EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
(Nevis Circuit)

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**: NEVHCV2018/0008**

Between **Kevin Huggins**

Claimant

and

Nisha Vanmali

Defendant

BEFORE: **Master Ermin Moise (In Chambers)**

APPEARANCES:

Midge Morton with Maurisha Robinson for the Claimant
Adrian Daniel with Michele Slack for the Defendant

2018: 6th April
12th April

Judgment

[1] **Moise, M.:** The Claimant filed an action against the defendant claiming damages for libel on 26th January, 2018. Having been served with the Claim Form and Statement of Claim, the defendant failed to file an acknowledgment of service as prescribed by the Civil Procedure Rules 2000 (CPR) and on that basis the claimant requested and obtained judgment in default on 23rd February, 2018 for an amount to be determined by the court. Armed with this judgment the claimant filed an application for an order restraining the defendant from leaving the jurisdiction of Saint Kitts and Nevis. The application also requested an order for the defendant to make an interim payment into court. This application was not initially served on the defendant despite it not being filed as an application made without notice. The defendant on the other hand filed an application to set the judgment in default aside on 21st March, 2018. All applications were heard on 6th April, 2018. I have denied the applications made by both parties and these are my reasons for doing so.

The Claim

[2] The claimant is the owner of an apartment complex in which the defendant was a tenant. The claimant describes himself in the statement of claim as a businessman. The defendant on the other hand is a medical student with the MUA in Nevis and is a foreign national. For the purpose of the current applications it suffices to say that the relationship between the parties broke down and by October, 2017 the parties were engaged in an exchange of email correspondence which

culminated in an email from the defendant on 16th October, 2017. In that email the defendant states as follows:

> ***"Kevin,***
>
> ***There was absolutely no windows left open which you would have noticed since you claim to have been in my apartment. These were the same areas that flooded from the hurricane. In which you respondent "even my house gets flooded from grout." If its physically impossible. I'm not sure why you'd make this claim. If you took a second to look at the photographs, you would see areas of flooding that are nowhere near the windows. And the areas near the windows are completely dry.***
>
> ***You have threatened me multiple times over email. You have a history of extortion and fraudulence, that anyone with internet access can see. You will be paid once you send the corrected amount: which excludes laundry facility charges on Sept 8th (since I have the student who was doing my laundry able to prove this) and remove the cleaning fees off 5-3 unit."***

[3] The claimant contends that this email was copied to Charlene Huggins who is an employee of the MUA and to Sterling Hyliger, the manager of the serenity apartments. It is further contended that this correspondence was forwarded to the defendant's father who resides abroad. On that basis the claimant filed his claim for damages for libel including aggravated damages. The claim form and statement of claim was served on the defendant on 5th February, 2018 and due to her failure to file an acknowledgment of service a judgment was entered against her on 23rd February, 2018 for an amount to be decided by the Court. The claimant states that the judgment was served upon the defendant on 28th February, 2017. The defendant on the other hand states that she was served a copy of the default judgment on 14th March, 2018.

[4] On 14th March, 2018 the claimant filed an application for an "urgent order" that the defendant be restrained from leaving the jurisdiction of Saint Kitts and Nevis unless she sooner makes an interim payment into court of a reasonable proportion of the likely amount of the final judgment after assessment by the court. The claimant submitted that given what are alleged aggravating circumstances, the amount of damages is likely to be in the region of **One Hundred Thousand Eastern Caribbean Dollars ($100,000.00EC)**. This matter was referred to me as an urgent application and on 21st March, 2018 I ordered that the claimant supplies written authority for the proposition that the court can so restrain the defendant from leaving the jurisdiction in the manner requested. These submissions were filed on 22nd March, 2018 by which date the defendant's application to set the default judgment aside had been filed. Given that the application of the claimant was not filed as a without notice application and I was not of the view that this application should have proceeded ex parte, an inter partes hearing was scheduled for 29th March, 2018 at which point further case management orders were made for a full hearing of all the applications to take place via video conference on 6th April, 2018. The applications were therefore heard on 6th April, 2018 and I shall address each one in turn.

The Claimant's application to restrain the Defendant form leaving the jurisdiction of Saint Kitts and Nevis unless an interim payment is made into the Court.

