IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 409 of 2022

BETWEEN:

[1] SUSAN FLAHERTY
[2] ROBERT FLAHERTY
[3] DANIEL FLAHERTY

Claimants

and

[1] AMIGOS DEL MAR LTD
(dba Amigos Del Mar Dive Shop)

Defendant

Appearances:

Iliana N. Swift for the Claimants
Anthony Sylvestre and Aaron Tillett for the Defendant

2023: May 24

June 5

September 29

RULING ON APPLICATION FOR TERMS OF DEFAULT JUDGMENT TO BE DETERMINED

[1] **CHABOT, J.**: The claimants obtained a default judgment against the defendant with terms to be determined. The default judgment was entered by Shoman J., and the matter was subsequently transferred to me to determine the terms of the default judgment. At the hearing of the application for the terms of the default judgment to be determined, I raised the question of whether the defendant was entitled to make representations in light of rule 12.13 of the Supreme Court (Civil Procedure) Rules ("CPR"). CPR 12.13 provides that a defendant against whom a default judgment has been entered may

only be heard with respect to costs, the time of payment of any judgment debt, enforcement of the judgment, or an application under CPR 12.10(2). The parties were given time to file additional submissions. As a result of my inquiry, the defendant challenges the constitutionality of CPR 12.13.

[2] For the reasons outlined in this ruling, I decline to rule on the constitutionality of CPR 12.13, but considered the defendant's submissions on the application. I find that the default judgment entered by Shoman J. was for an unspecified sum. I order the defendant to pay the claimants the principal sum of US$7,488,322.72, plus pre and post-judgment interest and costs.

Background

[3] The Flahertys reside in the State of Massachusetts, in the United States. On 21st May 2019, while the family travelled in Belize, Mrs. Flaherty suffered severe injuries during a dive organized by the defendant, Amigos del Mar Ltd. ("Amigos"). The Flahertys filed a claim against Amigos in the United States District Court for the District of Massachusetts (the "US court"). Amigos failed to defend the claim. On 23rd February 2022, the US court entered judgment (the "US judgment") against Amigos. Mrs. Flaherty was awarded US$6,238,322.72, plus judgment interest from 21st May 2019 in the amount of 12% on past damages of US$777,115.00 through the date of the entry of the US judgment, post-judgment interest from the date of entry of the US judgment, and costs. Mr. Flaherty was awarded US$1,000,000.00, plus post-judgment interest from the date of entry of the US judgment, and costs. Their son, Daniel Flaherty, was awarded US$250,000.00, plus post-judgment interest from the date of entry of the US judgment, and costs.

[4] On 6th July 2022, the Flahertys filed a claim on the US judgment in Belize. Amigos failed to file an acknowledgment of service or a defence to the claim in time. Amigos subsequently applied for an extension of time to file its defence. The application was dismissed by Shoman J., and on 11th January 2023 she entered a default judgment against Amigos with terms to be determined.

[5] The matter was transferred to me to proceed with the determination of the terms of the default judgment. The application to determine the terms of the default judgment raises four issues:

1. What is the nature of the default judgment;

2. Whether Amigos is entitled to be heard;

3. What are the terms of the default judgment; and

4. Whether the sums awarded can be expressed in USD.

Analysis

What is the nature of the default judgment

[6] The order entered by Shoman J. on 11th January 2023 does not specify the CPR rule(s) under which it was made. The order states that a "default judgment is granted in favor of the Claimants with terms to be determined". The uncertainty over the nature of the default judgment entered by Shoman J. is giving rise to some complexities at this stage, because the nature of the default judgment has an impact on how I determine its terms under Part 12 of the CPR.

[7] Part 12 of the CPR provides for four types of default judgments. The default judgment in this matter is not for a specified sum of money. Had Shoman J. entered a default judgment for a specified sum of money, she would have entered judgment for the sum of money claimed by the Flahertys, together with interest, pursuant to CPR 12.8. The default judgment is also not in relation to a claim for goods. This is a monetary claim. There are therefore only two options: the default judgment was either entered for an unspecified sum under CPR 12.10(1)(b), or for "some other remedy" under CPR 12.10(4).

