IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 73 OF 2014

BETWEEN:

BELLA VISTA DEVELOPMENT LTD.

LOPEZ EQUIPMENT COMPANY LTD **Claimants/Respondents**

AND

MAHEIAS UNITED CONCRETE & SUPPLIES LTD. **Defendant/Applicant**

Before: Hon. Mde Justice Shona Griffith

Date of Hearing: 22nd May, 2014

Appearances: Ms. Stevanni Duncan of Barrow & Williams for Claimant.

No Appearance for Claimant/Respondent

RULING

Dated 29th May, 2014

[Default Judgment – Application to set aside – CPR Part 13 – Factors to be considered.]

Introduction

1. This is a claim for repayment of the sum of $103,562.13, being an amount of principal sum owed, interest and costs arising under a contract for supply of goods made between the Claimants Bella Vista Development Ltd. and Lopez Equipment Company Ltd and the Defendants Maheias United Concrete & Supplies Ltd. The claim with Statement of Case was filed on 17th February, 2014 and served on the Defendant Company on the 20th February, 2014 by delivery of a copy of the same at its registered office.

2. The Defendant failed to file an Acknowledgment of Service, the Claimant filed a Request for Entry of Judgment in Default on 25th March, 2014 and Judgment in Default was entered against the Defendant on the 26th March, 2014. The Default Judgment was served on the Defendant on 27th March, 2014 and service was proved by Affidavit. An Application to Strike Out the Default Judgment was filed on 8th April, 2014. The Application was supported by Affidavit of even date and in response to the said Application, the Claimant by its Director, filed an Affidavit on 15th May, 2014.
3. The Application was heard on its scheduled date of 22nd May, 2014. Counsel for the Respondent/Claimant was absent as was the Claimant. No explanation for or communication in respect of Counsel for the Respondent's absence was received by the Court and being satisfied that the date of the Application was known to the Claimant/Respondent the Court proceeded as it is empowered to do under Rule 11.17, to hear and determine the Application in the absence of the Claimant. In these circumstances, the Court considers it appropriate to reduce its Ruling into writing.

The Application

4. The Application sought to set aside the Default Judgment obtained as set out above, pursuant to CPR Rule 13.3, the Judgment having been regularly obtained. Rule 13.3 is extracted as follows:

13.3 (1) Where 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 the judgment had been entered;

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

(c) has a real prospect of successfully defending the claim.

(2) Where this Rule gives the Court power to set aside a judgment, the Court may instead vary it.

5. The affidavit in support of the Application sworn to by the Managing Director of the Applicant, set out the circumstances pertaining to the Applicant receiving notice of the Claim Form and thereafter Default Judgment and also detailed the steps taken once the Default Judgment was received. The Court was satisfied on the Affidavit evidence that condition (a) of Rule 13.3(1) was satisfied. The time between receipt of the Default Judgment and the filing of the Application was 12 days, within which the Applicant was engaged from the onset, in consultation with its Attorneys-at-Law. In relation to condition (b) the reason advanced for not filing an Acknowledgment revealed a degree of sloth by the Applicant in relation to its internal administrative operations pertaining to its receipt of the claim.

6. However, given that the Applicant did in fact take reasonably immediate steps to consult with its Attorneys (this was prior to learning of the Default Judgment); that the Applicant would have been relying on its Attorneys to handle the matter and also that the matter from all indications was not current thereby requiring some investigation, the Court can reasonably accept as sufficient, the reason put forward by the Applicant as its failure to file an acknowledgment. Counsel for the Applicant was accordingly directed to substantively address the Court in relation to condition (c) of Rule 13.3(1).

