IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. HCV 00243 OF 2004

BETWEEN	*KEN SALES & MARKETING LTD.*	*CLAIMANT*
A N D	*BEVERLEY LEVY*	*1ST DEFENDANT*
A N D	*PELICAN SECURITIES LIMITED*	*2ND DEFENDANT*

Miss Carol Davis instructed by
Mesdames Carol Davis and Company for Claimant.

Dr. Lloyd Barnett, Mr. Hugh Hart and Mr. Conrad George
Instructed by Hart Muirhead & Fatta for defendant.

Heard: March 30 and April 1, 2005

Harris J.

This application by the defendant is for an order that:

"The Judgment in default of Appearance granted to the Claimant on July 27, 2004 be set aside."

On February 9, 2004 the Claimant issued a fixed date claim form seeking the following declaration:

> "that the Claimant's equitable charge over all those parcels of land part of Anchovy in the parish of Portland, and known as Trident Hotel & Villas, Port Antonio, being the lands comprised in Certificates of Title registered at Volume 552 Folio 32, Volume 1339 Folio 969 (formerly registered at Volume 589 Folio 74), Volume 1157 Folio 129, Volume 1150 Folio 908, Volume 1214 Folio 709 and Volume 931 Folio 68 of the register Book of Titles, by virtue of the registration of an Order for Sale of the said premises pursuant to S. 134 of the Registration of

Titles Act, ranks in priority to any equitable interest in the aforesaid premises claimed by any or either of the two Defendants."

The Notice to the defendant endorsed on the claim form states among other things: 'The first hearing of this claim will take place at the Supreme Court, Public Building East, King Street on the 27th day of July, 2004 at 10 a.m."

Service of the Fixed date claim form was made on the 1st defendant on February 9, 2004 and on the 2nd defendant by way of substituted service on the Messrs. Hart Muirhead Fatta, an order of the court having been obtained for service on them. They accepted service and filed an acknowledgement of service on behalf of the defendants.

On the date of hearing, an order was made in terms of the declaration sought. The defendants and their attorney-at-law were absent.

Rule 11.18 of the Civil Procedure Rules makes provision for the setting aside or variation of an order made in the absence of a party. The Rule states as follows:

"11.18 (1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made."

So far as Rule 11.18(1) is concerned there is no dispute that neither the defendants nor their legal representative was present at the hearing of the fixed date claim form.

However, the defendant is mandated to comply with rule 11.18 (2) as it requires the application to be made within 14 days of the date of the service of the order. The order was served on the 1st defendant by registered post on August 4, 2004 and on the 2nd defendant's attorneys at law. Messrs. Hart Muirhead Fatta on July 30, 2004. This application to set aside the order was not made until January 27, 2005. This application is clearly outside the prescribed period. Mr. George stated that the failure to file the application in time was due to the Court Administrator informing him, the very day the order was made, that the judge who made it would not have been available for some time.

On July 27, 2004 Mr. George had been aware that the order had been made. A copy of the order was served on him July 30, 2004. It would have been obligatory on his part to have filed the application within 14 days of the

service of the order upon his firm. The fact that he had been informed that the judge who made the order would not have been available to hear the application does not avail the defendants.

A further requirement of the Rule is that a good reason, must be advanced for the defendant's failure to attend the hearing. Mr. George averred that he was notified that the time of hearing was 11:00 a.m. and exhibited a copy of a fixed date claim form bearing a notice on which the time of hearing is stated as 11:00, Miss Davis, however, deposed that the notice of the fixed date claim form served on Messrs. Hart Muirhead Fatta reflected the time of hearing to be 10 o'clock. She exhibited a copy of the document served. The date inserted in the notice to the defendants submitted by Miss Davis appears to be a replica of that which was filed in this Court which bears the time of hearing as 10:00 a.m. Further, the published court list shows that the matter was in fact listed for hearing at 10 o'clock. Mr. George had been aware of the Judge before whom the matter had been listed, the inference is that he would also have had the knowledge of the time of hearing.

It is also necessary for the defendants to show that if they wee present some other order might have been made. The applicant would have to show that they had a sustainable defence.

The claim relates to the rank in priority of competing interests in lands owned by defendants.

On 15th January, 2003 the Claimant obtained an order of sale in respect of those parcels of land known as Trident Hotel & Villas, Port Antonio in the parish of Portland owned by the defendants, pursuant to a Judgment in their favour. The order for sale of the property was registered on each of 6 certificates of title in respect of the lands comprising Trident Hotels & Villas, on 17th January, 2003.

The records show, by way of evidence from the Claimant, that the defendants have averred that they have an equitable interest in property as mortgagees. On November 10, 2003 the 1st defendant lodged a caveat to protect her interest as an equitable mortgagee.

The defendants are contending that by virtue of S. 134 of the Registration of Titles Act their interest in the property would take priority over the Claimant's interests.

The Certificates of Title exhibited to the Claimant's affidavit show that there were a number of mortgages created prior to the making of the order on January 15, 2003.

It is possible that if the defendants were present the Court might have made some other order.

However, the fact that the defendants did not file the application within the time limited for so doing, they are precluded from obtaining relief under Rule 11.18.

The applicant has prayed in aid Rules 13.2 and 13.3 of the Civil Procedure Rules.

Rule 13.2 provides:

> 13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because:
>
> (a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied:
>
> (b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or
>
> (c) the whole of the claim was satisfied before judgment was entered.
>
> (2) The court may set aside judgment under this rule on or without an application."

The court is bound to set aside a judgment entered in default if the Judgment had been wrongly entered. An acknowledgment of service had been filed, so Rule 13(2)(1)(a) is inapplicable. Rule 13(2)(1)(c) also does not apply.

So far a s Rule 13 (2)(1)(b) is concerned, the court is under an obligation to set aside a Judgment if any of the conditions prescribed by Rule 12.5 had not been fulfilled:

Rule 12.5 so far as it is relevant to this case reads:

"12.5 The registry must enter judgment at the request of the claimant against a defendant for failure to defend if –

(a) the claimant proves service of the claim form and particulars of claim on that defendant; or

(b) an acknowledgement of service has been filed by the defendant against whom judgment is sought; and

(c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(d) that defendant has not -

(i) filed a defence to the claim or any part of it (or ……..)"

The Claimant has proved service. An acknowledgement of service has been filed by the defendants. No defence had been filed by the defendant and the period for filing a defence had expired.

The Applicant would therefore not obtain any protection under this Rule.

I now turn to Rule 13.3, which provides:

"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 judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgement 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.

For the defendants to succeed under the Rule, compliance with every requirement of the Rule must be established. Did the applicants apply as soon as reasonably practicable after discovering that the Judgment was entered? The applicant's attorney-at-law knew that Judgment had been entered from July 27, 2004. The defendants were aware of this as of July 30, 2004. An application to set aside the order was not made until almost 6 months later. This cannot be recognized as a reasonable time. Mr. George's explanation with reference to what the Court Administrator had told him about the unavailability of the judge, does not absolve the defendants. Mr. George is an attorney-at-law; he would have known that the application ought to have been made within a reasonable time.

Rule 13.3 requires the defendant to advance a good explanation for having not filed a defence. No explanation has been proffered for the defendant's failure to file a defence.

Do the defendants have a real prospect of successfully defending the claim? Rule 13.4 enjoins them to exhibit a draft of a proposed defence to the affidavit in support of the application. This is mandatory. This has not been done.

The defendants have failed to satisfy every criterion of the foregoing Rule. The application is dismissed with costs to the Claimant to be agreed or taxed.