EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
(NEVIS CIRCUIT)

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**: NEVHCV2017/0149**

Between **OCEAN REEF RESORTS LTD.**

Claimant

and

NEVIS ISLAND ADMINISTRATION

Defendant

IN MASTERS COURT

BEFORE: **Master Ermin Moise**

MADE ON: The 5th day of March, 2018

ENTERED: The , 2018

APPEARANCES:

Rayana Dowden for the Claimant
Terrence Byron with Rhonda Nisbett – Browne for the Defendant

2018: 5th March
12th April

Judgment

[1] **Moise, M.:** This is an application to set aside a judgment in default entered against the defendant on 11th December, 2017 for failure to file an acknowledgment of service in keeping with Part 12.4 and 12.10 of the Civil Procedure Rules 2000(CPR). The defendant applies to this court pursuant to Rule 13.2(1) of the CPR which states that ***"the court must set aside a judgment entered under Part 12 if the judgment 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.*** The applicants have further contended that the judgment ought to be set aside ***ex debito justitiae*** as part of the Court's inherent jurisdiction**.** The applicants have also argued that the Court office was not at liberty to enter a judgment in default pursuant to rule 12.10(1)(b) when the request for

judgment in default was made pursuant to 12.10(1)(a) in that the claim is for an unspecified sum of money.

[2] The claimant filed a claim form and statement of claim against the defendant, Nevis Island Administration, on 15th November, 2017 claiming damages for breach of contract. By way of affidavit of service filed on 5th December, 2017, Trishna Stevens, paralegal employed with Webster Chambers, states that the claim form and statement of claim, along with the prescribed documents attached, were served on Ms. Nadia Newton, the secretary of the Legal Department of the Nevis Island Administration, on 16th November, 2017. According to the affidavit of service, Ms. Newton signed as having authority to accept service of the claim at 12:35pm on the said date. Trishna Stevens goes on to state that on 4th December, 2017 she searched the Court file and observed that no acknowledgment of service had yet been filed by the applicant. As a result of this a request for entry of judgment in default was filed with the registry of the Supreme Court on 5th December, 2017 pursuant to rule 12.4 and 12.10(1)(a) of the CPR. Judgment was then entered by the Registrar on 11th December, 2017 for an amount to be decided by the Court in accordance with 12.10(1)(b) rather than 12.10(1)(a) as requested by the claimant.

[3] On 22nd December, 2017 the applicant applied to have this judgment set aside. The applicant has included a total of 20 grounds upon which the application is based. It suffices to state however that one of the main contentions of the applicant is that the claim form and statement of claim was not served personally on the Nevis Island Administration in keeping with the provisions of CPR5.1(1) in that the legal department is not authorized to accept personal service on behalf of the applicant. Despite this however, I observe that the application was not initially accompanied by an affidavit in keeping with CPR 13.4. An affidavit in support was however filed on 13th February, 2018 only after the respondent filed its own affidavit in opposition to the application and raised certain pertinent issues therein. Further, the applicant has failed to attach a draft defense to its affidavit as is stipulated in Rule 13.4 of the CPR. In my view this may very well be fatal to an applicant to set aside a judgment in default given the mandatory requirements of rule 13.4. However, in the event that I am wrong I will consider the substance of the application.

[4] The Nevis Island Administration is established by virtue of section 102 of the Constitution of Saint Christopher and Nevis. The section states that ***"there shall be a Nevis Island Administration, which shall consist of: (a) a Premier; and (b) two other members or not less than two nor more than such greater number of members as the Nevis Island Legislature may prescribe, who shall be appointed by the Governor-General."*** It is my understanding, based on the representations made by Counsel for both parties at the hearing of the application, that the legal department is an office within the general structure of the Nevis Island Administration. It has not been established by any specific legislation, neither is the department referred to in the constitution; but it nonetheless forms part of the day to day affairs of the Nevis Island Administration.

[5] By way of affidavit dated 13th February, 2018, the current Deputy Premier, Mr. Alexis Jeffers states that at the time of the filing of the claim form in this case the Administration consisted of the Premier, Honourable Mr. Vance Armory, deputy Premier Honorable Mark Brantley and himself. He goes on to contend that the claim form was not personally served on any of those persons but was rather served on the secretary of the legal department of the applicant. The contention is simply that this is not personal service for the purpose of rule 5.1(1) of the CPR.

