IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV 1997/0115

BETWEEN:

LOUISE MARTIN
(as widow and executrix of
The Estate of Alexis Martin, deceased)

Claimant/Respondent

And

ANTIGUA COMMERCIAL BANK

Defendant/Applicant

Appearances:

Messers E. Ann Henry, C. Debra Burnette and Jasmine Wade of Henry & Burnette for the Claimant/Respondent
Ms. Tracy Benn of Roberts & Co for the Defendant/Applicant

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2007: May 05 August 13
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Civil Procedure Rules 2000 (CPR 2000) – Application to set aside judgment obtained in default of defence – Whether application accords with Part 13.3 of CPR 2000 – Good explanation for failure to file defence – Real prospect of successfully defending the claim.

RULING

[1] Thomas J: This is an application by the Applicant/Defendant seeking to have a judgment in default of defence dated 8th January 2007 set aside. The Application is supported by an affidavit sworn to by Alincia Grant, Legal Counsel/Corporate Secretary of the Applicant/Defendant.

SUBMISSIONS

[2] By order of this Court both sides filed written submissions. The following constitutes the main submissions tendered on behalf of the Defendant/Applicant.

1. The setting aside of a default judgment is governed by Part 13 of CPR 2000 under which a judgment may be set aside 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 a defence;

   (c) has a real prospect of successfully defending the claim.

2. The judgment in default of defence is irregular in that it is not in accordance with Part 12.10 (4) of CPR. There should have been an application to the Court to determine the terms of the judgment under paragraph 4 and not a request for judgment in default of defence since the claim is for some other remedy other than a specified sum, see Parts 12.10 (4) and (5).

3. Reliance is placed on the decision of this Court in DSS Company Limited et al v Allied Hotels and Resorts (Claim No. ANUHCV 2005/0059) where the facts are similar and the default judgment was set aside.

4. Part 73 of CPR 2000 appeared not to be satisfied. In accordance with Part 73.3 (3) in order for there to be a transition between the old and the new rules, the Court Office must fix a date, time and place for a case management conference under Part 27 after a defence had been filed.

[3] The following are the main submissions on behalf of the Claimant/Respondent:

1. The governing provisions for setting aside an irregularly obtained judgment in default are to be found in Part 13 of CPR 2000 of which rule 13.2 (1) (b) is the operative provision. This provision must be read together with Part 12 r. 5.

2. The defence advanced by the Defendant/Applicant does not raise to the level of having a real prospect of success but is rather fanciful – *Swain v Hillman* and another [2001] 1 All ER 91.

3. The failings of the Applicant cannot be saved by the overriding objective provisions in CPR 2000, see *Brathwaite Henderson* v *Potter & Potter* Civil Appeal No. 18 of 2002.

4. It is submitted that the Court in applying the strict provisions of Part 13.3 cannot look to the overriding objective to assist a party in succeeding in an application which is doomed under other parts of the Rules and accordingly without merit and in effect seeks to retain the administration of justice.

5. It is submitted that the application must be dismissed with costs to the Respondent in the sum of $5,000.00.

ANALYSIS

[4] The analysis of the submissions will follow the path of Part 13 of CPR 2000 and Part 73 (3) of CPR 2000.

PART 13 OF CPR 2000

[5] The powers of the Court to set aside or vary a default judgment are set out in Rule 13.3 of CPR 2000. Its contents are in these terms:

> "13.3 (1) 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 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".

[6] The first observation, which is now well settled, is that the constituents of Rule 13.3 are conjunctive.

RULE 13.3 (1) (a)

[A]pplies to the court as soon as reasonably practicable after finding out that judgment had been entered.

[7] With respect to this requirement, the Defendant/Applicant contends that an Application, Affidavit in Support (with Draft Defence and Counterclaim attached) and Draft Order to set aside judgment in Default of Defence on 6th February 2007 after being served on 22nd February 2007 with the Judgment in Default of Defence.

[8] With respect to r. 13.3 (1) (a) the Claimant/Applicant says that: there is no specific time period given in the rules. Reasonableness, therefore deposes on the facts of the case. The facts of this case are that the matter was in train since 1997 when a Writ of Summons, indorsed with a Statement of Claim was filed and served. These facts place the issue in perspective as the Applicant was not caught by snap of justice. It is further submitted by

the Claimant/Applicant that at this stage it was the duty of the Applicant to move with haste to file its defence so as to avoid entry of judgment against it.

