[2023] JMCC Comm 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2021 CD00075

BETWEEN	**MARLYN DANIEL**	**1ST CLAIMANT**
AND	**JOHN DANIEL**	**2ND CLAIMANT**
AND	**WEBSTER GRANT**	**1ST DEFENDANT**
AND	**RAYMOND GRANT**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Shanique Golding instructed by Deacon & Associates for the Applicants

Mr John Givans instructed by Givans & Company for the Respondents

Heard: April 13 & May 3, 2023

Application to set aside default judgment – Default Judgment entered at inter partes hearing binding on parties - Whether five-month constitutes delay – Issues raised on application not reviewable by Judge of concurrent jurisdiction - Rules 1.1,13.3, 42.2, Civil Procedure Rules, 2002

WINT-BLAIR, J

[1] The applicants seek orders from this court to set aside the default judgment of The Honourable Mr Justice Batts as well as permission to file and serve their defence to the claim.

[2] A party hoping to be successful to set aside such a judgment must meet the requirements of rule 13.3 of the Civil Procedure Rules ("CPR"), which provides as follows:

"13.3 (1) The court may set aside or vary a judgement entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

(b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[3] In **Ameco Caribbean Inc Appellant v Seymour Ferguson**[1], the Court of Appeal said that **Evans v Bartlam**[2], has long since been used to guide applications to set aside default judgments in our jurisdiction:

> *"…[U]nless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."*

[4] This case has been cited by both sides and has guided this court in the determination of the issues at bar.

The Judgment

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[1] [2021] JMCA Civ 53

[2] [1937] 2 All ER 646

[5] A judgment in default of defence was handed down by Batts, J on May 24, 2022. The said judgment was entered in Judgment Binder number 778 and Folio number 379. The judgment was regularly entered after an inter partes hearing with counsel for both parties. Those proceedings engaged Rule 42.2 of the Civil Procedure Rules, which as was pointed out by Mr Givans, binds the parties present whether in person or by their attorneys-at-law on the date of delivery of the judgment. There can therefore be no issue of service. The relevant date is May 24, 2022.

Whether the applicants have a real prospect of successfully defending the claim

[6] This issue is the primary consideration on this application. The applicants rely on a joint affidavit, in which they depone, that they are the registered proprietors of lands at Beverly, St. Ann comprised in the Certificate of Title registered at Volume 466 Folio 76 of the Register Book of Titles. They entered into several agreements with the respondents concerning the said lands on or about July 2015 and October 2017, with the intention that the respondents would be investors in the development of the said lands.

[7] The applicants deponed that by agreement, the respondents loaned the sum of Fourteen Million dollars to them as their investment in the said lands. The sum of Four Million dollars was agreed as the interest to be paid on the sum loaned. In exchange for this investment, the respondents were to receive a total of six lots for a price of Three Million dollars, which was the going price for the lots then.

[8] The applicants continued by saying that the agreement was drafted by the respondents' lawyers, and they had not been properly advised of the "contents to which we were signing to." They stated that at the time of the preparation and signing of the agreement, they were not represented by an attorney-at-law nor were they advised of the necessity to retain one.

[9] Further, they deponed that upon being served with the claim and particulars of claim, they retained the firm of Deacon & Associates and an acknowledgment of service was filed in the matter. The applicants deponed that they elected to pay the sum of Eighteen Million dollars as the "lots would not be available." The applicants said they elected to pay this sum based on the "respondents' contrary intentions of the nature of our investment." The applicants stated that they never intended to sell eleven lots for the sum of Fourteen Million dollars as is contended by the respondents.

[10] The applicants posit that they discussed with the respondents their role as property developers and that the respondents were aware that the number of lots had not been agreed between the parties. The applicants said that there was no agreement as the lands had not yet been surveyed, infrastructure development had not yet commenced, and they had not received the certificate of compliance from the St Ann Municipal Corporation. The agreement between the parties as to the number of lots, would only be based on the amount invested towards the development and how much of the expenses of the development could be offset based on the investment.

[11] After the survey and infrastructure development had commenced the respondents agreed to acquire six lots, as that was what their investment would yield.

[12] The applicants depone that the six lots and all other lots have been sold to bona fide purchasers. However, it is still their intention to pay Eighteen Million dollars to the respondents in three instalments of Six Million dollars over the period of nine months.

[13] The respondents argue that there is no proof that the claimants are other than purchasers in the documents before the court. There is no documentary proof of

an investment by the claimants in a development or otherwise. They contend that the applicant's assertions are all without proof.

[14] Having considered the submissions and the evidence, I find that in addition to the lack of documentary proof, all the matters relating to the subject land now being raised before this court are matters which it would have been expected were raised at the inter partes hearing and considered by the learned trial judge. If they were not, then they ought to have been, as this is a court of concurrent jurisdiction to which no appeal lies.

