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

CLAIM NO. 242 OF 2014

BETWEEN:

BELIZE ELECTRICITY LIMITED **Claimants/Respondents**

AND

RODOLFO GUITIERREZ. **Defendant/Applicant**

Before: Hon. Mde Justice Shona Griffith

Date of Hearing: 11nd November, 2014

Appearances: Mr. Yohhahnseh Cave, Youngs Law Firm, Counsel for Claimant/Respondent.

Mr. Kevin Arthurs, Arthurs & Associates, Counsel for the Defendant/Applicant.

DECISION

Dated 21st November, 2014

[Default Judgment – Application to set aside – CPR Part 13.3 – Conditions to be satisfied – Good explanation for failure to file defence – Real prospect of success].

Introduction

1. This is the Defendant's application to set aside a default judgment obtained by the Claimant Belize Electricity Limited, in respect of a claim for damages for conversion in the sum of three hundred and forty-two thousand, seven hundred and ninety dollars and eleven cents (**$342,790.11**). The claim was filed by fixed date claim form on 13th May, 2014 and served on the 20th May, 2014. The claim was later amended and an amended claim filed and served on the Defendant, on 26th June, 2014.

2. The Defendant acknowledged service in relation to the original claim out of time, on 5th June 2014 (claiming to have been served on 29th May, 2014) and once again in relation to the amended claim acknowledged service on the 4th July, 2014 (claiming to have received service on 30th June, 2014). The Defendant however, then failed to file a defence after the time for doing so in relation to the amended claim expired on or about 25th July, 2014. The judgment in default of defence was entered on 31st July, 2014 and personally served on the Defendant on 11th August, 2014. On 19th August, 2014 a notice was filed on behalf of the Defendant announcing a change of attorney from that on record pursuant to the Acknowledgment of Service.
3. On 24th September, 2014 the application to set aside was filed, accordingly supported by affidavit of the Defendant to which the draft defence was appended. An affidavit opposing the application to set aside was filed on behalf of the Claimant on 7th November, 2014. The matter came on for hearing on oral submissions and the Court now delivers its written decision.

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.

It is clear on a plain reading of the rule and well settled by authorities that the 3 conditions set out in paragraph (1) are cumulative and which must all be satisfied in order for the Court to exercise its discretion to set aside a default judgment. Notwithstanding the well settled state of the law on this issue the Court refers to the case of **Belize Telecommunications Limited v Belize Telecom Limited et al, Belize Civil Appeal No. 13 of 2007** per Morrison JA at paragraphs 24-26 in support of the need for all 3 conditions set out in rule 13.3(1) to be met.

5. The affidavit sworn in support of the Application by the Defendant chronicled his actions in response to being served with the claim from the time of receipt on 26th June, 2014. These efforts commenced from the Defendant's consultation with an attorney, his failed attempts at communication with his attorney both via phone calls and arranged meetings, to his being reassured by the attorney as having sufficient time to file the defence, and to having received misrepresentations from the attorney as to the time remaining for filing the defence after being served with the default judgment, and finally not being able to contact the attorney at all, a few days after advising the attorney as to the default judgment.

6. The Defendant by his affidavit then goes on to explain that he met with another attorney on 19th August, 2014 to whom he gave instructions regarding the preparation of his defence but was advised that the Supreme Court's long vacation was underway. The affidavit attached the Defendant's draft defence which denied liability for the claim.

The Court's consideration

7. This account by the Defendant is to form the basis of the Court's consideration in relation to the first two conditions precedent to the exercise of the Court's discretion in setting aside the default judgment. The matter is considered as follows:-

   (a) The Defendant applied to set aside as soon as reasonably practicable after receiving notice of the judgment in default.

      (i) The Defendant's affidavit indicates that he consulted alternative Counsel on 19th August, 2014, (after having on his account, been failed by his original counsel) that being about 1 week after receiving the default judgment but with a few days within that week having been applied towards still trying to contact his original counsel. He therefore contacted alternative counsel a few days after receiving notice of the default judgement. The application to set aside was then filed on the 24th September, 2014 – almost 6 weeks after the Defendant received notice of the default judgment and more than 1 month after he consulted with a new attorney.