[8] I find that the default judgment was entered for an unspecified sum under CPR 12.10(1)(b). I reach this conclusion for two reasons. First, the claim is a monetary claim. The Flahertys are seeking to recover the damages owed to them in the United States by virtue of the US judgment. While the CPR does not define the types of remedies that are contemplated by CPR 12.10(4), I find that the expression "some other remedy" must, by implication, exclude monetary claims because monetary claims are dealt with separately in CPR 12.10.

[9] Second, the entry of a default judgment for "some other remedy" under CPR 12.10(4) is a one-step, as opposed to a two-step process as is the case for the entry of a default judgment on a monetary claim. This was explained in **Lux Locations Ltd. v Yida Zhang**,[1] a recent judgment from the Privy Council interpreting Rule 12 of the Eastern Caribbean Civil Procedure Rules ("ECCPR"):

[1] [2023] UKPC 3 ("Lux Locations").

> 40. The Rules do not say that, on a claim for "some other remedy," the court office must enter a default judgment before an application for the court to determine the terms of the judgment under rule 12.10(4) has been made. Reading rules 12.5 and 12.10 together, it is apparent that, whatever the nature of the claim, only one default judgment is envisaged, the content of which is provided for by rule 12.10. Where the claim is for a sum of money, the form of the default judgment is prescribed by rule 12.10(1) and the court office can and should therefore proceed to enter judgment immediately. Where, on the other hand, the claim is for a remedy other than money - either an order to deliver goods or "some other remedy" - a decision of the court is needed before judgment can be entered.
>
> 41. Rather than assisting Mr Yida's argument, the comparison with a claim for an unspecified sum of money in the Board's view shows why his argument is wrong. As already mentioned, on a claim for an unspecified sum of money where the conditions in rule 12.5 are satisfied, rule 12.10(1)(b) requires a default judgment to be entered for the payment of a sum of money to be decided by the court. Rule 16.2 set outs the procedure for assessing damages after such a judgment has been entered. This procedure is not part of the default process but in effect involves a trial of the issue of quantum. By contrast, where the claim is for some other remedy, the rules do not provide for a default judgment to be entered for relief to be determined in accordance with some further procedure. Rather, rule 12.10(4) requires default judgment to be "in such form as the court considers the claimant to be entitled to on the statement of claim". It follows that default judgment cannot be entered before a determination by the court under rule 12.10(4) has taken place. [emphasis added]

[10] Had Shoman J. determined that the claim was for "some other remedy", as opposed to a claim for an unspecified sum, it would not have been open to her to first enter a default judgment before proceeding to the determination of its terms. Under CPR 12.10(4), a default judgment for "some other remedy" must include its terms as determined by the court.

[11] I hasten to add that I am not pronouncing on the correctness of Shoman J.'s order, nor have I been asked to do so. I understand that the nature of the default judgment to be entered was argued before Shoman J., but the order does not make it clear whose position she accepted. My role at this stage is to determine the terms of the default judgment entered by Shoman J., and to do so, I must determine, as best I can, the rule that applies. The terms of a default judgment for an unspecified sum are determined through an assessment of damages pursuant to CPR 12.10(1)(b) and 16.2, and the terms of a default judgment for some other remedy are determined based on the statement of claim pursuant to CPR 12.10(4). Having found that Shoman J. entered a default judgment for an unspecified sum, I must proceed to an assessment of damages. Before doing so, I must consider whether Amigos is entitled to be heard on the assessment of damages.

Whether Amigos is entitled to be heard

[12] CPR 12.13 provides that a defendant against whom a default judgment has been entered can only be heard in respect of certain matters exclusive of the terms of the default judgment:

> 12.13 Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are –
>
> (a) costs;
>
> (b) the time of payment of any judgment debt;
>
> (c) enforcement of the judgment; and
>
> (d) an application under Rule 12.10(2).

[13] Since I found that Shoman J. entered a default judgment for an unspecified sum under CPR 12.10(1)(b), **Lux Locations** makes it clear that the default judgment has been entered. Amigos's argument that a default judgment is not entered until its terms are determined only applies to a default judgment for "some other remedy" under CPR 12.10(4). CPR 12.13 applies and Amigos is not entitled to be heard on the assessment of damages.