[9] There need not be much debate on this issue since the evidence reveals that a period of fifteen days elapsed between being served with the judgment and the filing of the application to set it aside. The Court considers this to be 'as soon as reasonably practicable' for the purposes of rule 13.3 (1) (a) of CPR 2000.

RULE 13.3 (1) (b)

[G]ives a good explanation for the failure to file a defence.

[10] The reasons advanced by the Defendant/Applicant for the failure to file and serve a defence are as follows:

1. First, after the Claimant filed the 'Amended Claim Form, it had been involved in the interlocutory proceedings which led to the dismissal of the claim in the High Court on 14th day of April 2003. There was no requirement to file and serve a defence during that period or thereafter.

2. Shortly thereafter, the Claimant filed a Notice of Appeal against the judgment of the High Court on 22nd day of April 2003. The appeal was not heard until 23rd day of November 2006. During that time the case stood dismissed and therefore there was no reason or requirement to file a defence.

[11] On behalf of the Claimant/Respondent the following are the submissions:

"3. The operative provision is to be found in rule 13.2 (1) (b) of CPR 2000.

4. The provisions in Part 13 r. 2 (1) (b) should be read together with Part 12 – r. 5.

5. Part 12 r. 5 outlines the conditions to be satisfied in order for the judgment to be entered for failure to file a defence. The provision is unambiguous and on any application for judgment in default of defence, the requirements are that:

   (i) the Claimant must prove service of the Claim Form and Statement of Claim;
   (ii) the Defendant must not file an Acknowledgment of Service, or

   (iii) the period for filing a Defence must have expired.

6. The above requirements indicate the limited circumstances in which a court is restricted to say that default judgment was 'wrongly entered'. It is submitted that the question is one of fact.

7. In the affidavit in support of the Request for Judgment filed on the 8th January 2007, at paragraph (6), the Respondent deposed that she served her Amended Statement of Claim on the Defendant on the 19th December, 2001. At paragraph (7) of the said affidavit the Respondent deposed that no defence was filed by the Applicant, even as late as November, 2002. The Writ of Summons with Statement of Claim was filed and served since April 1997.

8. It follows that on the strength of the evidence, the Claimant/Respondent has met the threshold requirement to have a default judgment entered in her favour. In that respect the Respondent submits that the first and second grounds of the Applicants application must fail as a matter of law and fact.

15. In its affidavit in support of its application filed 6th February, 2007 the Applicant admits that the judgment in default of Defence was served on the 22nd January 2007 and the present application is made on the 6th February, 2007. At paragraph (6) of the affidavit the applicant deposes that its failure to file a defence was on account of it been involved in interlocutory proceedings including the hearing of the appeal in November 2006.

16. It is the Claimant/Respondent's submission that even at the stage of the interlocutory proceedings, the Applicant was out of time and made no attempts to file an application for an extension of time. It is further submitted that once the Court of Appeal ruled in favour of the Appellant/Respondent, the matter automatically was reinstated as the decision of the learned trial judge was quashed and the application of the Defendant/Applicant was dismissed."

[12] It is the Court's view that the Defendant/Applicant's submissions have not addressed the legal consequences of its failure to file a defence prior to the date of the application to have the claim struck out. In this context certain dates are both significant and critical:

1. The Claimants' action was commenced on 9th April 1997.

2. An Amended Claim Form was filed and served on 19th December 2001.

3. On 19th November 2002 application was filed on behalf of the Claimant for Judgment in default of Defence.

4. Application seeking to strike out the claim was filed on 16th December 2002.

5. The Application was heard on 4th April 2003 and the decision granting the reliefs sought by the Applicant/Defendant was delivered on 14thApril 2003. The Court granted the reliefs as prayed which meant that as of 14th April 2003 the Claimants' claim was nugatory.

6. By notice of appeal filed on 22nd April 2003, the decision of the High Court was challenged but the decision was delivered until 26th November 2006.

7. As of 26th November 2006 the Claimant's claim was restored.

[13] The established rule is that an order of the Court stands until it is set aside by another Court of competent jurisdiction, see: ISAAC v ROBERTSON [1984] 3 AII ER 140. Even without citing this authority this is what learned counsel for the Defendant/Applicant implicitly alludes to in her submissions. What is contended is that between 14th April 2003 and 29th November 2006 the Defendant/Applicant there was nothing the Defendant or even the Claimant could do. This submission however overlooks the period during which no interlocutory proceedings were filed. It is for this reason that the Claimant/Respondent contends that as of November the Claimant had met the threshold for the purpose of making application for a Judgment in Default of Defence. In like manner, during the said period a defence could have been filed either during the normal period or by way of extension sought for the purpose.