[6] The respondent on the other hand argues that the claim from was properly served on the applicant in keeping with the provisions of rule 5 of the CPR. In affidavit dated 26th January, 2018 Trishna Stevens claims at paragraph 7 that court proceedings and other documents are routinely served on the secretary and other staff of the legal department. That assertion was not challenged by the applicant and to a great extent remains uncontroverted. There was no cross examination in this regard. The affidavit goes on to refer to ongoing judicial review proceedings involving the same parties in the present case and states that the service of the court proceedings in that matter was in fact effected upon the legal department of the applicant administration. It goes on to say that during a hearing of the judicial review proceedings, counsel on behalf of the Nevis Island Administration referred to the current proceedings in an argument that there was an alternative remedy available to the respondent in lieu of judicial review. In particular, paragraph 13(g) of the affidavit states that ***"neither Ms. Nisbette-Brown nor Mr. Byron disputed Ms. Bullen-Thompson's contention that Mr. Byron told her about the contractual claim nor did they seek to assert that the claim had not been validly served."*** The respondents essentially argue that at the least the legal department has ostensible authority to accept service on behalf of the applicant based on the past precedent set in previous cases.

[7] It is to be observed that this affidavit of Trishna Stevens was filed prior to that of the deputy Administrator of the applicant. Despite this, no attempt was made to controvert the evidence that counsel for the applicant had acknowledged in other proceedings that the claim currently under review was filed against the applicant and that there was service of the claim. In fact in so far as this issue is concerned, paragraph 15 of the affidavit of Mr. Alexis Jeffers is instructive and states as follows:

> ***"if on the other hand the Claimant contends that it does not have to be reasonable to stand on what it claims to be it rights, then the Defendant must be similarly entitled to claim its rights to be personally served in the matter, and to insist that the Claim Form was neither proved to be personally served, nor in fact personally served on the Defendant."***

[8] Taken in the context of the preceding paragraphs it does not appear that the applicant is contesting the fact that they were aware that the claim form was served on the legal department and in fact had knowledge of the Claim, but are rather claiming a right to be personally served in light of the actions of the respondents. This must also be taken in light of what is uncontroverted evidence that claim forms and statements of claim are routinely served on the legal department of the applicant. On the other hand, the applicant requests that the Court considers the provisions of rule 5.6 of the CPR which states as follows:

> ***If a legal practitioner –***
> ***(a) is authorised to accept service of the claim form on behalf of a party; and***
> ***(b) has notified the claimant in writing that he or she is so authorised; the claim form must be served on that legal practitioner***

[9] In that regard, the applicants argue that the secretary of the legal department is not a legal practitioner and not authorized to accept service of the claim form, neither was there any notification to the respondent that the secretary was so authorized. The applicant therefore submits that service on the secretary of the legal department cannot constitute personal service for the

purpose of satisfying rule 5(1). If this argument is to be accepted then it would suggest that the legal department of the applicant is to be treated as an independent firm of legal practitioners who must first notify litigants in writing of their authorization to accept service on behalf of the administration and that further, the secretary, who is not a legal practitioner cannot accept service on behalf of the applicant.

The Court's Analysis

[10] Firstly, it is not entirely clear as to whether the applicants are contending that the claim form and statement of claim should be served personally on at least one of the three individuals who make up the Nevis Island Administration. However in so far as this issue is concerned I refer to the case of **Bertha Compton v. the Attorney General**[1] where Rawlins JA stated the following at paragraph 14***:***

> ***A person is not an Attorney General in a private capacity, but in an official capacity. Service in that capacity should not be at his residence but at the office where he works in the official capacity. An Attorney General may be a single person who has to travel on government business. Little good purpose could be achieved by requiring service at his residence when he might not be available there? A process server who goes to serve a document on the Attorney General should not be required to go to his residence to serve it if the Attorney General is not available at his office.***

[11] Despite what may be the distinguishing elements of this case to that of ***Bertha Compton,*** I am of the view that the same principles apply. The issue for consideration in that case was whether the Attorney General had to be served at his personal residence. However the Court did decide that the Attorney General did not have to be served personally but that it would suffice if the documents were served upon his office. In my view it would not be correct to suggest that in order for there to be proper service on the Nevis Island Administration personal service must be effected on one of the three individuals duly appointed by the Governor General. Persons holding such offices do not do so in their personal capacity and it would be unreasonable to suggest that a process server must have an obligation to find these individuals wherever they may be to effect personal service upon them. For all intent and purposes the Nevis Island Administration is an office and it would suffice for service of process to be left in an office with due authority to accept service of the court process on behalf of the Administration. One of the questions for determination is whether the legal department is such an office.

[12] From the onset I wish to state that I do not accept the submissions of counsel for the applicant in so far as it relates to the applicability of Rule 5.6 of the CPR. I am of the view that the legal department of the applicant cannot be equated to an independent law firm who must first provide written notification of its authority to accept service on behalf of the applicant. Whilst it can be successfully argued that the legal department does not have the constitutional status of the office of the Attorney General for example, there is no doubt that this legal department has become part and parcel of the administrative functions of the Nevis Island Administration with specific mandate to provide legal services to the administration. Mr. Byron, on behalf of the applicants argued that the

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administration reserved the right to instruct any counsel it so desired to represent them in any particular manner and was not obligated to use the services of the legal department. In so far as that may be the case the situation is no different from the office of the attorney general. In most islands including Saint Christopher and Nevis, the governments routinely seek outside counsel to assist with the prosecution of matters; but this does not mean that the service of the court process may not be effected on the office of the legal department.