Counsel's Submissions on 'real prospect of successfully defending the claim'

7. As required pursuant to Rule 13.4(3), a draft defence was exhibited along with the affidavit in support of the Application. Counsel for the Applicant outlined the thrust of the proposed defence as follows: - The Defendant is not indebted to the Claimant under the contract as alleged or at all; that contrary to the claim that the matter arose out of an oral contract, there was a written contract, a copy of which was exhibited. That moneys were in fact advanced to the Defendant under the contract for the Defendant to supply concrete pillars to the Claimant for use by the Claimant in performance of a construction contract in which the Defendant was not a party. There was part performance in the supply of some concrete pillars but then the Claimant's construction contract fell through and the Claimants requested the return of their moneys in the sum of the value of the concrete pillars not yet supplied.
8. Considering that the cancellation of the Claimant's construction contract had nothing to do with them, the Defendant declined to return any moneys but entered into an oral agreement with the Claimant, the performance of which would extinguish the parties' obligations under the written agreement.
9. The oral contract was performed as evidenced by the fact that the Claimant acknowledged receiving an amount in goods and services in its Statement of Case and the Defendant attached a printout of an account of additional goods and services received by the Claimant from the Defendant over a period of approximately two years, to the amount agreed in the oral agreement.
10. As submitted by Counsel for the Applicant, the case for the Defendant is summarized and shown as required to be, a good and not merely just arguable case on the following bases:

(i) There is in fact a written agreement, not an oral agreement as alleged by the Claimant and a copy of the written agreement is exhibited to the draft defence;

(ii) There was an oral agreement intended by the parties to dispose of the written agreement after the Claimant no longer required performance under the written agreement; and

(iii) The existence of the oral agreement is confirmed by reference in the Claimant's statement of case of receipt of goods (paragraphs 8 and 9), and also by the account produced by the Defendant showing performance in terms of the supply of goods from the Defendant to the Claimant.

11. Counsel relied upon OECS High Court Judgment **Earl Hodge v Albion Hodge BVIHCV 2007/00098** in making her submission as to the standard required to be met under Rule 13.3(1)(c). Advancing the authority on the basis of the OECS CPR Part 13 being a mirror of the Belize CPR Part 13 (perhaps the reverse is more accurate), Counsel drew the Court's attention to the relevant discussion of Hariprashad J on the issue of the Applicant therein being required to show a real prospect of successfully defending the claim. The discussion therein drew from UK and other Commonwealth authorities and acknowledged the position with respect of the standard required, as having been adopted and applied by the OECS Courts.

12. The standard therein adopted and applied speaks to a party being required to show a 'serious defence' or a 'prima facie' defence. Further reference was made by Hariprashad J to **International Finance Corporation v Utexafrica sprl [2001] CLC 1361** as to the reason behind a person being required to show more than a merely arguable case, ie - that a person holding a regular default judgment has something of value, of which they ought not to be deprived without good reason; that something more than arguable is therefore

needed to tip the Court's balance to set a default judgment aside [paraphrased]. In applying the principles as illustrated in the case of *Hodge* above, Counsel for the Defendant urged the Court that the Defendant's proposed defence met the standard of having a real prospect of success.

The Court's Consideration

13. As stated before, the requirements of Rule 13.3(1)(a) & (b) were found to have been sufficiently made out, leaving most importantly, consideration of condition (c). The decisions of the OECS Supreme Court being of persuasive authority, the Court was not averse to being solely referred to its decision as authority upon which to determine the Application at hand. The Court nonetheless first looks to Belizean authority for the general principles which underpin the application of the Rule, for example **Belize Telecommunications Ltd v Belize Telecom Ltd & Innovative Communications Corp. LLC. Civil App. 13/2007**. Morrison JA @ para. 27, (adopting the principles stated in UK decisions, admittedly the same as those referred to by Hariprashad J in *Hodge*) emphasizes that the burden of proof of establishing to the Court that a judgment regularly obtained should be set aside, lies with the Defendant. In this regard the defendant is to show a 'realistic as opposed to fanciful' prospect of success. Additionally, Morrison JA @ paras 24-26 reinforces that the conditions set out by Rule 13.3(1) are cumulative and must all be satisfied in order for the Court to consider the exercise of its discretion to set aside.