[14] Amigos challenges the constitutionality of CPR 12.13. Relying on **George Blaize v Bernard Lamothe and The Attorney General of Grenada**,[2] Amigos argues that CPR 12.13 deprives a defendant against whom a default judgment has been entered from their constitutional right to a fair hearing. In **Blaize**, the Court of Appeal of the Eastern Caribbean Supreme Court found that, by restricting the right to cross-examine and the right to make submissions, rule 12.13 of the ECCPR violates the right of access to court, and the violation is not proportionate to the means employed and the aim sought to be achieved:

> We are cognizant that the right of access to the court calls for regulation by the State. We are also satisfied that interference with the right may be justified on the grounds that the particular legislation may pursue a legitimate aim and if the scope of the legislation is necessary and proportionate to the achievement of the aim. We are of the opinion and hold that barring the right to be heard (cross examination and the right to make submissions) in the circumstances dictated by CPR 12.13 effectively restricts or reduces the access left to a defaulting defendant to such an extent that it impairs the very essence of the right of access to the court. Furthermore, there is not a reasonable relationship of proportionality between

[2] HCVAP 2012/004 ("Blaize").

> the means employed and the aim sought to be achieved. For these reasons we allowed the appeal and granted the declarations referred to in paragraph 1 of this judgment.[3]

[15] In **Natasha Richards and anor v Errol Brown and The Attorney General,**[4] the full court of the Supreme Court of Judicature of Jamaica agreed with the Court of Appeal's reasoning in **Blaize,** and found that rule 12.13 of the Jamaican Civil Procedure Rules, 2002 equally violated the Constitution of Jamaica. Batts J. offered the following remarks, which are relevant to the matter at hand dealing with a default judgment for an unspecified sum:

> [30] There are a few observations I wish to make largely out of deference to the well structured and articulated submissions of Lord Anthony Gifford, Q.C. There is to be drawn a distinction between claims for specified amounts (liquidated damages) and for unspecified amounts (unliquidated damages). In the former, a defendant properly served, who elects not to enter an acknowledgment of service or to defend, can safely be assumed to have acceded without demur to the amount of the claim. In the latter case however, no such conclusion can be drawn. The defendant after all may well and reasonably expect that, although liable, if and when a court is to make a determination on quantum his or her input, no matter how negligible, will be accepted. That input may amount to no more than attendance at the assessment to ask the Claimant giving evidence if he is still feeling pain, or more likely to cite some relevant case on damages to assist the court while it assesses quantum. I believe the ordinary Jamaican would be surprised to know that a court of law would, at a hearing to quantify damages against him, say he must remain silent because he had not filed an "admission". Moreso because even if no acknowledgement were filed, it has long been the practice of our court to accept undertakings to file, and allow an immediate right of audience. Form, in the way of a failure to file an acknowledgment, was not allowed to prevail over the substantive right to be heard. We should not by this decision allow substantive rights to be taken away because of formalities. Even if one has no positive case to put, the trial process will still benefit from cross examination (which tests the witness) or by submissions which may bring to the attention of the court aspects of the medical report or authorities on damages, relevant to the issue of quantum [emphasis added].[5]

[16] Although not binding, **Blaize** and **Richards** are highly persuasive authorities which raise important issues of relevance to Belize. It is because of the importance of these issues that I decline to rule on the constitutionality of CPR 12.13 in the present matter. The constitutionality of CPR 12.13 was raised by Amigos only in response to the court's inquiry as to whether Amigos could be heard at the hearing for the determination of the terms of the default judgment granted against them. The parties' brief written submissions on the interpretation of CPR 12.13 were due to be filed on the same day, and as such the

[3] Blaize at para. 16.
[4] 2014HCV02965 ("Richards").
[5] Richards at para. 29.

Flahertys had not had sight of the constitutional argument when they filed their submissions. In addition, because the issue had not been squarely raised in this matter, the Crown has not been notified of the constitutional issue and has not had an opportunity to make submissions. As a result, I do not have before me fulsome submissions that would allow me to make a just ruling on the issue of the constitutionality of CPR 12.13, and do not wish to make such a determination lightly. In the circumstances, I decline to find CPR 12.13 unconstitutional. I will note, however, that the issue is important and should be fully ventilated when the circumstances are appropriate.

[17] Nevertheless, because **Blaize** and **Richards** raise important concerns of justice and fairness in the application of CPR 12.13, and keeping in mind the overriding objective of the CPR to deal with cases justly, I decline to apply CPR 12.13 in this matter. Using my broad case management powers, I grant Amigos the right to be heard on the issue of the terms of the default judgment.

