ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2005/0634

BETWEEN:

KELTON DALSO

Claimant

AND

JEROME ELVIN

Defendant

Before:
Master Cheryl Mathurin

Appearances:
Ms. C Debra Burnette and Ms Jasmine Wadefor the Claimant
Mr. George Lake holding papaers for Mr. Asquith Fearon for the Defendant

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2006: October 2nd
November 23rd

RULING

[1] MATHURIN, M: A brief chronology of these proceedings in necessary, in my opinion to put this application in perspective. The proceedings were commenced by way of an application from which an order was made by the court on the 3rd January 2006 for a warrant to be issued for the arrest of the Defendant (hereafter "Mr. Elvin") to show cause why he should not give security for the payment of $9,000.00 plus damages or to be committed to prison. A part of the order granted by the court on that day was that the Claimant (hereafter "Mr. Dalso") was to file a claim form within 7 days.

[2] On the 12th January 2006 the warrant was executed and Mr. Elvin entered into a bond before the Registrar of the High Court with two sureties in the sum of $8,000.00. An Affidavit by the Bailiff of the High Court indicates that on that same day the Defendant was served with the Claim Form. Mr. Elvin took no further steps in the proceedings and on the 3rd February 2006 pursuant to a request by Counsel for Mr. Dalso, Judgment in default of

acknowledgment of service was entered against Mr. Elvin. Counsel for the Defendant filed an acknowledgment of service on the 3rd April 2006.

[3] On the 7th April 2006, Mr. Elvin was personally served with a copy of the Judgment in Default of Acknowledgment of Service. Mr. Elvin took no further steps and on the 15th June 2006 was personally served with a copy of a Judgment Summons to attend Chambers on the 11th July 2006. On the 11th July 2006, the Defendant appeared and the matter was adjourned to enable him to respond to the Judgment Summons. The matter was subsequently listed for the 18th September 2006.

[4] On the 7th September 2006, Mr. Elvin filed an application pursuant to Part 13 to set aside the default judgment of the 3rd February 2006. In support of the application the Mr. Elvin stated that when he was served with the Claim, he was not able to retain Counsel immediately and he left the jurisdiction and upon his return he retained Mr. Fearon as his legal representative. He then stated that he was served with a judgment summons on the 19th May 2006. Attached to the application and also filed obviously and admittedly in error was a defence.

[5] Counsel for Mr Dalso opposed the application by way off affidavit in reply on the 14th September 2006. The bases of the objection are that Mr Elvin has failed to give a good explanation for his delay in filing the defence, that the application was not filed in a timely fashion. Mr Fearon replied that the entering of a default judgment is an administrative process with no investigation into the merits and if the judgment was not set aside, there was a potential to cause injustice. The parties were asked to make brief written submissions to assist the court in its determination.

The Law

[6] The relevant law is Part 13 Rule 3 of CPR 2000 which states;

> *"…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 acknowledgment of service or a defence as the case may be; and*
> *(c) has a real prospect of successfully defending the claim."*

Defendant's submissions

[7] Counsel for the Defendant has submitted the following authorities in support of his submissions;

Evans v Bartlam (1937) AC 473
Excerpts from Commonwealth Caribbean Civil Procedure Gilbert Kodilinye
The Supreme Court Practice 1991 London, Sweet & Maxwell

[8] Counsel argues that the determination of the case upon hearing the merits of it that is the sine qua non of the attainment of justice and that the major consideration of the court is whether the Defence is one of merit and this should transcend any reasons given by him for the delay. Counsel also states that in support of this consideration, an applicant may make repeated applications if unsuccessful on their first or subsequent attempts.

Claimant's submissions

[9] Counsel for the Claimant relies on the following authorities;

Phillip MB Luke v Bernard Alexander DOMHCV2001/0161 Commonwealth of Dominica
Chastenet v Stanley Leonaire SLUHCV1997/0566 Saint Lucia
Brathwaite and Henderson v Potter and Potter Civil Appeal 18 of 2002 Grenada
Alexander and Alexander v Kent Estates Limited Civil Appeal 8 of 1998 Grenada

[10] Counsel for the Claimant argues that the conditions are mandatory and that the Defendant has failed to satisfy the three requirements to be met before a judgment can be set aside by the Court.

[11] I have examined the authorities and submissions of both Counsel. It is regrettable that Counsel for the defendant clearly invested no time in research within the jurisdiction to support his claim. There is learning on the area both pre and post CPR2000 and frankly the authorities for the Defendant were, in my opinion, inadequate. The Supreme Court Practice, represents the law in England which differs from that under CPR2000 on the ground that whereas the length of delay and failure to provide a good explanation for the delay as well as a defence with a real prospect of success are principles (my emphasis) upon which a court relies to set aside a default judgment, they are statutory criteria under the CPR2000 which the court is obliged to take into consideration.

[12] I am guided by and agree with Hariprashad-Charles J in Chastanet v Leonaire when she states that "*the second application to set aside a Judgment in default is an abuse of the process of the court and involves the principle of res judicata"* .

[13] The Court of Appeal in this jurisdiction has upheld the ratio in the case of Vinos v Marks & Spencer (2001) 3 AER 784 where May LJ held that the words "*only if"* the stipulated conditions are fulfilled appearing in the rule as a precondition to the exercise of a discretion meant that the Court did not have the power to do otherwise. An extension of that ratio would therefore mean that the Court clearly does not have the power ignore any of the three requirements stated in Rule 13.3. The defendant has to answer all three requirements to the satisfaction of the Court.

[14] The Defendant was served with the judgment against him from the 7th April 2006, shortly after he had entered an appearance on the 2nd April 2006. He has offered no evidence either as to why he has not applied to the Court before 7th September 2006 to set aside the judgment or why 7th September 2006 was as soon as practicably possible for him to make that application.

[15] Counsel for the Defendant entered an acknowledgment of service for the Defendant signed on the 28th March 2006. The judgment in default was entered on the 7th April 2006. No explanation has been proffered as to why no defence was filed or why an extension of time to file a defence was not sought from either the Claimant or the Court in accordance with the Rules. The Defendant avers however, untruthfully, that by the time he was able to retain Counsel, the Claimant had obtained a Judgment in default. The documents on the file do not support this.

[16] The draft defence exhibited to the application posits an entirely different contract to the one alleged in the claim. This can only be established on evidence and if determined in favor of the Defendant poses a real prospect of defending the claim. However, taking into account all the circumstances and the neglect of the Defendant in relation to the requirements of the Rule, I would dismiss the Defendant's application to set aside the Default Judgment dated the 7th April 2006 with costs to the Claimant in the sum of $1,000.00.

CHERYL MATHURIN
Master