Appendix A.

4. Between 17 June 2011 and 30 April 2014 various invoices containing a detailed description of the work completed, the hourly rate and the total amount due were sent to the defendants,

5. On 30 April 2014, the Claimant wrote each Defendant informing them of their non-payment of the outstanding invoices and that the invoices should be settled without delay. This was followed with a letter before action to each defendant on 27 May 2014. The Claimant sent the Defendants another pre-action letter on 22 December

2014. The Defendants did not respond to any of the letters that were sent to them by the Claimant using registered mail.

6. On 25 April 2015, the court granted the Claimant permission to serve the Defendants with the claim form outside the jurisdiction. The Claimant failed to serve the claim form amended to comply with the order of the court in relation to the periods for filing the acknowledgment of service and defence.

7. The Second and Third Defendant applied to the court to have the claim form struck out for, inter alia, non-compliance with CPR 8.2. The Master ruled on 19 May 2016 as follows:

> (a) The application by the 2nd and 3rd named defendants to strike out the claimant's claim form is dismissed with costs to the claimant in the sum of ECD $350.00
> (b) The matter shall be listed for further case management on a date to be arranged and notified by the court office.

8. The Claimant applied to the court office on 18 February 2016 for entry of judgment in default of defence against all the Defendants. The First Defendant was served on 16 November 2016, the Second Defendant on 17 November 2015 and the Third Defendant on 5 January 2016.

The Request for Default Judgment

9. In the request for default judgment, it is stated that "[j]udgment should be entered for a specified sum" but the request included items that could never be a specified sum, namely: (1) a caution pursuant to section 127 of the Registered Land Act; (2) charges on land; and (3) orders for the sale of those lands. Rather than being a claim for a specified sum (CPR 12.10(1)), it seemed more akin to a claim where there is some other remedy (CPR 12.10(4)). In addition, the total amount claimed in the request was for US$297,163.00 but, in the list of items, three items did not have specific

dollar values, namely: (i) Court fees; (ii) Service of letters and (iii) personal service of claims. Near to each was typed "TBA" – to be assessed.

10. The Registrar on 7 July 2016 entered judgment in default of defence for an amount to be decided by the court. In her reasons for default judgment dated 30 September 2016, the Registrar notes that the Claimant via email dated 6 July 2016 abandoned her request for the three items mentioned in the last sentence in [9] above. The Registrar also notes that the Claimant did not provide supporting documents for some matters itemised in the request, namely: (a) interest rate and the amount of interest; (b) costs for the service of letters; and (c) collection costs. Since the Claimant did not wish to abandon these items, judgment was entered for an amount to be decided by the court.

11. Counsel for the Defendants submitted that the request was for a specified sum of money and was requested on Form 7, the form that must be used to request default judgment (CPR 12.7). Counsel also submitted Form 7 cannot be used to request default judgment on a claim that includes "other remedies" such as cautions, charges and order for sale of lands, as in the instant case. Counsel for the Defendants argued that, pursuant to CPR 12.10(4) and (5), the Claimant had to make an application for default judgment not a request under CPR 12.5. Counsel continued that the default judgment, which was for a sum to be assessment by the court, was not on the appropriate Form 32 as required by CPR 12.10(1)(b).

12. The first point to note is that CPR 12.10(1)(b) requires a claimant to use Form 32 to make an application for default judgment on a claim for an unspecified sum of money. It does not preclude the Registrar or the court from entering judgment on the same terms even when this is not requested by the claimant but is necessitated by the terms of the request and subsequent actions of the claimant. I entertain no doubt that the Registrar acted properly in entering judgment as she did. When pressed, Counsel for the Defendant could not point to any CPR which precluded the Registrar from entering judgment in that manner, and could only point to a previous practice

where the Registrar denied a request a request for default judgment because not all matters were in order. In my opinion, this was a properly entered judgment for a sum to be assessed by the court in due course.

13. Counsel for the Defendants cites the decision of the Court of Appeal in *Fellows v Carino Hamilton Development Company Limited* (HCVAP 2011/006 dated 6 June 2012) where the Registrar had entered judgment in default of defence on a claim for fraudulent misrepresentation in the amount of EC$1m and interest thereon. The Master ruled that the default judgment was irregular because there were no supporting documents to prove the award of EC$1m. In fact, the Master opined (at [38]) that:

> That said, I am of the view that the Request *should have been for judgment in default of Defence for payment of an amount to be decided by the court pursuant to CPR 12.10(1)(b)* or in terms to be decided by the court under CPR 12.10(4) and (5). (emphasis added)

14. The Master's ruling was upheld by the Court of Appeal which accepted (at [10]) that:

> The term a "specified sum of money" is defined in CPR 2.4 to mean a sum that is ascertainable or capable of being ascertained as a matter of arithmetic. Damages for fraud can never fit into this definition. CPR 12.7 provides Form 7 as the usual form to be used in requesting of the Registrar a default judgment on a claim for a specified sum.

