

IN THE SUPREME COURT OF Belize, A.D. 2003

ACTION NO. 484

BETWEEN

(ALFONSO CASEY      PLAINTIFF/RESPONDENT)

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(Belize ELECTRICITY LIMITED      1<sup>ST</sup> DEFENDANT

(ATTORNEY-GENERAL 2<sup>ND</sup> DEFENDANT/APPLICANT

Mr. Oswald Twist for Claimant/Respondent

Mr. Darrel Bradley for 1<sup>st</sup> Defendant

Ms. M. Perdomo for 2<sup>nd</sup> Defendant/ Applicant.

R U L I N G

1. By his application dated 22 September 2009, the applicant (Attorney General) applies to the court to set aside the default judgment entered against the second defendant on 16 April 2008 and the order on assessment of damages made on the 10 June 2009.

2. In support of the application, the applicant relies on the affidavit of Mr. Gian Gandhi SC sworn to on 22/9/08 and filed on 23/9/09.
  
3. The case between the parties arose out of the Mollejon Hydroelectric Project under which electricity poles and high tension election power lines were erected on and over various parcels of land including the claimant's land at Camalote Village, Cayo District, Society Hall Registration Section, Block 24, Parcel 1494, 11.08 acres from Mollejon, Cayo District, to Belize City to bring hydroelectric power to the national grid.
  
4. The project was completed in the 1990s. The claimant instituted his action on 30/9/03 against the 1<sup>st</sup> defendant, Belize Electricity Ltd. The Attorney-General was later added as 2<sup>nd</sup> defendant by order made on 28/9/06 and dated 12/10/06.

5. The 2<sup>nd</sup> defendant failed to file an Acknowledgment of Service as required by the Rules and so the order was made on 16/4/08 and dated 30/4/08 for default judgment against the 2<sup>nd</sup> defendant. The said default judgment was granted following an application by the claimant and after hearing Mr. Oswald Twist of Counsel for the claimant and Ms. Andrea McSweeney Mckoy of Counsel for the 2<sup>nd</sup> defendant. The default judgment included an order for damages to be assessed against the 2<sup>nd</sup> defendant.
  
6. On 10/6/09, the assessment hearing was conducted before Hafiz J. Present at the hearing were Mr. Oswald Twist of Counsel for the claimant and Mr. Philip Palacio of Counsel for the 2<sup>nd</sup> defendant. No argument had been raised on behalf of the 2<sup>nd</sup> defendant to the effect that assessment of damages ought not to have been done because the default judgment was going to be disputed. I have the benefit of reading the decision of Hafiz J and clearly based on the valuation submitted to the court, Mr. Twist sought damages in the sum of \$33,387.75. The position taken by Mr. Palacio on behalf of

the 2<sup>nd</sup> defendant was simply that since the claim was brought for nuisance the normal measure of damages was diminution in value of the land. Hafiz J awarded the claimant the sum of \$33,387.75 with 6% interest per annum from date of claim and costs of \$5,008.00.

7. For the reasons that I will come to shortly, I set out the order of the court (Hafiz J) granted on 10/6/09 and dated 22/6/09. It reads:

*“The 10<sup>th</sup> day of June, 2009.*

***BEFORE** the Hon. Madam Justice Hafiz.*

*Upon Default Judgment having been obtained against the 2<sup>nd</sup> Defendant on 30<sup>th</sup> April, 2008 for failure to file Acknowledgment of Service and Defence,;*

*AND UPON assessment of damage being done on 29<sup>th</sup> May, 2009;*

*AND UPON the decision of Madam Justice Minet Hafiz handed down on the 10th day of June, 2009;*

***IT IS ORDERED** that the 2<sup>nd</sup> Defendant pay the Claimant the sum of Thirty Three Thousand Three Hundred Eighty Seven dollars and Seventy Five Cents (\$33,387.75) with interest payable at the rate of 6% from the date of claim i.e. 30<sup>th</sup> September, 2003 to the date of judgment with cost of Five Thousand and Eight dollars (\$5,008.00)*

*Dated the 22<sup>nd</sup> day of June, 2009.”*

8. Not only Ms. Perdomo of Counsel for the applicant/2<sup>nd</sup> second defendant, but also Mr. Twist of Counsel for the claimant and Mr. Bradley of Counsel for the 1<sup>st</sup> Defendant, overlooked the

most salient effect of the order of 10/6/2009. That order embodied and the final stamp to the default judgment dated 30/4/08 and the assessment of damages flowing from the default judgment. By its nature and effect, the order of 10/6/09 establishes that there is a final order now in place against the 2<sup>nd</sup> defendant in this claim.

9. The first issue is therefore, not whether the court should exercise its powers under Rules 12 or 13 of CPR, in this case the question is, in fact, whether this court has the power to set aside the two orders as sought by the applicant. In my view, this case has already gone past the application of Rules 12 and 13 of the CPR. As such, this court has no power to set aside the order of 30/6/08 and 10/6/09.

10. There are two principal reasons why this court cannot do so. First, Parts 12 and 13 of the CPR deal with default judgments which are entered against the defendant in two ways, namely by request procedure or by application. In this case, an application was made and the court considered the application

on 16/4/09 and granted the order. The Default Judgment to be entered against the 2<sup>nd</sup> defendant. Thus, although, in a limited way, the court had considered the merits of the claim. Second, and most importantly, in this case, as the claimant's claim is unspecified sum, and the default judgment obtained was for the damages to be determined by the court, it must be taken that Default Judgment is conclusive on liability on the matters pleaded except for the question of quantum of damages. It is therefore not open to the 2<sup>nd</sup> defendant, in this case, to contend that he is not liable to the claimant for damages. See *Lunnun- v- Singh & Ors. (1999) The Times 19 July 1999*; see also *Pugh –v- Cantor Fitzgerald International [2001] EWCA Civ. 307; The Times, 19 March 2001*. In the former case, a default judgment with damages to be assessed was entered against the defendant on a claim for damages for leakage of water and sewerage onto his land from a sewer on the adjoining premises owned by the defendant. On assessment of damages hearing the court stated:

*"That on assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether*

*such determination takes the form of a judgment following a full hearing on the facts of a default judgment."*

11. In my view, the court had already pronounced on the merits of the case against the 2<sup>nd</sup> defendant. The judgment cannot now be properly considered under the Default Judgment provisions of the Rules. In my view the Orders made on 16/4/08 and 10/6/09 constitute the final judgment against the 2<sup>nd</sup> defendant in this claim. It can only be set aside, varied or otherwise dealt with by a court higher than this court on an appeal process, and not by this court in a setting aside procedure.

12. For the above reasons, I feel that this court does not have the power to consider the 2<sup>nd</sup> defendant's application and I decline to do so.

13. The 2<sup>nd</sup> defendant's application is refused with costs.

**DATED** this 14<sup>th</sup> day of June, 2010.

Sir John Muria  
Supreme Court Judge.