

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**Claim No. 731 of 2012**

**ANGELA PATRICIA PARRIS**

**CLAIMANT**

**AND**

**JOAN WARNER**

**FIRST DEFENDANT**

**STEPHANIE GOODING**

**SECOND DEFENDANT**

*Before The Hon. Mr. Justice William J. Chandler, Judge of the High Court*

**Appearance: Mr. Branford M. Taitt, Attorney-at-Law for the Claimant**

**Date of Decision: 2020 December 17**

*Judgment in default of acknowledgement of service– Claim for declaration of interest in a dwelling house-land owned by estate of deceased person-First and Second Defendants beneficiaries of the estate- CPR 9.2, 12.4 and 12.7-principles applicable where claim is for declaratory relief.*

**Decision**

**Brief background**

[1] The Claimant is the executor and duly appointed personal representative of the estate of Iva Olivia Parris, deceased. The First Defendant is the sister of the deceased and one of two persons entitled to the beneficial ownership of property situate at Union Road, St. Philip (the property). The Second

Defendant is the other person entitled to the beneficial ownership of the said property.

- [2] The Claimant alleges that the deceased and the First Defendant agreed in 2003 to construct a dwellinghouse on the property using their personal monies. The Claimant acted as agent of the deceased in overseeing the construction and paying the contractor. The Claimant alleges also that she paid Cdn \$125,000.00 on behalf of the deceased and Cdn \$41,900.00 on behalf of the First Defendant towards the construction whose final cost was Cdn \$166,900. It is further alleged that it was agreed that the house would be owned by the deceased and the First Defendant as tenants in common.
- [3] After completion the parties entered into occupation of the property, however, due to ill health, the deceased returned to live in Canada where she eventually died. The Claimant and her brother, as agents for the deceased, called upon the First Defendant to convey a one-half share of the property to the deceased pursuant to the oral agreement but she refused so to do denying the deceased's contribution to the property.
- [4] The Claimant as personal representative of the deceased's estate called upon the First Defendant to repay the estate the disparity in sums paid to the contractor but she neglected and/or refused to do so.
- [5] It is in this factual matrix that the application arises.

## **The Application**

[6] Under the notice of application filed 8 January 2014, the Claimant seeks (1) permission to enter judgment against the First Defendant for failure to file an Acknowledgement of Service within the time prescribed by **Rule 9.1(2)** of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)**. Alternatively, (2) such orders and/or directions as the Court may deem fit.

[7] It is timely to set out here the relief sought by the Claimant in the substantive action.

## **The Claim Form**

[8] The Claimant filed a form 1 Claim Form on 4 May 2012 seeking the following relief:

1. A declaration that the property is jointly owned by the estate of the deceased and the First Defendant.
2. In the alternative, an order determining the respective interests of the estate of the deceased and the First Defendant in the said dwelling house.
3. An order that the dwelling house be valued by a competent valuer to be agreed by the parties or in default of such agreement as fixed by the Court and that the cost of such valuation be shared equally between the parties.
4. An order that the property situate at Union Road in the parish of Saint Philip in this Island be sold by private treaty or public auction and that

the parties be paid such sums as represents their share and/or interest in the said property.

5. In the event that the property situate at Union Road in the parish of Saint Philip in this Island must be sold by private treaty or public auction that the Attorney-at-Law for the Applicant do have conduct of the sale.
6. Costs.

### **The Affidavit in Support of the Application**

[9] The application was supported by an affidavit, sworn to by the Claimant on even date with the application, in which she deposed, inter alia, that:

1. The Claim Form was filed on 4 May 2012 for the relief set out therein.
2. Permission of the Court for service of the Claim Form on the First Defendant out of the jurisdiction was obtained on 3 July 2012.
3. The Claimant was informed by her then Attorney-at-Law that she had made enquiries at the Registration Office and was advised that no acknowledgment of Service had been filed.
4. Further enquiries disclosed that no defence had been filed.
5. The First Defendant had not satisfied the claim or any part thereof, and in consequence the application for default judgment was being made.

### **The Preliminary Point**

[10] The Court raised with both Ms. Doria Moore, then counsel for the Claimant and Mr. Branford Taitt, present counsel, whether or not the present application was properly before the Court and whether the relief sought could be obtained

on the application. They both filed written submissions which I will shortly refer to.