14. The standard therein being affirmed, the Court's remaining consideration is whether the case advanced for the Defendant meets that requisite standard. The Claimant's claim is for the return of moneys advanced under a contract for the supply of construction goods

and services, the performance of which was not completed through the fault of neither party to the contract. The contract was in effect a sub-contract arising from a main construction contract which fell through. The contract is alleged to have been an oral contract. The monies claimed are pleaded as representing the greater portion of the value of the unperformed obligations under the contract.

15. The Defendant's proposed defence firstly claims that the contract was written, which the Court regards as a significant difference as opposed to the oral contract pleaded by the Claimant. In either case, an issue arose in relation to whether or not the Claimant was entitled to a return of the moneys advanced under the contract to supply, on the mere fact that the Claimant's main construction contract fell through. The Claimant says an invoice was settled under a portion of the unperformed amount and they were entitled to the return of the rest.
16. The defendant says the contract having already been agreed, they having part performed, it was not a matter for them that the Claimant no longer needed the goods they contracted for supply. The Defendant's proposed case continues – nonetheless, an oral agreement was made with the Claimant to have the balance of the monies settled by way of provision of goods and services to a certain amount and the written contract would thereafter be discharged. In support of its position the Defendant submits that it produces the written contract between the parties and an account of goods provided to the Claimant pursuant to the subsequent oral agreement.
17. The Court's interpretation of what suffices as a real prospect of success as per the standard accepted as applicable is that it must firstly be that the facts and issues raised in the proposed defence must be capable of standing in answer to the claim. Stated another

way, as a matter of law, are those issues if successfully argued and facts raised, if successfully proved, both capable of affording the Defendant a successful answer to the Claim? Secondly, in respect of the latter, short of an absolute failure to present evidence in support of a proposed defence, the Court considers that at this stage, a forensic assessment as to the validity or otherwise of the proposed evidence is not required. Support for this view is taken once again from *Morrison JA in Belize Telecommunications Ltd v Belize Telecom Ltd* above *@ para 29*, referring to **Swain v Hillman [2001] 1 All E.R. 91 @ 95**, wherein the Court is cautioned, 'that it is not required to '*conduct a mini trial on untested affidavit evidence'* at that stage (in Swain, in relation to summary judgment, in Belize Telecom, in relation to setting aside). Following on however *"...the court can nevertheless subject the material put forward by the defendant to some analysis to see whether there is any real substance in the factual assertions made...*".

18. In respect of the Court's consideration of the standard to be applied in determining the application to set aside, the issues raised by the Defendant are capable of providing a successful answer to the claim insofar as the Defendant is alleging that a <u>new</u> albeit oral agreement was made between the parties after performance of the written agreement was negated by circumstances attributable to the Claimant. Additionally, whilst the sufficiency of any evidence put forward in support of a proposed defence is properly a matter for trial, the evidence produced by Defendant (in the form of the written agreement and statement of account) is on its face, capable of legitimately supporting the proposed defence. In the circumstances the Court is of the view that the Defendant has satisfactorily advanced an answer to the Claim which has a real prospect of success. The

Court earlier found that there was no real question of delay in filing the application once learning of the judgment and the Court takes no issue with the reason given for the failure to file an Acknowledgment of Claim. The Court also considered (the three conditions having been met), that the interests of justice would be served in allowing the Defendant to defend on its merits, a claim which it alleges has already been satisfied.

The Court's Ruling is therefore as follows:

1. The Judgment in Default of Acknowledgment entered in favour of the Claimant on the 26th March, 2014 is hereby set aside;
2. The Defendant is granted leave to file and serve a Defence on or before 2/6/14;
3. Cost be costs in the cause; and
4. The matter is adjourned for Case Management Conference on 17/6/14.

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Shona O. Griffith

High Court Judge.