[13] The respondents in their affidavit and written submissions argue that it is routine for service of court process to be made on the legal department and that it is not at all unusual for the secretary or an individual within the department to sign and accept service on behalf of the applicant. In fact, the evidence suggests that in judicial review proceedings involving the same parties the claim form and statement of claim were served on the legal department in much the same way that it was done in this particular case. The applicants do not controvert this evidence. To my mind having found that there is no obligation to serve the claim form personally on the individuals appointed to the office of the Nevis Island Administration, I am also of the view that service of the claim form and statement of claim on the legal department of the Administration is proper service for the purpose of rule 5 of the CPR. It would be wrong to suggest that the applicant, by its past conduct, can set the precedent that service of the claim form on the legal department within the administration is acceptable and then claim a right to demand personal service as contained in the affidavit of Mr. Jeffers whenever it so suits them. The documents must be served on an office within the administration sufficient to draw the claim to the attention of the relevant personnel; and I am of the view that the legal department is a proper office on which service of the court process can be effected given the uncontroverted evidence that this has been the practice in the past.

[14] In the circumstances I find that the service of the claim from and statement of claim on 16th November, 2017 was in fact proper service which created an obligation on the part of the applicant to file an acknowledgment of service within 14 days from the date thereof. Therefore, I do not accept that the judgment in default ought to be set aside under the provisions of rule 13.2 of the CPR. I am also not of the view that there are grounds to invoke the Court's inherent jurisdiction in order to set this judgment aside ***ex debito justitiae***. This is a jurisdiction which the court has always retained for the purpose of protecting its process and to further the objective of doing justice in given circumstances. There is no need for this jurisdiction to be invoked in this case, having found that service of the court process on the legal department suffices for the purpose of CPR 5.1.

[15] The applicants have also contended that the registrar had no authority to enter judgment in default on the basis of the provisions of rule 12.4 and 12.10(1)(b) of the CPR. It is argued that the claimant filed a request as though this was a claim for a specified sum of money when it was not. Indeed the claimant requested judgment for a specified sum whilst the registrar entered judgment for an amount to be determined by the Court. In that regard the applicant contends that a judgment entered contrary to the terms requested by the claimant cannot stand.

[16] It is argued that the mere indication of an estimate of damages is insufficient to deem this a case for a specified sum of money. In the claim form and statement of claim the claimants claim damages for breach of contract in the following manner:

(a) Loss of profits estimated to be approximately $68,000,000.00US

(b) Further or in the alternative, costs and expenses thrown away in the sum of $11,522,000.00US less the residual value of the expenditure;
(c) Further or in the alternative, wasted management costs;
(d) Further or alternatively the loss in value of the development property;
(e) Further or alternatively, further costs of acquiring the foster land estimated to be $3.998million

[17] 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 so far as that is the case I have little difficulty in deciding that the claim filed by the claimant is not for a specified sum of money. In all instances where monetary compensation is claimed it speaks to an estimate or an approximate amount which in my view was not ascertained, neither were they ascertainable as a matter of arithmetic. In the circumstances I find that this is not a claim for a specified sum of money and the claimant would not have been entitled to judgment on the terms requested. What I do not agree with however is the assertion that the Registrar ought to have simply rejected the request as opposed to relying on the provisions of rule 12.10(1)(b). The basis of the grant of judgment in default pursuant to Rule 12.4 is that the defendant has failed to file an acknowledgement of service within the requisite time; provided of course that all the conditions of 12.4 are satisfied. Rule 12.10 on the other hand deals with the terms upon which the judgment is granted. There is a distinction to be drawn between the claimant's entitlements to judgment in default and the nature of the judgment which should be entered. In this case, the claimant clearly requested judgment for the applicant's failure to file an acknowledgement of service, the conditions for which were in fact satisfied. The registrar however, entered judgment on the terms which were warranted within the provisions of 12.10 and in my view her actions were well within her powers. I do not find that this judgment was granted on her own initiative but rather upon a request by the claimant albeit in the proper terms in keeping with the provisions of 12.10(1)(b) of the CPR.

[18] In the circumstances the application to set aside the judgment in default dated 11th December, 2017 is denied. The general rule is that the successfully party is entitled to an award of costs in his favour. I therefore award costs on this application in the sum of $1,000.00EC.

Ermin Moise
Master

By the Court

Registrar