[14] Therefore, the contention that the Defendant/Applicant was involved in interlocutory proceedings is only the latter part of the equation. The earlier part creates a serious difficulty for the Defendant/Applicant as it is not addressed. In other words, since the interlocutory proceedings did not commence until 4th April 2003, no reason far less a good explanation is advanced by the Defendant/Applicant as to why a defence was not filed during this period. This issue will be further addressed below.

RULE 13.3 (1) (c)

[H]as a real prospect of successfully defending the claim.

[15] The submission on behalf of the Defendant/Applicant runs in this way:

> "9. Regarding (c) above, the Defendant contends that there is a real prospect of successfully defending this claim. We refer to the Draft Defence and Counterclaim filed herein on February 6, 2007.
>
> 10. In particular, the Defendant denies that:
>
> (a) There was an implied term that '... the purpose of the insurance policy was to keep the building on the charged land in good and proper repair and in the premises, the Bank would not apply any monies towards the discharge of the sum secured as provided in clause 1 (b) of the written variation of charge unless the building on the charged land had been destroyed or otherwise rendered 'incapable of repair'. In fact, clause 1 (6) states that the Bank had a discretion on whether to apply any monies received on any building on the charged land or part thereof howsoever affected either in or towards making good the loss or damage in respect of which monies are received or in or towards the discharge of the secured sum. In this

case, the Bank in exercising its discretion applied the proceeds of the insurance monies towards the discharge of the sum secured. There was therefore no breach of contract as alleged by the Claimant.

(b) The Bank further denies that there are good grounds for holding it liable for any deterioration of the Claimant's property as claimed;

(c) In addition, the Claimant in paragraph 18 of the Amended Statement of Claim admits that they were supplied with the information as to the account of all the monies paid by the Claimants between December 12, 195 and October 31, 1996 thus rendering the claim for an account inappropriate;

(d) The Defendant also denies that it owes the Claimant the sum of $154,954.76 to be applied towards the payment of interest after the 10th day of March, 1998 and also that it is liable to pay damages for breach of contract."

[16] The Claimant's submission with respect to rule 13.3 (1) (c) are as follows:

"13. The principle emanating from the authorities indicates that whether an Applicant succeeds in setting aside a default judgment does not only depend on the existence of a defence, but that all of the requirements must be satisfied in order that they must succeed. In the High Court decision Claim No. ANUHCV 2005/0634 Kelton Dalso v. Jerome Elvin, the Master followed the line of authorities which clearly state that in order that the Applicant may succeed under Part 13.3 all the requirements of the rule must be complied with as the same is conjunctive.

14. Further, in the Privy Council decision in Dipcon Engineering Services Ltd v Bowen and Another [2004] UKPC 18, the [Privy Council] recognized that although the merits of a defence is of importance, it could even be decisive, however it is the Defendant's explanation and failure to comply which are material to the success of an application be set aside a default judgment.

19. The Applicant's main contention is that it has a real prospect of successfully defending the claim. The Respondent's claim before the court is that the true nature of requiring a policy of insurance was to protect the building and to keep in a good state of repair. The Respondent does not deny that Clause 1 (6) provided two alternatives to the Chargor. Rather, the Respondent asserts that the true nature of the policy required by the Applicant was to ensure that the property was kept in good state of repair.

20. It is the Defence, the Defendant largely admitted the Statement of Claim of the Respondent. However, as to the gravamen of the issue of the true purpose of the policy of insurance the defence is silent. Instead the Defendant sought to circumvent the issue by pleading that the insurance was to ensure that its security was not impaired. The Respondent submits that this is not that needs to be answered. In that respect the Respondent submits that is not a good defence to simply repeat the provisions in the Charge document. The defendant ought to have gone further and put its case within clearly recognized legal principles. In that regard, it is respectfully submitted that, the defence does not raise to the level of having a real prospect of success, but is rather fanciful – Swain v Hillman and another [2001] 1 All ER 91.

21. The Respondent in conclusion submits that the failings of the Applicant cannot be saved by the overriding objective provisions in *CPR 2000, Part 1*. Indeed, in the Court of Appeal decision in Grenada Civil Appeal No. 18 of 2002 Brathwaite & Henderson v Potter & Potter, in response to the Appellant argument at paragraph (9) that the court has no discretion to

apply the overriding objective where there are specific rules, the Court at paragraph (14) agreed with the submission and that where the words of the rules are clear, a judge who exercises a discretion and apply the overriding objective is exercising a discretion which the CPR does not permit. It follows that where the provisions of Part 13.3 are specific and clear the court cannot be move to apply its discretion and applying the overriding objective.

