EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: SKBHCV2009/0119

Between **DEVELOPMENT BANK OF ST. KITTS-NEVIS**

Claimant

and

GREAME HUGGINS
LESLIE WALLACE
CELESTINE STANLEY

Defendants

BEFORE: **Master Ermin Moise**

APPEARANCES: Mr. Sylvester Anthony with Ms. Rènal Edwards for the 3rd Defendant/Applicant
Ms. Deidra Williams for the Claimant/Respondent

2018: 6th March
20th March

Judgment

[1] **Moise, M.:** This is an application to set aside a judgment in default entered against the 3rd defendant (hereinafter referred to as the applicant) for failure to file both an acknowledgement of service and a defense within the time prescribed by the Civil Procedure Rules 2000(CPR). The applicant also requests an order that she be allowed to file a defense within 14 days from the date of this decision. Despite the fact that the judgment was entered by the Registrar of the Supreme Court on 8th September, 2009, it was not until the claimant's filing of a judgment summons in 2017 that the applicant filed an application to set the judgment aside.

[2] The Claim Form and Statement of Claim were filed on 4th June, 2009. The claimant brought an action against the 1st defendant as the principal borrower on a loan agreement dated 16th August, 1999. The claim against the 2nd and 3rd defendants was filed against them as guarantors of the loan to the 1st defendant. It must be noted that the 1st defendant was never served with the Claim Form or the Statement of Claim and the 2nd defendant filed a defense on 10th July 2009. The respondent asserts that the Claim Form and Statement of Claim were duly served on the applicant on 11th June, 2009. It is not now disputed that she failed to acknowledge the claim and to file a defense in the time prescribed by the CPR. As a result, the

claimant filed a request with the Court office for judgment in default both for the failure to file an acknowledgement of service and a defense. The judgment was duly entered by the Registrar of the High Court on both grounds on 8th September, 2009.

[3] It appears from the facts presented to me that the claimant made no further efforts to pursue the claim against the 1st defendant and the time for serving this claim form upon him has now elapsed. In so far as the 2nd defendant is concerned, although he has filed a defense, nothing further was done to pursue the case against him in this 9 year period. There is nothing to suggest that the claimant was intent on withdrawing the case against him and electing to proceed against the applicant only. The matter simply did not progress from there on.

[4] The notice of application for an order setting aside this default judgment was filed on 4th July, 2017. This application was amended on 12th December, 2017. The applicant applies to the Court pursuant to Rule 13.3(2) of the CPR for the following orders:

(a) That the judgment in default of the 3rd defendant's filing and serving an acknowledgement of service and a defense entered on 8th September, 2009 be set aside;

(b) That the 3rd defendant be granted leave to file a defense within 14 days from the determination of the application; and

(c) That the respondent bears the cost of this application.

[5] In relying on Rule 13.3(2) the applicant contends that there are exceptional circumstances which justify setting the judgment in default aside. The contention is simply that the registrar had no authority to grant the default judgment as this was a case in which there was more than one defendant. The applicant also argues that the grant of judgment in default both for the failure to file an acknowledgement of service and a defense is irregular and is also a ground on which the judgment should be set aside.

[6] In keeping with rule 12.9 of the CPR, a judgment in default is not to be entered against a defendant, if the claim is against 2 or more persons, unless certain provisions of the rules are satisfied. The rule states as follows:

12.9. (1) A claimant may apply for default judgment on a claim for money or a claim for delivery of goods against one of two or more defendants and proceed with the claim against the other defendants.

(2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –

(a) can be dealt with separately from the claim against the other defendants –

(i) the court may enter judgment against that defendant; and

(ii) the claimant may continue the proceedings against the other defendants;

(b) cannot be dealt with separately from the claim against the other defendants, the court –

(i) may not enter judgment against that defendant; and

(ii) must deal with the application at the same time as it disposes of the claim against the other defendants.

[7] It is a well-established principle that the Registrar of the Supreme Court has no jurisdiction to consider an application for judgment in default where there is more than one Defendant. This is the case as Rule 12.9 requires a determination of fact as to whether the criteria set within the rule is satisfied. The Court has determined that such an application must be considered by a judge or master of the High Court and not the Registrar. In the case of ***Mohammad Sadik Atassi Chirin Atasi v. Raghen Murtada and LiveNevis Developments Limited***[1] for example, Master Corbin-Lincoln noted that consideration of such an application envisaged in Rule 12.9 ***"involves a more complex analysis than is required under CPR 12.4 and 12.5"*** and in these circumstances the proper procedure would be for an application to the made to a judge or master of the court rather than a request to the Court office under CPR 12.4 and 12.5.