(ii) The Court observes that within the circumstances of what appeared to be an urgent situation, there was an unexplained delay by the Defendant in why his application to set aside was not filed sooner than the 24th September. Learned Counsel's answer in relation to this inquiry by the Court was that the Court was in long vacation. The answer that the Court's long vacation was in session is not considered a good answer to that question of delay in light of the fact that the filing of documents is not affected during the Court's vacation.

(iii) Whilst the application to set aside would have had to await the re-opening of the Court to be heard, the filing of the application could have been effected at any point during the vacation and an earlier filing would have demonstrated the urgency with which the Defendant regarded his situation. Be that as it may, the Court for argument's sake is prepared to disregard the vacation period and treat the application as filed within a reasonably practical time.

(b) <u>The Defendant has a good explanation for failure to have filed a defence</u>.

(i) The Defendant's account of the events leading up to the default judgment being entered against him essentially alleges outright negligence on the part of his original attorney. His account also paints his role as a fully engaged client who made all attempts in contacting his attorney in trying to ensure that his matter was attended to.

(ii) It is observed, that the Defendant's factual account of his actions begins in relation to the claim form dated 26th June, 2014 and states that he met with his attorney the next day – the 27th June, 2014 when he was told about an additional set of documents received on the 26th June, 2014. It is assumed that the first reference to the date of the claim inadvertently refers to the date of the amended claim and not the original claim. It is also assumed that somewhere in the Defendant's account of events, the date of 30 June, 2014 which is noted as the date of receipt of the amended claim, is also an error as according to the Defendant's account in his affidavit, his attorney advised him on the 27th June, as having received the amended claim on the 26th June.

(iii) Those apparent errors aside, the Court examines the authorities submitted by Counsel for the Claimant, in opposition to the application to set aside, pertaining to the issue of good explanation for failure to file a defence. Firstly the authority of **Franco Nasi v David M. Richards, Civil Appeal No. 4 of 2011** per then Hafiz-Bertram J, on an appeal from the Registrar, wherein the argument in objection to the application to set aside that lack of diligence on the part of counsel was not a good explanation to file a defence, was upheld. Reliance was also placed upon **Evan Tillett v Elwyn McFadzean, Belize Supreme Court Claim No. 63 of 2007** per Muria J who also held in that case that the tardiness or lack of diligence on the part of attorneys was not good reason for failure to file a defence.

(iv) In as much as these cases are of concurrent jurisdiction and whilst the Court accepts that as a general rule, one may be able dismiss the inadvertence or lack of diligence on the part of counsel as not amounting to a good reason to file a defence, the Court is not prepared to accept that in no circumstance, can the behavior or actions of an attorney not be accepted as a good reason why a defendant failed to file a defence. As per any general rule, there must always be consideration for the peculiar circumstances of any case, which may by its own peculiar facts, render it an exception to the general rule.

(v) That being said, the Court, in this case views the Defendant's explanation for failure to file a defence within the time limited for so doing with some reserve. As Counsel for the Claimant pointed out, the Defendant in his affidavit (paragraph 5) acknowledges having been told by his counsel that he had 28 days within which to submit his defence. With that knowledge, the Defendant would have been aware as to the approach of the deadline and its subsequent expiration and therefore is to be attributed some responsibility for his handling of his dealings with his attorney leading up to and after the deadline for filing the defence passed.

(vi) Further, as alluded to earlier (paragraph b(ii) herein) there is some inconsistency in the Defendant's account of how he treated with the claim from the inception. The Defendant in paragraph 3 of his Affidavit deposed to having stopped everything and acted immediately in setting up a

meeting with his attorney which he had on 27th June, 2014. At that meeting the Defendant states that he was informed that another copy of trial documents had been received, stamped with the date 26th June, 2014.

(vii) Given that according to the Defendant he learned of the amended claim at his first meeting with his attorney on 27th June, 2014 the immediate action referred to in relation to setting up that meeting must have arisen out of his receipt of the original claim in respect of which he acknowledged receiving on 29th May, 2014. The Claimant's affidavit of service alleged service on the 20th May, 2014 but the Court for argument sake gives the Defendant the benefit of the doubt of having received the original claim on the 29th May, 2014. Even with the benefit of that doubt, the Court hardly regards the Defendant meeting with his attorney on the 27th June, after having received the claim form since the 29th May, 2014 as having been immediate.