[15] Further, there is no evidence before me to address why these matters are being raised now. In other words what are the considerations which would move this court, to address the issues being raised by the applicants after an inter partes hearing before another judge on May 24, 2022? I would go further to indicate that the learned judge, held a second inter partes hearing on July 14, 2022, to address the issue of specific performance and he made orders on that date in favour of the claimants. There were therefore, two opportunities to raise these matters before Batts, J. There has been no explanation as to why they have been placed before this court.

[16] There are no documents before this court to suggest that the claimants, had made an investment of Fourteen Million dollars. Similarly, there is no agreement in writing before this court for the sale of six lots at Three Million dollars each.

[17] Additionally, the applicants were advised of the need to obtain independent legal advice by Ann Marie Brown, attorney-at-law and a certificate of independent legal advice rendered by Michael Williams, attorney-at-law is Exhibit 2 to the affidavit of the first claimant. The legal position is, as indicated by Mr Givans, that the transaction may only be set aside for the failure of the attorney to disclose to the

client, that he has a personal interest in the transaction unknown to the client or where there is a breach of fiduciary duty owed to the client.

[18] In the leading case of **Clarke Boyce v Dorothy Dean Mount**[3] the Board said:

> *"There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather it is the position that he may act provided that he has obtained the informed consent of both to his acting."*

[19] The claim was filed on March 8, 2021, the affidavit[4] of Lilieth Deacon, attorney-at-law of Deacon & Associates, said that she was retained sometime in 2016 and had carriage of sale in respect of the subject land indicated above. Counsel deponed to being instructed to assist the applicants to obtain splinter titles for the subject lands. She said she was never presented with either an agreement for sale or for a loan in respect of the lots now being claimed by the respondents.

[20] It is against this backdrop that, the applicants contend that they had not received proper advice and did not know what they were signing. This assertion would be more consistent with an agreement in July 2015 but not for any after 2016 as counsel Mrs. Deacon, had by then been retained by the applicants concerning the subject lands. The evidence of counsel is that she was not presented with any of the documents now in contention on this application, such as the executed agreement for sale dated October 30, 2017, and the second addendum to the loan agreement.

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[3] Privy Council Appeal No. 49 of 1992

[4] Filed on October 20, 2022

[21] The applicants commence their affidavit[5] to this application, by stating that they are the registered proprietors of the subject lands. The affidavit of Mrs Deacon, states that the applicants were seeking buyers to obtain funds for the subdivision to be completed. This is not the same as stating that any of the lots have been transferred to bona fide purchasers. The copy registered title exhibited to counsel's affidavit shows the applicants are the registered proprietors of the subject lands. There was no documentary evidence adduced by the applicants before me to bolster the assertion that the lots made subject of the order of Batts, J are no longer available.

[22] In fact, the affidavit[6] of Kori Soares for the respondents attaches a search certificate bearing number 2459375 issued on February 3, 2023, at 2:50 pm which bears the seal of the Office of Titles. The applicant for the search certificate is Ms. Soares. The certificate shows that caveat numbered 2148995 has been registered against lots 27, 29-32, 37 and 38, caveat numbered 2148997 against lots 17, 28 & 36 and caveat numbered 2148998 has been registered against lot 18. Each of these caveats bears a registration date of October 2, 1998.

[23] In the case of **Dipcon Engineering Services Limited v Gregory Bowen and The Attorney General of Grenada**[7] , the Board said this at paragraph 28:

> *"Of course, the merits of the proposed defence are of importance, often perhaps of decisive importance upon any application to set aside a default*

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[5] Filed on October 20, 2022

[6] Filed on February 28, 2023

[7] [2004] UKPC 18

judgment. But it should not be thought that it is only the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them…will also be material."

[24] In **Ameco** at paragraph [59], after indicating that a reasonable explanation is not always necessary and that there is no rule that the court must be satisfied that one exists, the Board referred to **Evans v Bartlam**[8] where Lord Atkin indicated that an explanation for allowing a judgment to be entered is one of the matters the court will have regard to. The Board, at paragraph 30, said:

"Important too will be any delay in applying to set aside the default judgment and any explanation for this also."

[25] The explanations proffered which are the failure to obtain legal advice and matters concerning the contract and its contents are without merit.

[26] This court notes the submission by the applicants that the default judgment was irregularly obtained, however as indicated above, the evidence was that an acknowledgment of service had been filed on behalf of both applicants on May 10, 2022, for the foregoing reasons, it cannot be said that the default judgment was other than regularly obtained. This ground fails.

Whether the application was made as soon as reasonably practicable

[27] The applicants rely on the date of service of the judgment, which was August 16, 2023, to ground the submission that the application to set aside the default judgment, was done as soon as was reasonably practicable. The instant notice of

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[8] [1937] 2 All ER 646

application for court orders to set aside default judgment was filed on October 20, 2022.

[28] The respondents correctly contend that the judgment in default of defence was delivered on May 24, 2022, and therefore there was no issue of service of the judgment as indicated above. The making of this application would have been some five months after the entry of the default judgment at an inter partes hearing, with counsel for the applicants in attendance.