[8] In the circumstances there is little controversy in setting aside the judgment entered against the applicant. Indeed, counsel for the respondent, who is the claimant in this matter, has conceded, albeit orally, that the judgment ought to be set aside. In its written submissions however, it was argued by the respondent that the Court should instead allow the decision to stand as was done by the Master in the case of ***Irma Marryshow v. Stephen Mc Burnie et al***[2]***.*** In that case Master Corbin-Lincoln made the assumption that ***"the Claimant and the Court office had regard to CPR12.9 and it was determined by the Court office that the claim against the Defendants could be dealt with separately since the Court office entered judgment in default of defense against the 2nd Defendant."*** Here the Master was dealing with an application by the 1st defendant to strike out the claim against him as an abuse of process given the fact that judgment in default had been granted against the 2nd defendant. The Master was not considering an application to set the judgment aside. Notwithstanding this, I am not at all sure that the assumption made that the claimant and Court office had due regard to the provisions of CPR12.9 is a proper way to proceed in an application as the present one. The determination as to whether the matter can be dealt with separately is the very exercise which the Registrar has no authority to undertake.

[9] The main source of contention however rests on the second request made by the applicant; which is that she be allowed to file a defense some 9 years after the Claim Form and Statement of Claim was served upon her. The respondents argue that the defendant must satisfy the Court of the provisions of CPR Rule 26.8 which would have required a prompt application for relief from sanctions for her failure to file an acknowledgement of service or a

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[1] SKBHCV2015/0283
[2] GDAHCV2011/0189

defense. This rule would also require the applicant to prove by way of affidavit evidence that her failure to comply with the rules was not intentional, that there is a good explanation as to why she did not comply and that she has generally complied with all other rules, practice directions, orders or directions of the court. It would take but a brief understanding of the facts in this case to conclude that this is a tall order for the applicant to satisfy some 9 years later.

[10] The applicant on the other hand refers the Court to Rule 13.5 which states that ***"if judgment is set aside under rule 13.3, the general rule is that the order must be conditional upon the defendant filing and serving a defense by a specified date."*** In that regard, the applicant argues that the court is to embark on no further enquiry and must simply allow for the defense to be filed once it is determined that the judgment in default is to be set aside under the provisions of Rule 13.3(2). The Applicant therefore argues that Rule 26.8 is not applicable in the present circumstances.

[11] To my mind, there is much to be said about the rule under which the applicant has grounded her applicant in the first place. She contends that the basis for setting aside this judgment in default is that there are exceptional reasons for doing so and on that basis she relies on rule 13.3(2) of the CPR. It is for that reason counsel for the applicant contends that the court is to simply give directions for the applicant to file a defense in accordance with Rule 13.5 without further consideration of the circumstances.

[12] However, there appears to be some inconsistency in the manner in which such applications have been dealt with in the past. In setting aside judgment in default in the case of ***Mohammad Sadik Atassi Chirin Atasi v. Raghed Murtada and Livenevis Developments***, Master Corbin-Lincoln stated that ***"the Court has a discretion under Rule 13.3(2) to set aside a judgment if the applicant satisfies the court that there are exceptional circumstances to do so. In this case I am satisfied that there are exceptional circumstances for the reasons outlined below."***[3] These reasons, according to the Master, were, to some extent, similar to the circumstances in the present case. Although the claim also included an action for remedies other than a money judgment, the main issue for consideration was the question of whether the Registrar ought to have entertained a request for judgment in circumstances where there was more than one defendant. It would appear from the decision that the Master accepted this as an exceptional circumstance which warranted the setting aside of the judgment in default entered by the Registrar.

[13] On the other hand Master Agnes Actie in the case of ***Isula Shearman v. Devon Glasgow et al***[4], in dealing with similar circumstances as the present case, noted that ***"CPR 13.2 refers to a judgment wrongly entered i.e., the judgment being irregular as in this case. The Court must set aside the wrongly entered judgment."***[5] In that case, as in the present case, the claim was never served on the 1st defendant and the claimant sought to enter and enforce judgment against the 2nd defendant only. The Master was of the view that the judgment was irregular and could not stand, at least partially, because the Registrar had no jurisdiction to grant the application in the first place. A similar approach was adopted by Master Actie in the

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[3] See paragraph 8 of the judgment
[4] SVGHCV2011/0259
[5] See paragraph 19 of the judgment

case of ***Kenlyn Pamela Clouden v. Phil Culzac and Phillip James***[6]. It would appear that in both cases Master Actie relied on the powers conferred in Rule 13.2 as a justification for setting the judgment aside. I prefer this approach in so far as it states that what we are dealing with is an irregular judgment as opposed to a judgment which may be set aside because there are exceptional circumstances for doing so. However, I do have my doubts as to whether Rule 13.2 of the CPR is the applicable rule in the present circumstances given the limitations placed in its provisions.