22. It is submitted that the Court in applying the strict provisions of Part 13.3 cannot look to the overriding objective to assist a party in succeeding in an application which is doomed under other parts of the Rules and accordingly without merit and in effect seeks to retard the administration of justice."

[17] On the pleadings the central issue in these proceedings concerns the purpose and interpretation of an insurance policy relating to the property of the Claimant. And in an effort to show both sides of "a real prospect of successfully defending the claim" in Rule 13.3 (1) (c) learned counsel on both sides have engaged in technical arguments. But for the purposes of this said rule what is really required to succeed wither way?

[18] In BLACKSTONE'S CIVIL PRACTICE 2002 at paragraph 34.10 the matter is addressed in these terms in relation to summary judgment under Rule 24.2 of the English Civil Procedure Rules. However, this provision contains the phrase "real prospect of succeeding" hence the relevance.

> "In *Swain* v *Hillman* [2001] 1 All ER 91, Lord Woolf said that the words 'no real prospect of succeeding' did not need any amplification as they spoke for themselves. The word 'real' directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. Nor does it mean that summary judgment will be granted if the claim or defence is 'bound to be dismissed at the trial'. The Master of the Rools went on to say that the summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. A claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based (*Three Rivers District Council v Bank of England* (No.3)). The judge should have regard to the witness statements and also to the question of whether the case is capable of being supplemented by evidence at the trial (*Royal Brampton Hospital NHS Trust v Hammond* [2001] BLR 297)".

[19] Specifically to the issue of setting aside a default judgment, the learned authors of BLACKSTONE'S[1] at paragraph 20.11 record the following learning:

> "The wording of rule 13.3 (1) (a)[2] mirrors the test established in *Alpine Bulk* Transport Co. Inc v *Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's Rep 221 that the defendant must have a case with a reasonable prospect of success, and that it is not enough to show a merely arguable defence. In *Rahman* v *Rahman* [1999] LTC 26/11/99 the court considered the nature of the discretion to set aside a default judgment under CPR, r. 13.3. It concluded that the elements the judge had

[1] Op cit
[2] The analogue of Rule 13.3 (1) (c) of CPR 2000

to consider were the nature of the defence, the period of delay (ie, why the application to set aside had not been made before), any prejudice the Claimant was likely to suffer if the default judgment was set aside, and the overriding objective.
In *Thorn* v *Macdonald* (1999) CPLR 660 the Court of Appeal approved the following principles:

(a) while the length of the delay by the defendant must be taken into account, any pre-action delay is irrelevant;

(b) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but it is not always a reason to refuse to set aside.

(c) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

(d) prejudice (or the absence of it) to the Claimant also has to be taken into account."

[20] By no stretch of the imagination can it be said that the Defendant's case is fanciful. In fact, as noted before, the issue of the insurance policy is the essence of the proceedings. It is the financial thread running through the proceedings. In turn much depends on the interpretation placed on it by either party and what is accepted by the Court. In a sense the probabilities are equal in this regard. It is therefore the determination of the Court that the Defendant/Applicant has a real prospect of successfully defending the claim.

[21] The foregoing however does not end the matter as the dicta quoted above suggest that the requirements of Rule 13.3 (1) (a) – (c) are not necessarily in water-tight compartments. In this regard that in *Thorn v Macdonald, supra* the English Court of Appeal in relation to the same rule approved, *inter alia*, that any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but it is not always a reason to refuse to set aside. Also, learned counsel for the Claimant, in view of the delay involved in the filing of a defence has pointed out that in *Dipcon Engineering Services Ltd v Bowen and Another, supra*, the Privy Council recognized that while the defence may be decisive, it is the Defendant's explanation and failure to comply which are material to the success of an application to set aside a default judgment.

[22] The reason advanced for the delay or failure to file a defence is involvement in interlocutory proceedings after the filing of the Amended Claim Form. This the Court does not accept as being factual as such involvement was from April 2003. In any event, should the default judgment be set aside?