What are the terms of the default judgment

[18] The Flahertys characterize their claim as an action on a foreign judgment. In their claim form, the Flahertys describe the nature of their claim as follows:

> By Order dated the 23rd day of February 2022, the Claimants obtained a default judgment against the Defendant from the United States District Court for the District of Massachusetts, Court File No. 1:20-CV-11485 in the sum of US$6,238,322.72 for the First Claimant, US$1,000,000.00 for the Second Claimant, US$250,000.00 for the Third Claimant and Interest before and after judgment as particularized therein. The Defendant has to date failed to satisfy payment of the judgment debt.

[19] They claim the following relief:

> 1. Payment of the principal sum of BZ$14,976,645.44 as a debt due and owing from the Defendant;
>
> 2. Payment of Interest awarded from the 21st May, 2019 to the 23rd February, 2022, at the rate of 12% on past damages of US$777,115.00, through the date of the entry of judgment, and post judgment interest from the date of the entry of the judgment as particularized therein in the sum of BZ$580,472.96;
>
> 3. Interest pursuant to sections 165 and 166 of the Supreme Court of Judicature Act;
>
> 4. Costs; and
>
> 5. Such further relief as the Court deems just.

[20] According to the Flahertys, an action on a foreign judgment is an action for the recovery of a contract debt. They cite the following excerpt from **Halsbury's Laws of England**[6] in support of their position:

> [416] Subject to certain qualifications, a judgment in personam of a foreign court of competent jurisdiction is capable of recognition and enforcement in England. Apart from statute, such a judgment will not be enforced directly by execution or any other process, but will be regarded, for procedural purposes, as creating a debt between the parties to it, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment. The debt so created is a simple contract debt and not a specialty debt, and is subject to the appropriate limitation period.

[21] They also rely on **Kuwait Oil Tanker Co SAK and another v Al Bader and others**,[7] in which the court held that a party can file a claim to recover the damages awarded to them in a previous claim, as the judgment on the first claim creates an implied contract to honour the judgment between the parties:

> [8] The Claimants are in principle entitled to seek a judgment against Mr Al Bader upon the judgment in the first action, however surprising that may seem. The juridical basis of the second action has long been explained as being an implied contract to honour the judgment in the first action. The authorities which support such cause of action, both ancient and modern, are *Adams v Ready* (1861) 6 H & N 261; *Grant v Easton* (1883) 13 QBD 302, 53 LJQB 68, 32 WR 239; *ED and F Man (Sugar) v Haryanto* (unreported) 17 July 1996 and *Bennett v Bank of Scotland* [2004] EWCA Civ 988, [2004] BPIR 1122.

[22] On the strength of these authorities, the Flahertys ask me to determine that the terms of the default judgment are the terms of the US judgment, which created a contract debt in their favour.

[23] Amigos argues that a default judgment for an unspecified sum creates a discretion for the court in quantifying the amount of damages to be awarded, and does not confine the court to any sum granted under a foreign award that has not been substantiated in the Belizean courts. Amigos argues that under CPR 16.2(2) and (3), the Flahertys must be able "to prove the amount of damages that they are seeking other than the figure granted by the court in the U.S.A.". Amigos notes that there is no evidence to show how the figure awarded in the US judgment was arrived at. Amigos further alleges that:

> […] should the court solely consider the award issued by the courts in the U.S.A., it would be treating the claim as one for a specified sum, with the only receipt being considered being the award, which would be in contravention of the court's order that it is not a claim for a specified sum, and in contravention of the court's obligation to assess the damages. Furthermore, this would be a breach of the overriding objectives of the court as it would lead

[6] Vol 19 (2011).
[7] [2008] EWHC 2432.

to severe injustice against the Defendants as they would be forced to accept liability for a sum without knowing how the figure was derived.

[24] I do not accept Amigos's position that the entry of the default judgment for an unspecified sum in this matter requires me to assess the damages sustained by the Flahertys as a result of the 21st May 2019 incident. I do not accept this position for two reasons. First, I agree with the Flahertys that this claim is a claim for the recovery of a debt, not a claim in negligence. Nowhere in the pleadings is negligence alleged or pleaded. The Flahertys do not seek to be awarded damages. They seek to recover monies owed to them. Amigos did not provide any authorities to counter those of the Flahertys which characterize a claim such as this one as an action for the recovery of a contract debt.