[14] It must be observed that in all of these cases the Court concluded that the judgment ought to be set aside. However both Masters applied different sections of the rules in coming to that conclusion. There is need for reconciliation and this is found in the judgment of the Court of Appeal in the case of ***Deidre Pigot Edgecomb et al v. Antigua Flight Training Center***[7] where Pereira CJ noted as follows:

> ***Although the appellants claim to be invoking CPR 13.3(2), in reality the essence of their complaint is that the judgment should be considered as a nullity or one which is irregular and thus liable to be set aside ex debito justitiae pursuant to the Court's inherent jurisdiction as applied in Lazard. This would not be a matter of discretion but rather an imperative in much the same way as the imperative under CPR 13.2. This is quite different from setting aside a judgment which is considered to be regular under CPR 13.3 which assumes the existence of a regular judgment and requires the court to exercise a discretion, having regard to various factors, in determining whether or not to set it aside. CPR 13.2, in contradistinction to CPR 13.3, deals with default judgments which must be set aside for irregularity based on the non-fulfilment of the conditions set out in sub paragraphs (a) and (b) of sub rule (1). However, the mere fact that no mention is made of the court's power to set aside an otherwise irregular judgment or one which may be considered a nullity under rule CPR 13.2, does not mean that such a jurisdiction does not exist. It does not take away from the Court, its inherent jurisdiction, which it has always had and maintains for the purpose of protecting its process.***[8]

[15] The Honourable Chief Justice noted that Rule 13.3 assumes the existence of a regular judgment. In so far as sub rule (2) is concerned, if the applicant can then satisfy the Court that there are exceptional reasons for setting aside a regularly and properly entered judgment then the court has a discretion to do so. It does not speak to a circumstance where the judgment is irregular. If a judgment is irregular or a nullity then the Court's power to set it aside may not necessarily be contained in Rule 13 of the CPR at all. In fact, although Rule 13.2 gives power to set aside an irregular judgment, this power is subject to the limits placed in that section of the rules. However, the Court has an inherent jurisdiction to set aside a judgment in default if it is an irregular judgment. This may not necessarily fall within the ambit of Rule 13.2 but it is a power which is similar to that which is contained in that rule in particular.

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[6] CLAIM NO. SVGHCV 2011/0466
[7] ANUHCVAP2015/0005
[8] See paragraph 11 of the judgment

[16] In the circumstances I am not of the view that the applicant's reliance on Rule 13.3(2) is well grounded. There is nothing exceptional about the circumstances under which the judgment in default was entered by the Registrar and there are no exceptional reasons for setting it aside. What is wrong about the judgment is that it is irregular and a nullity because the Registrar had no authority to entertain the request for judgment in default in the first place. The fact that the judgment was entered in default of an acknowledgement of service as well as a defense is yet another irregularity. However, I am not of the view that much needs to be said about this given the fact that the application was to be presented to a judge or master in the first place. In setting aside the judgment, the Court is not relying on the discretion in Rule 13.3 but on its inherent jurisdiction which it "***maintains for the purpose of protecting its process".*** According to the Honourable Chief Justice therefore, the Court is to consider this application in much the same way it considers an application under Rule 13.2; in that once the irregularity is established then the court should set aside the judgment. In fact, as Ramdhani J noted in the case of ***Development Bank of Saint Kitts and Nevis v. Brian Browne et al***[9] if a judgment is entered in circumstances other than in keeping with the express provisions of Rule 12.9 then ***"the default judgment, if not acted upon, should be set aside on the court's own motion, as it would have been improperly entered, and as such an omission by the court would be contrary to the express provisions of CPR12.9 and defeat the overriding objective of doing justice to the case."***[10]

[17] As such, whilst I have no doubt that the judgment should be set aside, I am not of the view that the basis for doing so is grounded in the provisions of Rule 13.3(2) of the CPR, but rather in the Court's inherent jurisdiction to protect its process and to further the overriding objective to do justice. In so finding I am also not of the view that Rule 13.5 applies in the present circumstances as I am invited to do by the applicant. I accept the submission of Counsel for the respondent that the Court in this instance is not obligated to allow the filing of a defense without giving further consideration of the circumstances of the case. The burden would then rest on the applicant to prove the circumstances which would warrant a grant of leave to file a defense some 9 years after the fact. I am not of the view that these circumstances exist in the present case.