[29] The explanation given for the delay is set out in the affidavit of Mrs Deacon, she deponed that she was presented with the claim form and particulars of claim in April 2021. She took instructions from the applicants, and she wrote to Mr John Givans, seeking to an extension of time for the payment by instalments of the sum of Eighteen Million dollars. In a subsequent conversation, she was told by Mr. Givans that he had not received her letter.

[30] In written submissions, the applicants indicate that the judgment was served on August 16, 2022, and this application was filed on October 20, 2022. The reasons given are: *"The reorganization of the firm and facilitating the traversing of the defendants/applicants who lives[sic] in St. Ann to the office to discuss the matter, to get their instruction[sic] and to sign documents would be attribute[sic] to any delay."* The difference between the evidence and this submission is stark. There is neither a good nor consistent explanation for the delay in the making of the application given the applicants' bifurcated position.

[31] In **Ameco**, the Court of Appeal said that once the learned trial judge determined that the application was not made as soon as reasonably practicable, after finding out about the judgment, then he was duty bound to consider why this was so and take account of any explanation proffered for the lapse. Edwards, JA said:

> *"[35] Phillips JA, in Rohan Smith, stated that, although rule 13.3(2) does not require an applicant to provide an explanation for the delay, an applicant who has failed to apply to set aside "as soon as is reasonably practicable" after finding out about a default judgment obtained against him should give an explanation for failing to do so (see paragraph [39]). Defendants would do well to remember that."*

[32] It is difficult to appreciate the submission that is now being made as the parties returned to the court of Batts, J on July 14, 2022, for an inter partes hearing on the issue of specific performance and up to that date, and thereupon, no complaint was made in respect of the default judgment entered on May 24, 2022.

[33] The date of the filing of the instant application is October 20, 2022. This is approximately five months. On the authority of **Ameco**, this period is regarded as a period of undue delay in the filing of this application given the unique circumstances of this case. It cannot be said that the application was made as soon as was reasonably practicable.

A good explanation for the failure to file a defence

[34] There is no issue that an acknowledgement of service was filed on May 10, 2021, and served on May 12, 2021. The applicants depose that no defence was filed as their attorneys were in negotiations with the respondents' attorneys, to have sums paid over and as a result there was no opportunity afforded to the applicants to defend the claim.

[35] The written submissions of the attorney-at-law for the applicants on the claim as well as on this application, stated that the attorneys for the parties were in dialogue with regard to the payment of the sum of Eighteen Million dollars by the applicants to the respondents. By the time the applicant's attorneys indicated to the respondents' attorneys that they were seeking consent to file the defence out

of time, the respondents' attorneys had requested default judgment and as a result the defence was inadvertently not filed.

[36] This submission is not contained in the affidavit filed by counsel in support of this application. I am of the view that the stated reason of inadvertence is inconsistent with the undisputed fact of the ongoing discussions regarding payment of the sum of Eighteen Million dollars. Ongoing negotiations suggest, a matter that is active and present, inadvertence suggests that which has been overlooked, as it is not at the forefront of counsel's mind. In my view, the evidence is at variance with the submission. There has also been nothing advanced to lead to a view that the filing of the defence, could not have taken place regardless of the discussions as to the payment of the sum. There is no good explanation for the failure to have filed a defence to the claim, particularly having regard to the filing of an acknowledgement of service on May 10, 2021.

The overriding objective

[37] Rule 1.2 of the CPR stipulates that the *"court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules".* The decision to set aside a default judgment is a balancing exercise of the court's coercive powers against the need for matters to be heard on their merits in keeping with the overriding objective. The authorities indicate that the factors in rule 13.3, must be considered in light of the overriding objective to deal with cases justly, and that inexcusable dilatory conduct and overwhelming prejudice to the respondent to be occasioned therefrom, are reasons to refuse relief to an applicant, notwithstanding the existence of a defence with a real prospect of success.

[38] The particular circumstances of this claim can be distinguished from the cases cited to the court. Firstly, this is not a case in which the defence had a real

prospect of success. That is why the learned judge proceeded as he did. Secondly, the appearance by counsel for the applicants in these proceedings and at all material times, is a factor upon which great weight is placed by this court. Thirdly, the evaluation of evidence which ought to take place at this stage was conducted on two separate occasions by His Lordship.

[39] There is now a valiant attempt, to have this court repeat those exercises without raising any legal or factual basis to do so. As each case has to be assessed on its particular facts, in my view the prejudice to the respondents is apparent on the face of this application. They are in brief:

(a) the length of time it would take to obtain a trial date in a matter which commenced in 2015.

(b) The fruit of their judgment being lost, and

(c) the ever-increasing cost of litigation would be visited on the respondents who live overseas.

[40] The applicants by comparison remain in possession of the lots and have not shown that the lots have been sold as they assert. Having regard to the totality of the circumstances, the orders of Batts, J shall be complied with without further delay.

[41] **Orders**:

1. The application is refused.

2. Costs of the application to the respondents to be agreed or taxed.

Wint-Blair, J