### **The Issues**

- [11] The first issue is simply whether the Notice of application is properly before the Court or whether it ought to have been made before the Registrar of the Supreme Court (the Registrar).
- [12] If the answer to the first issue is in the affirmative, then the second issue is whether declaratory relief may be obtained on a default judgment.

### **The Submissions**

- [13] Ms. Moore submitted that default judgment could be obtained under **Part 12** of **CPR** where the requirements of that Rule had been complied with and provided that the matter did not fall within the exceptions in **CPR 12.2**. Those requirements had been fulfilled and it was her opinion, that judgment ought to be entered.
- [14] With respect to the procedure adopted, counsel submitted that in claims other than money claims, judgment may only be obtained on application to the Court since the process involves some judicial examination of the claim. No authority for that proposition was cited.
- [15] Mr. Taitt's submissions on the issue of entitlement to default judgment are in line with Ms. Moore's first submission. He contends that there is no

requirement for notice of the default to be given to the Defendant. It is important to quote verbatim counsel's further submission on this point, namely, that "A mere request to the Registrar is all that is required." Mr. Taitt also submitted that **CPR** does not grant a defendant a right to notice of default applications for failure to file an acknowledgment in the case of other types of claims under **CPR 12.10.4** that it does not grant him for money claims under **CPR 12.7(1)**. He specifically quoted **CPR 12.10.5**.

[16] With respect to the declaratory relief sought, it was Mr. Taitt's submission that the Court has a discretionary power to make a binding declaration of right, citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade [1921] 2 AC 438*. Interestingly, counsel submitted that "It is not the practice of the Court to make a declaration of right in default of defence or on admissions or by consent of the parties, but where relief is to be granted *without trial or evidence* the request for the court is not to make a declaration but to state on what footing the relief is to be granted. *Wallersteiner v Moir [19764] 1 W.L.R. 991*."

[17] Counsel further submitted, on the other hand, that the rule of the court that the declaration will not be granted when giving judgment by consent or in default without a trial is a rule of practice and not of law and will give way to the paramount duty of the court to do the fullest justice to the plaintiff to which

he is entitled. According to counsel, it could not be disputed that the Claimant has a proprietary interest in the property and, accordingly, a declaration to that effect would do the fullest justice to the Claimant who would otherwise be unable to assert, protect and realise her proprietary interest in the said property.

### **The Law on the first issue**

[18] **CPR 12.1** defines default judgment as judgment without trial where a defendant:

- “(a) has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or
- (b) has failed to file a defence in accordance with Part 10.

**CPR 12.4** sets out the conditions which must be satisfied in order for default judgment to be entered against a defaulting defendant. This Rule provides the Registrar may, at the request of the claimant enter judgment for failure to file an acknowledgment of service where:

- (a) the claimant proves service of the claim form and statement of claim;
- (b) the period for filing an acknowledgment of service has expired;
- (c) the defendant
  - (i) has not filed an acknowledgment of service;
  - (ii) has not filed a defence to the claim or any part of it;
  - (iii) where the only claim, apart from costs and interest, is for a specified sum of money, has not filed or served on the claimant an admission of liability to pay all of the money claimed together with a request for time to pay it; and

- (iv) has not satisfied the claim on which the claimant seeks judgment;
- and

(d) necessary, the claimant has the permission of the court to enter judgment.”

[19] A literal reading of **CPR** establishes jurisdiction to enter default judgment in the Registrar, however, other Rules within **CPR** specifically speak to the Court exercising jurisdiction in certain circumstances. For example, **CPR 12.9 (1)** provides that a claimant may apply for default judgment on a claim:

“for money or a claim for delivery of goods against one of two or more defendants and proceed with the claim against the other defendants.

(2) Where a claimant applies for a default judgment against one of two or more defendants and

(a) the claim can be dealt with separately from the claim against other defendants

(i) the **court** may enter default judgment against that defendant; and

(ii) ...;

(b) the claim cannot be dealt with separately from the claim against the other defendants

(i) the **court** may not enter default judgment against that defendant; and

(ii) the **court** must deal with the application conjointly with the claim against the other defendants (**emphasis added**).”