[18] The applicant has provided little evidence or legal submissions regarding her failure to file acknowledgement of service or defense on time. Whilst I have noted that 9 years has elapsed since she was served with the Claim Form and Statement of Claim, it does not stand to reason that the Court may not allow for the filing of a defense at this stage if the right circumstances permit. However, given the applicant's reliance on Rule 13.3(2) as the basis of her application to set the judgment aside, it is understandable that she has then relied on Rule 13.5 as a basis for her application to be granted leave to file a defense. Having determined that Rule 13.5 does not apply in the present case the question then arises at to what basis in fact and law is there to allow for the filing of a defense at this late stage? The respondent contends that this is to be found in Rule 26.8 and as I have noted earlier the applicant did little to canvass the issues contained in that section of the rules before me.

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[9] SKBHCV2012/0084

[10] See paragraph 51 of the judgment

[19] It must also be observed however, that in setting aside the judgment in default in these particular circumstances the Court is not deciding as a matter of fact that a judgment in default ought not to have been granted. The judgment is irregular and a nullity in that it was granted by an officer who did not have the authority to entertain the application. This does not preclude the Court from embarking on the exercise which ought to have been undertaken in keeping with the provisions of Rule 12.9 in the first place. In the case of ***Isula Shearman v. Devon Glasgow et al*** Master Actie came to the conclusion that the case against the 1st and 2nd defendant could not be dealt with separately as it was important to first establish the 1st defendant's primary liability before any liability could be held against the 2nd defendant. This formed at least one of the reasons for her decision to set the default judgment aside. This issue has not been determined in the present case as neither party has made detailed submissions before me sufficient to allow for a determination of that nature to be made. The facts are not as simple as that of the case in ***Isula Shearman*** where the claimant sought to make the 2nd defendant liable as owner of the motor vehicle driven by the 1st defendant. The nature of the contractual agreement between the parties in the present case must be considered before the Court can conclude that the claim against the 1st, 2nd and 3rd defendants can be dealt with separately.

[20] On the other hand in ***Mohammad Sadik Atassi Chirin Atasi v. Raghed Murtada and Livenevis Developments***, Master Corbin Lincoln, after setting aside the default judgment, granted leave for the Defendant to file an application for an extension of time to file a defense. In the present case the applicant did request leave to file a defense but, as I have noted, she did so on the wrong premise and the evidence presented so far does not satisfy me that I should grant leave to file a defense at this stage. She has simply not addressed the fact that she did not even so much as acknowledge service of the Claim Form and Statement of Claim for a period of 9 years and has provided no good explanation for this failure.

[21] In the circumstances the Court makes the following orders and directions:

(a) That the Judgment in Default entered by the Registrar on 8th September, 2009 is set aside;

(b) The applicant's request for leave to file a defense within 14 days from the date of this order is denied;

(c) The request for judgment in default filed on 27th July, 2009 by the claimant is to be treated as an application under Rule 12.9 of the Civil Procedure Rules 2000 to be determined by the Master;

(d) The Parties are granted leave to file additional affidavit evidence and legal submissions in keeping with the provisions of Rule 12.9 in order to assist the court in determining whether a judgment in default ought now to be entered against the 3rd defendant; and in particular:

i. The respondent, who is the claimant in the Claim, is to file affidavit evidence along with legal submissions within 21 days from the date of notice of this order;

ii. The applicant, who is the 3rd defendant, is to file affidavit evidence and submissions in reply within 14 days from the date of service of the respondent's submissions.

(e) The claimant/respondent is to compile an electronic bundle of the affidavit evidence and legal submissions and to submit the same to the Registry of the High Court within 7 days from the date of service of the 3rd defendant/applicant's legal submissions; and

(f) The Court office is directed to forward the electronic bundle to the Master via electronic mail for further consideration on paper.

(g) Cost will be determined after full consideration of the outstanding issues.

Ermin Moise
Master

By the Court

Registrar