[5] The claimant in his affidavit contends that the defendant is a foreign national who is currently enrolled with MUA in Nevis. He further contends that he is aware that her tenure at the university is scheduled to come to an end on or about 15th April, 2018. Having obtained judgment against the defendant and having filed an application for the assessment of the damages to which he is entitled, the claimant submits that the defendant may leave the jurisdiction prior to this assessment. Given that she has no ties to the jurisdiction her departure creates a likelihood that he will be unable to enjoy the fruits of a judgment which he has obtained in his favour. On that premise he has invited the court firstly to restrain the defendant from leaving the jurisdiction unless she can pay a substantial amount of money into the Court.

[6] From the onset I have expressed my doubts as to the Court's jurisdiction to entertain such an application. The claimant, in his written submissions argues that the court has the power pursuant to section 26 of the **Eastern Caribbean Supreme Court Act** to grant an order of mandamus or an injunction in all cases where it is just and convenient to do so. It is further argued that the Court can grant an interim injunction where there is a preexisting cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right for the claimant. For the enforcement of this right the defendant must be amenable to the jurisdiction of the court. I am in no doubt of the Court's powers to grant an interim injunction and I accept that the claimant has obtained a judgment which he has a right to enforce; and in that regard the defendant is amenable to the jurisdiction of the court. However I am unaware of any precedent that the Court is to intervene in restraining an individual in the exercise of her constitutional right to her personal liberty in order to preserve the claimant's right to enforce a judgment; the terms of which have not yet been determined. What the claimant is in effect requesting is similar to the terms and conditions set for bail in criminal proceedings. I am not of the view that in the civil jurisdiction the Court is to intervene in such a manner.

[7] In any event, even if I were to consider the possibility of a grant of injunction as requested by the claimant I am not of the view that the balance of convenience would lie in his favour. As I have indicated, the request touches and concerns a right to personal liberty and the court, in my view, would weigh the balance of convenience in favour of the defendant. Essentially to acquiesce to the request of the claimant would be tantamount to saying to the defendant that she is barred from proceeding out of a country to which she is a foreigner unless she can find approximately $100,000.00EC to pay into court. This would not be a proper way for the court to proceed with this matter. The defendant in her affidavit filed on 4th April, 2018 states that she has no such intention to leave the jurisdiction soon and that she is unware of exactly when her tenure at the university is likely to end as she is still undergoing examination. In the circumstances the application to restrain the defendant from leaving the jurisdiction is denied.

[8] In the amended application filed on 5th April, 2018 the claimant further requested as an alternative to the grant of an interim injunction, that the court orders the defendant to provide the court with her travel plans including ticket/or travel itinerary and place of residence on which service can be effected abroad. As I have stated the defendant filed an affidavit stating that she has not made such plans and in the circumstances the court declines to grant this order in full except to say that in the event of her departure the defendant is to supply the court with an address for service out of the jurisdiction; unless of course the matter has been settled prior to her departure.

[9] In so far as it relates to the claimant's request for an interim payment into court he relies on Rule 17.1(m) which states that the Court may grant ***"an order (referred to as an "order for interim payment") under rules 17.5 and 17.6 for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay."*** In accordance with Rule 17.5 the notice required for such an application is 14 days prior to the hearing. Given that this matter was heard with some sense of urgency, at the hearing on 29th March, 2018 the parties agreed to abridge the time for service of this application and the defendant was to file affidavit evidence and written submissions in opposition. The defendant duly obliged. For the purpose of this application therefore Rule 17.6 is instructive. It states as follows:

> ***17.6(1) The court may make an order for an interim payment only if –***
>
> ***…***
>
> ***(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;***
>
> ***…***
>
> ***(d)(except where paragraph (3) applies), it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs;***
>
> ***(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.***

[10] The claimant contends that the application for an interim payment may not have been necessary save for the fact that the defendant's tenure in the jurisdiction is fleeting and that her departure is imminent. It is worth repeating that the defendant disputes this and states that she has no imminent plans to leave the jurisdiction. The claimant further contends that in keeping with the principles outlined in the case of ***Joseph Pinder and Trishel Wettherill***[1] the pleadings in this case do not give rise to any competing version of the facts given that the claimant has already obtained judgment which is likely to be assessed for a significant amount. For reasons which I will explain later in this judgment I have denied the application made by the defendant to set the judgment aside and in so far as that is the case I accept that there is no question arising regarding a competing version of the facts in this case. However, given that the defendant has stated that she has no imminent plans to leave the jurisdiction it is difficult, without more, to simply accept the proposition that her departure is imminent.

