SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 566 of 1997

BETWEEN:

CHASTENET ETS A TEISSEDRE BORDINET EXPORT

Claimant

and

STANLEY LEONAIRE trading as LNJ TRADING FOOD DISTRIBUTORS

Defendant

Appearances:

Ms. Vanessa Tamara Gibson for the Claimant.
Mr. Colin J. K. Foster for the Defendant.

2002: March 06
April 08

APPLICATION TO SET ASIDE DEFAULT JUDGMENT ...WHETHER CLAIM IS RES JUDICATA...PART 13.3 (1) OF CPR 2000....OVERRIDING OBJECTIVE: PART 1.1....CASES OF CITOMA TRADING LTD V THE FEDERATIVE REPUBLIC OF BRAZIL (1999) LTL 29/7/99 and KATHLEEN MACDONALD & ANOR V THRON PLC 1999) TLR 15/10/99 CONSIDERED.

JUDGMENT

[1] HARIPRASHAD-CHARLES J: The chronology of events in this matter is important. I will attempt to encapsulate them but some detail is inevitable.

[2] On 30th day of June 1997, the Claimant filed a Writ of Summons with a Statement of Claim seeking the sum of US$17,903.02 with interest and costs being the balance due and owing

by the Defendant for goods/ spirits sold and delivered by the Claimant to the Defendant who was at material times a customer of the Claimant.

[3] The Writ of Summons was personally served on the Defendant on 31st day of July 1997. On 26th day of November 1997, the Claimant entered Judgment in Default of Appearance.

[4] On 2nd day of February 1998, the Claimant filed an application to examine the Defendant/ Judgment Debtor. Several adjournments ensued. A few warrants for the arrest of the Defendant were issued. Then on 24th day of March 1999, Mr. Lorne Theophilus appeared for the Defendant and requested an adjournment. An adjournment was granted to 23rd day of April 1999 and the consequential sanction of costs was ordered against the Defendant. It is noteworthy to observe that Mr. Theophilus was never the Solicitor on record. Indeed, there was no solicitor on record until Mr. Colin Foster appeared for the Defendant towards the latter days leading to these proceedings.

[5] On the subsequent adjourned date, neither Mr. Theophilus nor the Defendant was present. Another warrant was issued. On the 14th day of May 1999, Mr. Theophilus re-appeared and requested an adjournment. Once again, the sanction of costs was imposed on the Defendant. The matter was adjourned to 18th day of June 1999.

[6] The record of the court is deficient of all information but it is evident that there were a series of adjournments. Ms. Gibson counted 20. The matter eventually came up on 9th day of February 2000 and another warrant was issued. It was adjourned to 7th day of April 2000. One day before the adjourned date, the Defendant filed an application to set aside the Judgment in Default of Appearance entered on 26th day of November 1997. His application was supported by a detailed affidavit, a defence and numerous exhibits.

[7] On 7th day of April 2000, in the presence of Counsel for the Defendant, d'Auvergne J ordered as follows:

> "(1) That the Judgment Debtor do pay to the Judgment Creditor the sum of EC$1,000.00 monthly commencing on the 30th day of April 2000 until the full amount of the judgment debt, interest and costs is satisfied.

(ii) Costs in the sum of $300.00 to the Plaintiff."

[8] There was no appeal from this Order. Nor was there any application at any time to vary or set aside this Order. This Judgment therefore stands.

[9] On 25th day of May 2001, the Claimant instituted committal proceedings for contempt of court alleging that the Defendant has failed, neglected or refused to comply with the Order of Court dated 7th day of April 2000.

[10] An Order was made committing the Defendant, STANLEY LEONAIRE to prison for one week for his contempt of disobeying the Order of the Court dated 7th day of April 2000. On 16th day of October 2001, the said Order of Committal was discharged and the Defendant was ordered to re-appear to be orally examined on 21st day of November 2001.

[11] On 21st day of November 2001, the Defendant filed in the High Court Office another application to set aside the Judgment in Default of Appearance entered herein on 26th day of November 1997. The said application was supported by an affidavit deposed to by the Defendant and a draft defence.

[12] The application to set aside the Judgment in Default of Appearance was heard on 6th day of March 2002. Two issues arise for consideration namely:

(i) The effect of the Order of the Court made on 7th day of April 2000 and

(ii) A second application to set aside the Judgment in Default of Appearance and the plea of *res judicata.*

[13] It is trite law that the Order of the Court made on 6th day of April 2000 is binding. As I indicated earlier, there was no appeal of this Order nor was there any application to set aside or vary the Order. The Order therefore stands.

[14] In my opinion, this second application to set aside the Judgment in default is an abuse of the process of the Court and involves the principle of *res judicata*. The principle of *res*

judicata was authoritatively stated in Henderson v Henderson (1843-1860) All ER 378. At pages 381 - 382, Vice Chancellor Wigram stated:

> " I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward only because they have, from negligence, inadvertence, or by accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

[15] In Hoystead v Commissioner of Taxation [supra], Lord Shaw (delivering the Judgment of the Privy Council) expressed the doctrine thus:

> "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents of the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

[16] The principle of *res judicata* has been applied in a number of cases emanating from our jurisdiction. See:

(1) Amos Richardson v Benjamin Richardson [Civil Appeal No. 4 of 1992] [Anguilla] [unreported].

(2) Donald Halstead v The Attorney-General et al [Civil Appeal No. 10 of 1993] [Antigua & Barbuda] [unreported].