[23] In BLACKSTONE'S supra at paragraph 20.11 it is noted that in *Law* v St Margaret's Insurance Ltd [2001] LTC 18/1/2001, the Court of Appeal allowed a judgment in default to be set aside despite the defendant's Solicitor's procedural errors in failing to file an acknowledgement of service and in failing to ensure that the statement of truth in relation to the evidence in support of the application was signed by the right person. The overriding objective required that the default judgment be set aside in order to enable the merits of the defence to be determined.

[24] It is reasonable to say that the foregoing case may be categorized as bearing on minor procedural errors, even with the statement of truth involved. Therefore, this case can be distinguished as there is the period 19th December 2001 and 18th November 2002 when, without explanation, no action in terms of filing a defence or seeking an extension to do so.

[25] Applying the principles set out by the English Court of Appeal in *Thorn plc* v *Macdonald,* supra, the results are as follows: First, there was no delay by the Defendant in addressing the default judgment after finding out that it was entered. Secondly, no good explanation was advanced for the failure to file a defence. Thirdly, the Defendant has a real prospect of successfully defending the claim.

[26] But the same case also establishes that the failure to provide a good explanation is not always a reason to refuse to set aside. Also that the primary consideration must be a defence with a real prospect of success and that justice should be done. Further, that prejudice to the Claimant (or absence of it) must be taken into account.

[27] While the Defendant has a real prospect of defending the claim successfully, this must be balanced against the lack of a good explanation for the failure to file a defence and the prejudice to the Claimant.

[28] The fact of the matter is that there was a period of eleven months prior to the Defendant's application was filed on 4th April 2003, when as learned counsel for the Claimant/Respondent put it, not only was there no defence filed but also no application for

an extension to do so. On the other hand, the Claimant's action was filed since 9th April 1997 and she is still at square one.

COMPLIANCE WITH PART 73 OF CPR 2000

[29] In Defendant's submission the issue of non-compliance with Part 73.3 (3) of CPR 2000 as not complied with. The Claimant's response to this is that the issue was fully rejected in the Court of Appeal in Civil Appeal No. 7/2003.

[30] The Court takes the view that given the fact that the matter of transition is of such fundamental importance that in restoring the Claimant's claim, this implies satisfaction that there was compliance.

CONCLUSION

[31] It is the view of the Court that the following statement of principles as contained in CIVIL PROCEDURE (THE WHITE BOOK), 2003 Vol. 1 at paragraph 13.31 respecting the exercise of the discretion regarding the setting aside of the default judgment to be both significant and critical:

> "The discretionary power to set aside is unconditional. The purpose of the power is to avoid injustice. The major on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other compelling reason why judgment should be set aside or he should be allowed to defend the claim. The defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with Pt 12: this is not something which the court will do lightly."

[32] The learning, in the context of Part 13.3 of CPR, speaks of the major consideration being the real prospect of successfully defending the claim. But major implies minor as there is in this context so that while rules 13.3 (1) (a) and (b) may be minor they are part of the conjunctive requirement of the entire provision[1].

[33] Learned counsel for the Claimant/Respondent in her submissions has pointed out to the fact that the Privy Council in Dipcon Engineering Services Ltd v Bowen and the Attorney

[1] DSS Company Limited v Allied Hotels and Resorts Limited Claim No. ANUHCV 2005/0059.

General of Grenada[1] also addressed the issue. This is what Lord Brown of Eaton-under-Heywood said on the issue at paragraph 28:

> "The judge was in terms referring to 'the application itself' and, indeed, he was clearly right to have been doing so. Of course, the merits of the proposed defence are of importance, often perhaps of decisive importance, upon any application to set aside a default judgment. But it should not be thought that it is *only* the merits of the proposed defence are important. The defendants' explanation as to how a regular default judgment came to be entered against them, in particular where, as here, it followed their failure to comply with the preemptory order, will also be material."

[34] Therefore for the purposes of a conclusion the events must be recounted in order to give rise to the equation: 1. The Defendant acted as soon as reasonably practicable. 2. The Defendant did not give a good explanation for the failure to file a defence. 3. The Defendant has a real prospect of successfully defending the claim.

[35] It means therefore that the Defendant has not satisfied the conjunctive requirements of Part 13.3 (1) of CPR 2000. The other part of the equation is prejudice to the Claimant having regard to the fact that the writ of summons was filed since 1997. It is therefore the determination and order of the Court that the application to set aside the default judgment must be and is hereby refused. The Defendant must pay the Claimant costs in the amount of $2,500.00. Order accordingly.

Errol L. Thomas
Judge

[1] [2004] UKPC 18