[11] However, it is in the requirement under 17.6(d) that I disagree with the submissions of the claimant. The rule states that the court is to only make an order for an interim payment into court if it is satisfied that the claimant will obtain damages for a substantial amount of money. The claimant relies on a number of authorities in support of the proposition that the damages to be assessed in this case is likely to be in the region of $100,000.00EC. The court is to proceed with some measure of caution in addressing this issue as I must be cognizant of the fact that this is not the actual assessment of damages. However, in order to determine whether this requirement of the rule has

[1] ANUHCV2011/0581

been satisfied I must assess the likelihood that the claimant will obtain damages in the approximate amount submitted. I do not accept that this is the case.

[12] The claimant refers the court to the case of ***Charles Hunte v. Loretta Phillip et al***[2] where Master Eddy Ventose (ag) stated the following at paragraphs 18 and 19:

> ***18. What is clear from this exposition is that many factors are to be taken into account including: (1) position and standing of a claimant and (2) the gravity of the allegation, especially insofar as it closely touches a claimant's personal integrity (Hunt v Times Newspaper Ltd [2013] EWHC 1868 (QB) (at [263]). In Sealy v First Caribbean International Bank (2010) 75 WIR 102, Chief Justice Sir David Simmons stated the following in relation to the quantum of damages to be paid for defamation (at [60]):***
>
> > ***A court is entitled to have regard to the position and standing of the plaintiff in the nature, mode and extent of the publication; the presence or absence of an apology; the conduct of the defendant before, during and after commencement of the action; and the plaintiff's injured feelings, distress, embarrassment and humiliation.***
>
> ***19. It must be remembered that the main purpose of an award of damages for libel is to compensate the Claimant for the damage done to his/her reputation. The compensation paid must take into account the damage to the reputation and the other factors mentioned above in the judgment of Sir Thomas Bingham MR in John v MGN. According to the authors of Gatley on Libel and Slander, damages for defamation serve three purposes: (1) to act as a consolation to the claimant for the distress he suffered from the publication; (2) to repair harm to his reputation; and (3) as a vindication of his reputation (at para. 9.2)***

[13] In this judgment Master Ventose (ag) assessed the damages to which the claimant in that case was entitled. Despite the aggravating factors assessed, not one of the authorities referred to by Master Ventose was an award of damages in the region of $100,000.00EC made. In so far as his assessment in the case was concerned he stated the following at paragraph 25:

> ***"In light of all the evidence I am of the view that the Claimant suffered damage to his reputation as a result of the defamatory statements made by the First Defendant and published by the Second and Third Defendants. The publication was done using a popular radio station, which has wide listenership in Antigua and Barbuda and perhaps elsewhere, and this has impacted on the extent of damage to reputation. The Defendants have not apologised for the statements made and published by them. The Claimant through his dealings with the members of the Association may have had a heavy hand but this does not justify the publication by the Defendants of false statements defamatory of the Claimant. Taking into account all the circumstances, the award of $25,000.00 is justified to: (1) to act as a consolation to the Claimant for***

[2] ANUHCV2014/0449

the distress he suffered from the publication; (2) to repair harm to his reputation; and (3) as a vindication of his reputation."

[14] Notwithstanding reference to this decision the claimant relies on number of authorities in which the award of damages was substantial. However, I agree with counsel for the defendant where it is argued that the cases referred to by the claimant can be distinguished from the present circumstances. In the case of ***Roxane Linton v. Louisiana Dubrique and the Attorney General***[3], the damages were awarded in the sum of $120,000.00EC. However, in that case not only was the extent of the publication much broader than in the present case but there was actual evidence of a significant impact the publication had on the reputation of the claimant. The claimant had to resign from her job and was unable to obtain gainful employment as a result of the libelous material published against her. I am not of the view that a similar situation arises in this case. Similarly in the case of ***Dr. Philbert Aaron v. Abel JNO Baptiste***[4] the libelous material was contained in a song performed by the defendant during the carnival celebrations in Dominica. This song was played over the radio to a broad audience. The claimant was also an individual of national repute. The circumstances are not similar to the present case.

[15] In the circumstances, whilst I agree that the claimant is entitled to damages, I am not of the view that the damages are within the range of the cases referred to by the claimant. To my mind, the range of cases considered by Master Ventose (ag) in ***Charles Hunte v. Loretta Phillip et al*** is more in keeping with the range of damages which the claimant may be entitled to. As stated earlier I do come to this decision cautiously as whatever determination is made in so far as this current application is concerned ought not to detract from the claimant's right to pursue a full hearing on the assessment of damages to which he is entitled. However, on balance I am not of the view that the damages in this matter is likely to be as substantial as asserted by the claimant. In the circumstances the application for an interim payment is denied.