(viii) Additionally, the fact that the time for filing the defence started to run again from the date of service of the amended claim on the Defendant further contributes to the reserve with which the Court regards the Defendant's account of his reasons for failure to file his defence. The service of the amended claim added even further time to a process that already ought to have been underway. Thus taken as a whole, the circumstances of the instant case are not as such that the Court accepts

the Defendant's account as amounting to a good reason for failure to file his defence.

Real prospect of success

8. In spite of the fact that the Court has already found that the Defendant's explanation for failing to file his defence is wanting, the Court nonetheless considers it prudent to address the third and final condition required in order for the Court to exercise its discretion to set aside the default judgment. Does the Defendant, on the draft defence exhibited demonstrate that he has a real prospect of successfully defending the claim?

    (i) The Court refers once more to the case of **Belize Telemedia** per Morrison JA, this time in respect of the question of what suffices as a real prospect of success. The real prospect of success was therein (paragraphs 28 et seq) discussed with the aid of several cases, as amounting to a 'realistic, as opposed to fanciful, prospect of success'; the defence argued must carry 'some degree of conviction'. The oft quoted **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc [1986] 2 Lloyd's Rep 221** was also referred to, which itself set the standard that there must not merely be an arguable prospect of success. But how are these expressions actually applied in order for the Court to come to this determination?

    (ii) Arising also from Morrison JA in **Belize Telemedia** it is to be noted that the burden of establishing the standard of having a real prospect of success rests with the Defendant in an application to set aside a default judgment.

In terms of the approach, the Court takes guidance from Morrison JA at paragraph 29 of his judgment wherein the Court is cautioned against conducting a mini trial on untested affidavit evidence but nonetheless is considered entitled to '*subject the material put forward by the defendant to some analysis to see whether there is any real substance in the factual assertions made*'. This scrutiny is deemed all the more necessary if the Defendant's factual assertions are '*contradicted by contemporary documents'.*

(iii) In applying this approach to the instant case the Court notes that in **Belize Telemedia** a 'blanket defence of denial' was found to have been pleaded and found wanting by the Court of Appeal. The Court therefore addresses its mind to the answers to the claim put forward by the Defendant in his draft defence.

(iv) The Claimant's claim is one for damages for conversion of over $340,000 at the hands of the Defendant, its former employee. The Claimant's case sets out the nature and extent of the Defendant's duties to the effect as follows:-

- that the Defendant was chiefly responsible for interfacing between customers purchasing electricity services from the Claimant which services required a certain level of infrastructure to be installed or provided by the claimant.

- part of that interface involved facilitating changes to the service provided by the Claimant which sometimes gave customers an entitlement to a refund of monies paid for installation or provision of electricity service
- the gist of the allegation was that the Defendant by misrepresentations and fabrication of documents created false claims for refunds in respect of legitimate customers who had already paid for services and caused cheques for refunds to be issued to customers, who had in fact never requested such refunds.
- detailed documentary support in the form of letters, memoranda, emails, cancelled cheques as well as statements from some (but not all) customers denying making requests for refunds and disavowing the signatures attributed to them, was provided by the Claimant.

(v) In his draft defence the Defendant denied the claim stating in effect that

- the system of operations set out by the Claimant was not accurately reflected in the statement of claim
- the actual operations of the Claimant were as such that other departments and personnel were tasked with the responsibility of carrying out certain actions in respect of which the Defendant had no part or responsibility
- that at no time could the Defendant accomplish what he was alleged to have done as there were checks and balances which required

approvals and verification of documents from heads of departments and managers in order for payments as alleged to have been generated.

- repeated accusations of the Claim amounting to nothing more than speculation and a fishing expedition.

(vi) In accordance with the approach outlined above (of subjecting factual assertions made by the Defendant to scrutiny especially where contradicted by documents), the Court highlights some answers of the draft defence against the allegations in the statement of claim as illustrative of the tenor of the entire draft defence.

