IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV2008/0228

BETWEEN:

ANTONIO GENCHI

Claimant/Respondent

And

PRESTIGE AUTO IMPORTS

Defendant/Applicant

On written submissions

Mr. A. C. Elliot for Claimant/Respondent
Ms. Renée T. St. Rose for Defendant/Applicant

2009: December 09.

RULING

[1] **GEORGES, J (Ag.):** This is an application by the Defendant/Applicant to have a judgment in default of defence entered on 24th March 2009 set aside. The Application dated 8th May 2009 is supported by an affidavit sworn by Jimel Harrigan Legal Clerk of the Defendant/Applicant.

[2] The claim is for damages resulting from breach of contract of sale in or about December 2006 of a 1999 Mercedes Benz E320 motor car by the defendant to the claimant which the claimant alleges was not of merchantable quality.

[3] The suit file shows that the claim form and ancillary documents were filed on 5th March 2008 and served on the defendant at Vide Bouteille Castries on 8th March 2008 and Acknowledgement of Service was duly filed by the defendant on the 11th March 2008.

[4] Rule 10.2 (1) of the Civil Procedure Rules 2000 (CPR) stipulates that as a general rule the period for filing a defence is the period of 28 days after the date of service of the claim form. This would have permitted the defendant up to 7th April 2008 to file its defence.

[5] On 3rd April 2008 the defendant's legal practitioner wrote to the claimant's legal practitioner requesting an extension of time to 21st April 2008 to file her defence. The defendant's legal practitioner then advised her that request for judgment (in default) **had already been entered** as her letter was received on 8th April 2008 after filing the Request for Judgment. The claimant's legal practitioner further went on to say that the letter in question was in fact delivered to his Chambers by an ex-employee of a neighbouring office. No further information was provided whereupon the defendant's legal practitioner by letter dated 9th April 2008 requested that the Request for Judgment be withdrawn so that the matter could proceed on its merits and to avoid the delay in having to subsequently apply to set aside the judgment. The claimant's legal practitioner refused to accede to the request.

[6] The file shows that the claimant's legal practitioner filed a Request for Entry of Judgment in default of defence on 7th April 2008. The document is also curiously stamped **8th April 2008** and even more curiously judgment in default of defence was entered by the Registrar on **24th March 2009** and filed on **2nd April 2009**.

[7] Judgment was entered for an amount to be decided by the Court and the matter was adjourned to Chambers for determination of the terms of the Judgment on Monday the 11th day of May 2009 at 9:00 a.m.

[8] When the application for assessment of damages came on for hearing on 11th May 2009 the application to set aside the default judgment was adjourned to 15th June 2009.

[9] The application to set aside the default judgment subsequently came on for hearing on 9th November 2009 when the Court ordered that each party file and serve written submissions by 23rd November 2009 and the Court would rule on 7th December 2009.

[10] Before doing so I should point out that the chronology of events reveals that before the entry of judgment in default of defence dated 24th March 2009 and filed 2nd April 2009 the claimant's legal practitioner sua motu had on 11th September 2008 filed an amended Request for Entry of judgment in default of defence. It is presumably on the basis of that amended request that judgment was subsequently entered over six months later by the Registrar. But the amended request dated 11th September 2008 seeks to validate the initial request filed on 7th April 2008 which was itself void ab initio irregular and of no effect. Hence the request for default judgment dated 11th September 2008 is itself irregular and so is any consequential judgment which purports to be derived from it.

[11] In his written submissions the claimant's legal practitioner opposed the defendant's application on the grounds that it was made pursuant to CPR 13.3(1) which stipulates that:

(a) the application must be made as soon as reasonably practicable after finding out that judgment has been entered;

(b) the applicant must give a good explanation for failure to file the defence;

(c) the defendant must have a real prospect of successfully defending the claim.

[12] It must be borne in mind that Rule 13.3(1) is prefaced by the requirement that the court may set aside a judgment entered under Part 12 (that is in default of acknowledgment of service of defence **only if** the defendant meets the criteria set out at (a) (b) and (c) above.