The Defendant's application to set aside the judgment in default

[16] The defendant submits that the default judgment entered on 23rd February, 2018 ought to be set aside on 3 alternative grounds. It argued firstly that in accordance with Rule 13.2(1) (a) of the CPR the judgment ought to set aside as all of the requirements of Rule 12.4 were not satisfied. In the alternative it is argued that the Court ought to exercise its discretion and set the judgment aside under Rule 13.3(1) of the CPR on the basis that the defendant has filed an application as soon as was reasonably practicable, that there is a good explanation for her failure to file an acknowledgment of service and that she has a real prospect of successfully defending the claim against her. Lastly it is contended that in accordance with Rule 13.3(2) there are exceptional reasons for setting this judgment in default aside.

[17] Rule 13.2(1) mandates the judge or master to set a default judgment aside if it was wrongly entered because in the case of a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied. Rule 12.4 states as follows:

The court office at the request of the claimant must enter judgment for failure to file an

[3] DOMHCV2011/0062
[4] DOMHCV2013/0015

acknowledgment of service if –

(a) the claimant proves service of the claim form and statement of claim;

(b) the defendant has not filed –

(i) an acknowledgment of service; or
(ii) a defence to the claim or any part of it;

(c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;

(d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) the period for filing an acknowledgment of service under rule 9.3 has expired; and

(f) (if necessary) the claimant has the permission of the court to enter judgment.

[18] The defendant argues that in accordance with subpart (d) of Rule 12.4 of the CPR a judgment can only be entered if the claim is only for a specified sum of money. Rule 2.4 of the CPR states that a claim for a specified amount of money means "***a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract*** …" In the claimant's claim for damages for libel he does not claim a specified sum of money which can be ascertained or is ascertainable, but rather for damages to be assessed. The defendant relies on the case of ***INTEGRAL PETROLEUM SA v. MELARS GROUP LIMITED***[5] where Bannister J (ag) states the following at paragraph 12:

> ***"It seems to me plain that in order for a claimant to be in a position to request default judgment on a claim for a specified sum of money, his statement of claim must be such as to enable the Court Office to see whether the sum for which judgment is claimed is (assuming the facts pleaded to be true) an ascertained or ascertainable sum recoverable under a contract ... If the Court Office is not in a position to make that determination from a consideration of the pleading as it stands, the request should be rejected on those grounds."***

[19] His Lordship went on to consider the judgment granted in that particular case and came to the conclusion at paragraph 20 that the claim was ***"not a claim for a specified sum of money because, in short, it is not a claim for an ascertained or ascertainable sum payable to Integral pursuant to the provisions of a pleaded contract. It follows that the conditions in CPR 12.4 are not satisfied and that the judgment must be set aside in accordance with CPR 13.2(1)(a) accordingly."*** In essence Bannister J was of the view that there was no jurisdiction to grant a judgment in default of a failure to file an acknowledgment of service unless the claim was

[5] BVIHC (COM) 0122 of 2015

for a specified sum of money. Put differently it would suggest that if the claim is for an unspecified sum of money then a judgment in default simply cannot be entered for the failure to acknowledge service.

[20] In my view there is one other interpretation of subpart (d) in Rule 12.4 where it states that one of the requirements is that "***the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it".*** This can be interpreted to mean that in a circumstance where there is only a case for a specified sum of money, the judgment ought not to be granted if the defendant has filed an admission of liability. In that instance the proper course of action would be to enter judgment on admissions rather than a default judgment. On that interpretation subpart (d) does not preclude the grant of a judgment in default for failure to file an acknowledgement of service where there is an unspecified sum of money but is rather prescribing that a default judgment ought not to be entered under Rule 12.4 in a claim only for a specified sum of money if there is an admission of liability filed by the defendant. The force of this interpretation is enhanced by the content of the prescribed from 32 of the rules which is headed ***Form of Judgment for amount to be decided by the Court.*** This form refers to a circumstance where a judgment in default is entered not for a specified amount but for an amount to be determined by a judge or master of the court. In its content is goes on to state as follows:

> ***NO ACKNOWLEDGEMENT OF SERVICE/DEFENCE having been filed by the Defendant herein, it is this day adjudged that Judgment be entered for the Claimant for an amount to be decided by the Court.***

[21] Whilst the content of the form cannot be equated with the express provisions of the rules itself, to my mind it can be argued that rule 12.4 did not set out to bar the grant of judgment in default of filing an acknowledgement of service in all cases unless the claim was for a specified sum of money. The attached form certainly envisages such a circumstance as it has included the failure to file an acknowledgement of service in the body of the form as one of the bases for which a judgment in default for an amount to be determined by the Court is granted.