The learned authors of *Atkin’s Encyclopaedia of Court Forms in Civil Proceedings, London, Butterworths, 2008, second issue, Volume 14* opine at page 92 that a default judgement is not a judgment on its merits and that “*It is usually obtained by an administrative act, that is by the claimant filing a request in the relevant practice form...It may be obtained by application to*

*the court for an order where the claim is for any other remedy.” A review of the case law indicates that default judgments have been entered by High Court judges in the United Kingdom, see for example, *Black Arrow Finance Ltd v Four Seasons Dry Cleaning and another* [2001] EWCA Civ 430 and *Patten v Burke Publishing Co Ltd* - [1991] 2 All ER 821.*

## **Conclusion**

[20] It is my view, therefore, that despite the wording of **CPR 12.2**, an application may be made to the Court for judgment in default of filing an acknowledgement of service, consequently, the Court has jurisdiction to entertain the application.

## **The Second Issue**

[21] I now turn to the application itself. The second issue arises with respect to the declaratory relief sought by the Claimant. This was specifically raised by the Court and addressed by Mr. Taitt in his submissions at paragraphs [13] and [14] above. In summary, it was his submission that a declaration can be made on a default judgment application.

## **The Law**

[22] I am of the opinion that the dictum of *Buckley L.J.* in *Wallersteiner v Moir; Moir v Wallersteiner and others* - [1974] 3 All ER 217(*Wallersteiner*)

represents the current view of the law on the making of declarations in default of pleadings when he said:

“...I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading....If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, ... Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation.”

[23] The rationale behind this view is that a declaration by the court is a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence, per *Kekewich J*, in *Williams v Powell [1894] WN 141*, quoted approvingly by *Buckley L.J* in *Wallersteiner*. Similar sentiments were expressed by *Millett J* in *Patten v Burke Publishing Co Ltd - [1991] 2 All ER 821* where the learned Judge expressed the view that:

“...in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts been investigated. Quite apart from this, however, it is clear from *Wallersteiner v Moir* that the rule is a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without such a declaration.”

## **Discussion and Analysis**

[24] The Claimant has satisfied all the conditions necessary to obtain a default judgment under **CPR 12.4**. The Claimant filed the notice of intention to enter judgment in default on 8 January 2014 and, whilst not being required to do so, served same on the First and Second Defendants by registered mail dated 11 November 2013. What is of utmost importance is the fact that on every occasion when the matter was adjourned, the Claimant served notice of the adjourned dates of hearing on the First Defendant by courier and also served notice of those dates on the second Defendant. The First Defendant, in spite of these notices, has failed to appear on any adjourned date whilst, the Second Defendant has appeared, once she was within the jurisdiction. The Second Defendant has always signified her intention not to contest the proceedings.

## **Conclusion**

[25] The Claimant, having satisfied the conditions of **CPR 12.4** for obtaining a default judgment, ought not to be further denied the justice that she deserves. She has given every opportunity to the First Defendant to put right her default and she has failed to do so. The First Defendant is in default and remains in default until this day. I am of the opinion, applying the overriding, objective of **CPR** that I ought to exercise my discretion in favour of entering judgment in default of acknowledgment of service against the First Defendant without

making a declaratory order in accordance with the law referred to in this decision.

[26] I preface my Order with the observation that the evidence before me is that the real property upon which the dwelling house is constructed was devised to the First and Second Defendants under the last will and testament of Elsie Warner also known as Doris Warner, deceased dated 29 June 1988. We are confronted therefore with the maxim quicquid plantatur solo, solo cedit (whatever is affixed to the soil belongs to it). Any order which I may make will materially affect the rights of the Second Defendant who has graciously attended this Court and, as previously mentioned, signified her intention not to contest any order that I might make. My disposal, therefore is reflective of this fact and my responsibility to protect the rights of the Second Defendant.

### **Disposal**

[27] In the circumstances, I make the following orders:

1. That the dwelling house constructed on the property is owned by the estate of Iva Olivia Parris, deceased and the First Defendant as tenants in common in such shares as shall be assessed by the court subject to the interests in the land of the First and Second Defendants.
2. That the Claimant do have her costs of this action against the First Defendant to be assessed.

3. That a certified copy of this Order be served on the First and Second Defendants by registered post within seven (7) days of its perfection.
4. Liberty to apply.

**William J. Chandler**

**High Court Judge**