[25] Second, Amigos's submissions grounded in the justice of the case are not persuasive. The Flahertys obtained a default judgment against Amigos in the US court. Amigos neither applied to set aside the default judgment, nor appealed the default judgment in the United States. Subsequently, Amigos was served with this claim in Belize, but again failed to defend it. A default judgment was entered against Amigos, but Amigos did not apply to set it aside. At this point in time, Amigos has had multiple chances to ask the US and the Belize courts to revisit the amount in damages awarded by the US court. Having failed to avail itself of any of these opportunities, I find no breach of the overriding objective, and no injustice, in declining to revisit the quantum of damages awarded to the Flahertys by the US court.

[26] Because this claim is a claim for the recovery of a contract debt, I find that the Flahertys have proven their damages by entering into evidence the Amended Judgment of the United States District Court for the District of Massachusetts dated 23rd February 2022 which created that debt. While I am mindful of Amigos's argument that doing so may be akin to treating this claim as a claim for a specified sum, in my view the terms of the default judgment cannot be determined in any other way without denaturing the claim. CPR 12.10(1)(b) confers on the court the discretion to determine the amount due on a claim for an unspecified sum. Neither CPR 12.10(1)(b), nor CPR 16.2, to which CPR 12.10(1)(b) refers, impose any constraint on this discretion. There is therefore no bar to determining the terms of the default judgment as being the sums due to the Flahertys under the US judgment.

Whether the sums awarded can be expressed in USD

[27] The US judgment awards the Flahertys damages expressed in United States dollars (USD). In their claim form, the Flahertys claim the equivalent amount expressed in Belize dollars. Amigos submits,

based on CPR 43.7(2), that the Flahertys failed to provide any evidence of any exchange rate being applied. CPR 43.7(2) provides as follows:

> 43.7 (1) This Rule has effect where the court gives judgment for a sum expressed in a currency of a country other than that in use in Belize.
>
> (2) The judgment creditor must, when commencing enforcement proceedings, file a certificate stating the exchange rate current in Belize for the purpose of the unit of foreign currency in which the judgment is expressed at the close of business on the previous business day.

[28] Further, the US judgment awards the Flahertys post-judgment interest calculated pursuant to 28 USC § 1961(a). Amigos submits that the Flahertys failed to provide evidence of the "weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding" for the calculation of the post-judgment debt under 28 USC § 1961(a). Amigos argues that the Flahertys' failure to provide this information demonstrates that the amount they seek in the claim is arbitrary.

[29] I agree with the Flahertys that a judgment can be entered for a sum expressed in USD. CPR 43.7(1) expressly contemplates a court giving "judgment for a sum expressed in a currency of a country other than that in use in Belize". CPR 43.7(2) does not apply to the entry of the judgment. CPR 43.7(2) applies where a judgment creditor commences enforcement proceedings on that judgment under Parts 44 to 53 of the CPR. The claim has not reached that stage yet. At this stage, the Flahertys were not required to provide any evidence as to the exchange rate, or the information required to calculate the post-judgment interest awarded by the US court.

[30] The US judgment awards Mrs. Flaherty the principal sum of US$6,238,322.72, Mr. Flaherty the principal sum of US$1,000,000.00, and Daniel Flaherty the principal sum of US$250,000.00. The total of the principal sum awarded to the Flahertys, expressed in USD, is US$7,488,322.72.

[31] The US judgment also awards Mrs. Flaherty pre-judgment interest from 21st May 2019 in the amount of 12% on past damages of US$777,115.00, and all three claimants post-judgment interest from the date of entry of the US judgment calculated pursuant to 28 USC § 1961(a), and costs.

IT IS HEREBY ORDERED THAT

(1) The terms of the default judgment dated 11th January 2023 are the following:

a. The defendant shall pay the claimants the principal sum of US$7,488,322.72 as a debt due and owing;

b. The defendant shall pay the claimants interest from the 21st May 2019 to the 23rd February 2022, at the rate of 12% on past damages of US$777,115.00;

c. The defendant shall pay the claimants post-judgment interest calculated pursuant to 28 USC § 1961(a) from 23rd February 2022 to the date of this ruling;

d. The defendant shall pay the claimants interest from the date of this ruling pursuant to sections 175 and 176 of the Senior Courts Act.

(2) Costs are awarded to the claimants in an amount to be agreed or assessed.

Geneviève Chabot
High Court Judge