[22] I am aware that this interpretation is in contradiction to that of Bannister J in the ***Integral Petroleum*** case. Given that the decision was one of a judge in chambers as in the present case, the question is whether it would be proper to depart from this decision. In the circumstances I am of the view that it is necessary to do so. I am not of the view that subpart (d) of Rule 12.4 creates a barrier to the grant of a default judgment for the failure to file an acknowledgement of service in all cases other than those in which only a specified sum of money is claimed. What the rule means in my view is that where the only claim is for a specified sum of money a default judgment ought not to be entered if the defendant has filed an admission of liability. I however, have no doubt that further clarification may be needed on this section of the Rules but in the circumstances I have determined that the judgment ought not to be set aside on the basis of Rule 13.2(1) as submitted by the defendant for the reasons explained above.

[23] The defendant has also submitted that the Court should exercise its discretion and set the default judgment aside under Rule 13.3(1) of the CPR. There are 3 conditions which must be satisfied in order for the Court to exercise this discretion. It is now a basic principle that all 3 conditions must

be met. The rule states that ***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 defense as the same case may be; and***
>
> ***(c) Has a real prospect of successfully defending the claim.***

[24] The defendant argues firstly that she was served with the judgment on 14th March, 2018. 5 days later on 19th March, 2018 she instructed her attorneys to set the judgment aside. She states that she was informed by her attorneys that they attempted to obtain the documents pertaining to this case from the registry of the High Court on 20th March, 2018 in order to assist in the filing of the application. The application was eventually filed on 22nd March, 2018. The claimant, in his affidavit filed on 4th April, 2018 states that the default judgment was in fact served on 28th February, 2018 and not 14th March, 2018 as asserted by the defendant. He states that an affidavit of service sworn to by a Court bailiff C John Arthurton is part of the Court's file and substantiates his assertion. However, neither the bailiff nor the defendant was cross examined on their assertions and the Court is unable to reconcile the distinction in the evidence. In any event, even if I were to accept the date provided by the claimant I am of the view that the application to set the default judgment aside was filed within a reasonable time. There had not been a significant period of time between which the defendant was served with the judgment and the time in which she gave instructions to her attorneys to make this application.

[25] The defendant submits that she has given a good explanation for her failure to file an acknowledgement of service in the time prescribed by the rules. She states that upon receiving the claim form she forwarded the documents to her father as he was in discussions with the claimant and his attorneys. She was of the view that the matter was being attended to. She states in her affidavit that she was not aware that an urgent response was required by the rules as she was unfamiliar with the court process. I am not of the view that this is a good explanation for the defendant's failure to file an acknowledgment of service. The Court would certainly set the wrong precedent if it were to decide that mere inadvertence was a good reason for one's failure to file an acknowledgment of service. The claim form and statement of claim contain attached documents which set out the defendant's duties upon receipt of the claim. It is not enough for the defendant to state that she forwarded the documents to her father and was of the view that he was dealing with the matter. It was her responsibility to comply and she has not provided a good enough explanation for her failure to do so. Given that the criteria in Rule 13.3(1) is conjunctive it is not necessary to consider whether the defendant has a real prospect of successfully defending this claim. Her application under this rule must fail.

[26] In paragraph 16 of her affidavit the defendant asserts her belief that there are exceptional circumstances which warrant setting aside the judgment in default. She however does not particularise what those circumstances are. In so far as the legal submissions are concerned there was nothing pointed out which satisfies me that there are exceptional reasons for setting this

judgment aside. It was argued that the overriding objective of doing justice in the case would warrant setting aside the judgment. However, I do not accept this submission. The defendant was served with the claim form and statement of claim with clear instructions as to what was to be done on order to comply with the rules of procedure. She failed to do so.

[27] In the circumstances I make the following orders and directions:

(a) The claimant's application for an order restraining the defendant from leaving the jurisdiction of Saint Kitts and Nevis unless an interim payment is made into court is denied;

(b) The defendant is to provide the court with an address for service out of the jurisdiction in the event that she is due to depart from Saint Kitts and Nevis;

(c) The defendant's application to set aside the judgment in default entered on 23rd February, 2018 is denied;

(d) There will be no order as to costs

(e) The matter will now take the normal course in accordance with the CPR2000

Ermin Moise
Master

By the Court

Registrar