15. In that decision, the Court of Appeal pointed out that the Master was correct to find that CPR 12.10(1)(b) could not be used to cure the defect because of the various reliefs prayed for in the claim. Consequently, it held that the claim for "some other remedy" in addition to a claim for damages meant that default judgment had to be made via application under CPR 12.10(5) (at [13]). The default judgment was defective on its face and the Master, the Court of Appeal held, was correct in so

finding. In the case at bar, there is no such error in the default judgment entered by the Registrar because the Claimant had disclaimed the other forms of relief originally claimed and, since the claim included items for which there were no supporting documents, the Registrar correctly entered judgment for an amount to be assessed by the court.

16. In the premises, I hold that the judgment in default of defence for an amount to be decided by the court entered on 7 July 2016 by the Registrar is valid. There is no basis on which it could be set aside pursuant to CPR 13.2(1)(b).

17. A consequence of finding that the Registrar correctly entered judgment for the payment of an amount to be decided by the court is that CPR 16.2 is engaged pursuant to CPR 12.10(1)(b). CPR 16.2 outlines the procedure for assessment of damages where judgment is so entered.

Setting Aside Default Judgment

18. CPR 13.3(1) governs applications to the court to set aside or vary a default judgment, as follows:

> 13.3(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 acknowledgement of service or a defence as the same case may be; and
>
> (c) Has a real prospect of successfully defending the claim.
>
> (2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.

19. In *Bayne v Meyer* (ANUHCVAP2015/0026 dated 30 May 2016), Chief Justice Dame Janice Pereira, speaking for a unanimous Court of Appeal, stated that it is well

established by the case law of the Court of Appeal, as to be considered trite, that these three conditions are cumulative. In short, all three must be satisfied.

The Application to Set Aside Default Judgment

20. CPR 13.3(1)(a) provides that the applicant must apply to the court as soon as reasonably practicable after finding out that judgment had been entered. The Defendants state that their Attorneys-at-Law were served with the judgment in default on 21 September 2016 and the application to set aide the judgment was made within 7 days of service. It is important to note that CPR 13.3(1)(a) does not mention service. The obligation is to apply "after finding out that judgment had been entered". Service is just one such method (and a conclusive one) by which an applicant can find out that the judgment has been entered. Counsel for the Defendants admitted that he was aware of the judgment in default by the end of August 2016. It is the Claimant's evidence that she informed Counsel for the Defendants of the default judgment via telephone on 21 August 2016. It is not necessary to make a finding on this point as Counsel for the Defendants accepted that by the end of August 2016 he was aware of the entry of judgment in default of defence. This means that the Defendants applied to the court four (4) weeks after finding out that judgment in default of defence had been entered. As a result, the Defendants fail on the first condition found in CPR 13.3(1)(a). Since the requirements are cumulative, it is not strictly necessary to consider the other two conditions, I will nonetheless consider them for completeness.

Good Explanation

21. The second condition that must be satisfied in CPR 13.3(1)(b) is that the applicant must give a good explanation for the failure to file a defence. The Defendants argue that they have good reasons for failing to file a defence. Firstly, they made an application on 18 December 2015 to strike out the claim within the time period for filing a defence and that, consequently, this action stopped time from running against them. Secondly, the Master refused the application to strike out and ordered the matter to be listed for further case management on a date to be arranged and notified

by the court office. The Defendants argue that as a result of the Master's ruling they were simply waiting for the court registry to fix a date for the next case management where they would be given directions for filing a defence. In addition, the Defendants also claim that the request for judgment in default was entered the morning of 18 February 2016, which was also the same date of the hearing of the application to strike out.

22. There is some merit in the argument that an application to strike out has the effect of stopping time from running in respect of the period for filing a defence: *St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited* (Civil Appeal No.6 OF 2002 dated 31 March 2003). Although the decision in the Court of Appeal in *Caribbean 6/49* involved a consideration of CPR 9.7, which states specifically that the period for filing a defence is extended when an application is made under that rule, Barrow JA [A.G.] articulated a principle of general application (at [39]) as follows:

> The effect of filing a strike out application must be the same even in the absence of such a provision. That effect must be to prevent the entering of judgment in default. It does not matter whether expression is given to the effect of filing a strike out application by saying that time has stopped running or that a new timetable operates pursuant to the court's case management powers under Part 26 or otherwise. That is not of importance for the present. The overriding objective of CPR 2000, to enable the court to deal with cases justly, dictates that the effect of filing an application to strike out a claim as an abuse of the court's process is to oblige the court office to refuse to enter default judgment. (emphasis added)

23. The principle that an application to strike out stops time from running for the period for filing a defence only partially assists the Second and Third Defendants. If time stopped running when the application to strike out was filed on 18 December 2015, then it restarted on 19 May 2016 when the Master handed down her ruling on the

application to strike out. Judgment in default was not entered until 7 July 2016, a full seven (7) weeks later.