- paragraph 20 of the Statement of Claim lists the names of the Claimant's customers in respect of whom it is said the Defendant wrongly converted the funds of the Claimant. The Defendant's response in his draft defence is to the effect that he is unable to recall the names of customers in respect of which events spanned as much as 7 years prior. This the Court considers, is not an unreasonable position – but it is hardly helpful to the defendant in the circumstances of him being faced with a default judgment.
- paragraph 21 of the Statement of Claim, alleges that the Defendant fabricated documents, email and other correspondence suggesting that the persons listed had requested or were entitled to refunds. Paragraph 22 exhibited in relation to <u>each person</u> on the list, a bundle

of documents including inter alia, memoranda written by the Defendant requesting refunds on behalf of the customers, the corresponding cancelled cheques and in several of those 11 bundles, letters from the customers stating that they never requested a refund and never signed the documents or cancelled cheques attributed to them

- The Defendant's answer in relation paragraph 22 which exhibited the bundles of documents in support of the allegations, in relation to each listed customer was in its entirety as follows "*Paragraph 21-23 of the Statement of Claim is wholly denied. There were no fabrications by the Defendant. The Defendant does not recall names of persons who received a refund as refunds were part of the Paid For Installation portfolio and this was a regular function carried out. Again this baseless accusation is a fishing expedition and is pure speculation*".

(vii) As stated earlier, it is not unreasonable that the Defendant is unable to recall the names of the persons listed by the Claimant…but such a recollection was hardly relevant to addressing the allegations in the Statement of Claim. As submitted by Counsel for the Claimant, the Defendant was coming before the Court as a supplicant – and in that regard, the Court finds that in the face of the detail provided by the Claimant, it was incumbent upon the Defendant to present his intended defence with a greater degree of particularity.

(viii) Counsel on behalf of the Defendant urged upon the Court the length of time involved in the allegations, the Defendant's lack of access to documentation of his own and stated that once given the opportunity to defend the claim the Defendant would be able to provide substantive details in answers to the allegations via his witness statements and oral evidence.

(ix) The Court appreciates the submissions in relation to passage of time and lack of access to documents to answer to the allegations, however, the Court nonetheless is of the view that what was perfectly within the capacity of the Defendant at this stage, was to have addressed even if one of the 'bundles of documents' so to speak, to put in context what appeared on the face of it to be evidence fully supporting the claim against him. To put in context means, to have explained the extent of his involvement; the reasons for him having generated (or for his name to have been appended to) those documents; or having regard to the system in place, others steps such as those approvals or checks and balances broadly alluded to, that would have been carried out in order for the refund process to have gotten to that stage.

(x) The failure of the defendant to particularly address any of the specific allegations pleaded by the Claimant along with the documentary support, amounts in the Courts view to a failure to establish an arguable defence or

a realistic prospect of success and as such the third condition of Rule 13.3(1) is also not met.

9. A few final considerations in relation to the Defendant's application to set aside the default judgment against him are firstly the submission that the judgment is not unsubstantial…it is in fact in the sum of approximately $342,000. Such a submission was also considered by Morrison JA in **Belize Telemedia** (@ paragraph 31). The learned Justice of Appeal clearly states that as neither the size of the claim nor the size of the judgment is one of the factors enumerated in Rule 13.3(1) they are not relevant factors to be taken into consideration in the determination of the application to set aside.

9. Additionally, the Defendant referred the Court to the case of **John Mutrie v The Attorney General et al, Belize Supreme Court Claim No. 251 of 2013** per Abel J. The Court therein considered inter alia, an application to set aside a judgment in default of acknowledgment of service of a claim for damages for libel and slander. The basis upon which the case was cited in support of the Defendant's application was not dealt with in the oral submissions but the Court nonetheless considered the authority. The Court's reasons upholding the application to set aside therein are unfortunately of no real assistance to the Defendant in the case at bar.

10. In particular, the Court in that case found:-

    (i) (@ paragraph 33) that the claim may have been slightly defective in failing to allege certain basic particulars at the root of a claim for defamation

    (ii) In addition, there appeared to be some irregularities surrounding the service of the claim form

(iii) The Claimant failed to serve the default judgment on the Applicant

(iv) The Applicant had a real prospect of successfully defending the claim.

At this point, in relation to all of the findings above, they amount to more than several distinguishing factors which led the Court to its conclusion and so provide no support to the Defendant herein.

11. Finally, there is the commendation of the overriding objective of the Rules to dispose of claims justly. In respect of this usual catch all submission the Court acknowledges that the overriding objective cannot be used to overcome a clear breach of the Rules.

12. **The Court's Decision and disposition of the Application to Set Aside is therefore as follows:**

(i) The Defendant's Application to Set Aside the Judgment in Default entered against him on the 31st July, 2014 is hereby dismissed.

(ii) The Claimant is entitled to costs on the dismissal of the Application in the sum of $1,500.

Dated this 21st day of November, 2014.

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Shona O. Griffith
Supreme Court Judge.