(3) Frederick Ballantyne v Cash and Carry Limited [Civil Appeal No. 4 of 1993] [Saint Vincent & The Grenadines] [unreported] and

(4) Etoile Commerciale SA v Owens Bank Ltd. [1992] 42 WIR 128.

(5) Heirs of Lucienne Zepherin Mathieu represented by Suzanna Isidore v The Chief Surveyor et al (unreported) Civil Suit No. 741 of 1999 (Saint Lucia)

[17] As I earlier pointed out, on 6th day of April 2000, an application to set aside Judgment in default was filed. On 7th day of April 2000, the Court upon hearing Counsel for the Claimant and Counsel for the Defendant, as is reflected in the Order, made an Order for the Defendant to pay a monthly sum towards the judgment debt. At that hearing, Counsel for the Defendant must have alluded to the application to set aside the Judgment in Default of Appearance which he had filed the day before. It therefore seems to me that the instant application to set aside the Judgment in Default of Appearance is an abuse of the process of the Court and a means to retard the administration of justice.

[18] In case I was wrong to conclude that the application is an abuse of the process of the court and must be struck out, I shall venture to deal with the present application to set aside the Judgment in Default of Appearance dated 26th day of November 1997. Learned Counsel for the Defendant was extremely vociferous in his submissions to set aside the default judgment. The main thrust of his argument focused on the 'real prospect of successfully defending the claim'. Counsel relied heavily on The Saudi Eagle [1986] 2 Lloyd's Rep. 221 and Evans v Bartlam [1937] AC 473. He finally implored the Court to disregard the 4½ years delay.

[19] Ms. Gibson for the Claimant was quite terse in her submissions. She argued that in setting aside a Default Judgment, the Court must be guided by the reason for the delay, the length of the delay and the conduct of the parties. She contended that the Defendant was served with the copy of Default Judgment on 12th day of December 1997 and to date, he has given no explanation at all for his failure to file an acknowledgement of service and a defence.

[20] Counsel next submitted that the Defendant has no real prospect of successfully defending his claim because under the Sale of Goods Act, he could have refused the goods. He did not do so. She contended that the length of delay is inordinate and that the setting aside of the judgment after 4 ½ years is oppressive and would seriously prejudice the Claimant. In closing remarks, Ms. Gibson referred to CPR 2000 and more specifically to Part 1.1 and Part 13.3 (1).

[21] Part 13.3 (1) of CPR 2000 states:

> "If 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 has been entered.
>
> (b) gives a good explanation for his 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.

[22] Part 13.3 (1)(a) requires that the Defendant applies to the Court as soon as reasonably practicable after finding out that judgment has been entered. This Judgment was obtained on 26th day of November 1997 and the Defendant became aware of the Default Judgment on 12th day of December 1997. The instant application to set aside the Default Judgment was made on 21st day of November 2001. In my opinion, a delay of 4 ½ years could not pass the test of 'as soon as reasonably practicable' as required by the Rule.

[23] Part 13.3 (1) (b) requires that the Defendant gives a good explanation for his failure to file an acknowledgement of service or a defence as the case may be. The affidavit evidence of the Defendant did not give any reason, good or otherwise why the Defendant had acted or not acted in the way he did.

[24] The Defendant's principal contention is that he has a 'real prospect of successfully defending the claim.' The Defendant purported to rely on the allegation that the goods received were not in a merchantable quality fit for resale and consumption. He further alleged that the goods were exported without labels and proper storage techniques. Looking at the defence, there is not an iota of evidence to indicate that the Defendant rejected the goods which he could have done in accordance with Section 289 Rule 4(b) of the Sale of Goods Ordinance. In fact, he accepted the goods even when he alleged that they were damaged. On the evidence presented, the Defendant may have an arguable defence but that is far from the cry of a 'real prospect of successfully defending the claim.'

[25] It is also worthy to note that prior to CPR 2000, if the Court was satisfied that there was a Defence to be advanced that had a real prospect of success, despite delay, for example, then the Court would favour setting aside the default judgment. The position after CPR 2000 is no longer so and is best illustrated by the decisions of Citoma Trading Ltd v The Federative Republic of Brazil (1999) LTL 29/7/99 and Kathleen MacDonald & Anor v Thorn PLC (1999) TLR 15/10/99.

{26] We are now in a world which is governed by the new Civil Procedure Rules. Under Part 13.3, the Court has to take ***all three factors*** into consideration before seeking aside a Default Judgment. The Court must not only look to see if there was a real defence to the claim but is obliged to take into account whether the person seeking to set aside the Defence had made the application promptly and give a good explanation for his failure to file an acknowledgement of service or a defence as the case may be. Thus, the additional elements that had to be considered were the nature of the delay, the period of the delay and the reasons for it, any prejudice the Claimant is likely to suffer if the Default Judgment was set aside and the overriding objective in CPR 1.1. Here the delay was exceptionally long and wholly unexplained. There would be prejudice to the Claimant if the case were reopened. There comes a point where mere delay causes prejudice. Finally the overriding objective meant that the matters had to be dealt with expeditiously and fairly and there had already been a great deal of court time spent on the instant case. Even if the Defendant had a 'real prospect of successfully defending the claim', there were numerous factors which militate against the setting aside of the Default Judgment.

[27] Taking all factors into account, I would dismiss the Defendant's application to set aside the Default Judgment dated 26th day of November 1997 with Costs to the Claimant of $1,000.00 to be paid not later than 8th day of October 2002.

INDRA HARIPRASHAD-CHARLES

High Court Judge