24. In any event, the principle articulated by Barrow JA [A.G] in *Caribbean 6/49 Limited* surely only applies to genuine applications to strike out. Otherwise, it would permit parties to make groundless applications to strike out in the hope of getting an automatic extension of time to file a defence. In light of the Master's finding, I have concerns as to whether the application was a genuine one and, in any event, it did not go to the heart of the Claimant's case.

25. I am of the view that, even though the time period for filing a defence may have stopped, the obligation was revived on 19 May 2016 when the Master ruled against the Second and Third Defendants on their application to strike out. There was no need to await directions from the court. Parties must always remember that a claimant cannot apply for judgment in default of defence within 28 days of service of the claim form (CPR 10.3(1)). Once that period ends, they are at the mercy of the Claimant and its Sword of Damocles in the form of CPR 12.4 and CPR 12.5. Consequently, the Second and Third Defendants would have had no good reason for not filing their defences after 19 May 2016. A fortiori the First Defendant who did not also make an application to strike out.

Real Prospect of Successfully Defending

26. The last of the conditions require the Defendants to show that they have a real prospect of successfully defending the claim. The Defendants aver that the Claimant is suing for work negligently done by her under several retainer agreements. They also claim that it is the Claimant who owes them money and point to their counterclaim and draft defence in support. The Defendants also point to aspects of the legal services provided by the Claimant to the Defendants in support of the claim for negligence.

27. In sum, the Defendants do not deny the work was done on their behalf (under the retainer agreements), but state simply that they are not liable to pay any monies to the Claimant because of the alleged negligence of the Claimant. In addition, the Defendants aver that the fees charged by the Claimant were disproportionate to the work allegedly completed, unfair, unnecessarily incurred, unjustifiable and highly unreasonable. No doubt the Defendants would have to establish a breach of the following duty of care on the part of the Claimant:

> "The extent of his [the solicitor's] duties depends upon the terms and limits of [the] retainers and any duty of care to be implied must be related to what he is instructed to do...The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession" *Henderson v Merrett Syndicates* [1995] 2 AC 145

28. Having failed to satisfy two of the three conditions, the prospects of success on this ground are not at all clear. The retainer agreements contain the basis on which the services of the Claimant are engaged and the letters to the Defendants contain a detailed outline of the work completed on their behalf. I have serious doubts as to whether the Defendants would succeed on their defence and counterclaim. On this ground, the Defendant's also fail.

Exceptional Circumstances

29. CPR 13.3(2) gives the court the power to set aside a default judgment if the defendant satisfies the court that there are exceptional circumstances. Although not addressing this ground in the submissions filed on 7 October 2016, the Defendants in their further submissions filed on 27 October 2016 discussed this almost as an afterthought in two paragraphs. The main argument is that the fees claimed by the Claimant are excessive and have not been taxed. The Defendants merely repeat what has already been unsuccessfully argued under the third condition of CPR 13.3(1)(c).

30. Chief Justice Dame Janice Pereira in *Bayne v Meyer* (ANUHCVAP2015/0026 dated 30 May 2016) stated what amounts to exceptional circumstance must be something more than simply showing that a defence put forward has a realistic prospect of success (at [26]). Chief Justice Dame Janice Pereira continued that:

> A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a "knock out point" in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive.

31. In the case at bar, it is unlikely that the claim, based at it was on signed retainer agreements, would fail and, having considered the defence, it is not a "knock out point" in the sense used by Chief Justice Dame Janice Pereira. The Defendants therefore also fail to satisfy the requirement of CPR 13.3(2).

Conclusion

32. The application to set aside default judgment and extension of time to file a defence is refused.

33. Consequent on the conclusion and the finding at [17] above, the assessment must now take place. It is therefore ordered as follows:

    (1) The Claimant shall file and serve any witness statements, submissions and authorities in respect of the assessment of damages within 28 days of today's date.

    (2) The Defendants may file and serve Form 31 within 7 days of service of the Claimant's documents.

    (3) The Defendants may file and serve witness statements, submissions and authorities in respect of the assessment of damages within 28 days of service of the claimant's documents.

(4) The assessment of damages will be conducted on a date to be determined by the court office and notified to the parties.

(5) Costs to the Claimant in the sum EC$2000.00 to be paid within 14 days of today's date.

34. I wish to thank Counsel for the parties for their submissions and authorities.

Eddy Ventose

Master [AG.]