In other words this provision specifies three conjunctive preconditions for setting side. If the three conditions are not present then the court may not set aside a default judgment.

See **Kenrick Thomas and RBTT Bank Caribbean Limited [formerly Caribbean Banking Limited] (2005) Saint Vincent and the Grenadines Civil Appeal No. 3** judgment of Barrow JA at paragraph 7.

[13] The claimant's attorney went on to submit that the wrong which gave rise to this action had occurred since January 2007 and that the defendant had treated the claimant's complaints with scant regard. He further pointed out that the claimant had procured a loan in December 2007 for the purchase of the car and he ought not to suffer under his loan obligation as long as the defendant failed to act prudently. For his part he had received instructions he added and had acted pursuant to CPR 12.5 in requesting judgment particularly due to the length of time that had already gone by since the cause of action arose.

[14] I hasten to point out that whilst the period of delay i.e. why the application to set aside had not been made before is certainly a factor to be taken into account in this exercise any pre-action delay is irrelevant. See **Thorn v Mac Donald (1999) CPLR 660 Court of Appeal**.

[15] The gravamen of the defendant's case as predicated in its legal practitioner's written submissions and grounds of application to set aside the default judgment is essentially that the said default judgment had been irregularly obtained in that the request for judgment was filed on 7th April 2008 on the very day on which the period for filing the defence would have expired. It was therefore premature and ought not to have been filed or accepted and if accepted and acted upon any resulting judgment would have been itself irregular and ought to be set aside on that account. I fully agree.

[16] Rule 12.5 (b) CPR mandates that:

> The court office at the request of the claimant must enter judgment for failure to defend if -

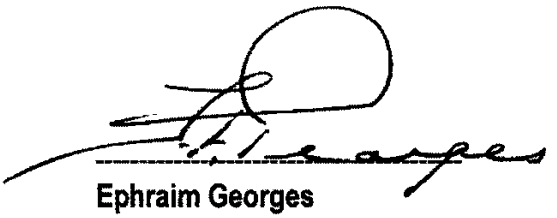
(b) **the period for filing a defence** and any extension agreed by the parties or ordered by the court **has expired.** (My emphasis)

There can be no gainsaying the fact that that fundamental requirement has not been met by the claimant's legal practitioner and the defendant's legal practitioner relying on the Court of Appeal's decision (Fry and Lopes L.JJ) in **Anlaby and Others v Praetorius (1888) QBD Vol XX pg 764** reversing the Queens Bench Division referred to the headnote of that case which reads that where a plaintiff has obtained judgment irregularly the defendant is entitled ex debito justitiae to have such judgment set aside and the court has only power to impose terms upon him as a condition of giving him his costs. That in my respectful view makes good sense and good law.

[17] I would accordingly on that basis set aside the default judgment entered on 24th March 2009 with costs to the defendant in the sum of $1500.00. It is ironical I venture to add that on 3rd April 2008 the defendant's legal practitioner according to paragraph 2.4 of her written submissions wrote to the claimant's legal practitioner asking that the request for judgment (filed 7th April 2008) be withdrawn so that the matter could proceed on its merits and so avoid delay in having to subsequently apply to set aside the judgment. The request was refused.

[18] Having myself perused the draft defence and counterclaim exhibited on file by the defendant's legal practitioner I entertain little doubt that the defendant has a real prospect of successfully defending the claim. The crucial issue which falls to be determined is whether having regard to all the circumstances surrounding the sale of the then 7-year old Mercedez Benz E320 motor car by the defendant company to the claimant and the subsequent breakdown of the vehicle on the road the claimant is entitled to repudiate the contract on the grounds of breach of warranty of merchantable quality. Only the evidence of the parties and their witnesses as accepted by the Court can resolve that.

[19] I would accordingly affirm my order at paragraph 17 and direct that the defendant file and serve its defence and counterclaim on the claimant within two days and that the matter thereafter follow the CPR without any further unnecessary delay.



Ephraim Georges
HIGH COURT JUDGE (AG.)

Delivered 8th June 2010.