SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2008/0438

BETWEEN:

MARIE CLARKE-JOHNEY

Claimant

and

EVARISTE AMBROSE doing business as SHAFT'S GARAGE

Defendant

Appearances:

Ms. Veronica Barnard for the Claimant
Ms. Wauneen Louis-Harris for the Defendant

2010: January 20;
2011: June 10.

JUDGMENT

[1] GEORGES J. [A.G.]: This is an application by the defendant to set aside the judgment in default of defence obtained by the claimant on 2nd June 2009, and consequent leave to defend.

[2] The grounds of the application filed 19th June 2009 are stated to be:

(i) That the Judgment is invalid because it was made on a Notice of Application whereas the proper procedure is a Request for Judgment in default.

(ii) That the Learned Judge granted the Respondent Judgment in default on the said Notice of Application.

(iii) That the Learned Judge did not consider the Notice of Application of the Appellant to extend the time to file the defence

(iv) That the Learned Judge erred in law in proceeding to assess the damages subsequent to or commitant to the making of the Order granting judgment in default.

(v) That the Defendant had advanced a good explanation for the failure to file the defence in that the Defendant required a vital document for his defence which was not within his possession in order to file the defence within the time prescribed.

(vi) The said document is the Motor Survey Report dated 26th February 2007, which he had given to the Claimant and that he was forced to obtain a copy from the Insurance Council.

(vii) That the Defendant has a sustainable defence to the claim in that the Claimant agreed to provide the Defendant with the parts for the said vehicle which the Claimant failed to do and the Defendant eventually expended his own money to fix the vehicle and the Defendant duly informed the Claimant of the position and asked the Claimant to pay to the Defendant the cost incurred, and for the cost of storage which was the purpose for which the Claimant first brought the vehicle to the garage of the Defendant.

[3] In support of his application the defendant relies on an affidavit filed on 19th June 2009, which states inter alia:

(i) That he was unable to instruct his lawyer to file his defence and counterclaim within the time prescribed by law as he was unable to retrieve a motor survey report dated 26th February 2007.

(ii) That he has a good defence to the action and has exhibited a draft defence to the application.

[4] Chronology of Events

(a) The claim was filed on 6th May 2008, and served on the defendant on 15th May 2008

(b) An acknowledgement of service was filed on behalf of the defendant on 30th May 2008

(c) The defendant failed to file his defence and more than one year later the claimant filed a request for judgment on 18th July 2008

(d) The Registrar of the High Court did not grant the request for judgment and on 11th May 2009, the claimant filed an application for entry of judgment. This was scheduled for hearing on 2nd June 2009 and served on the defendant on 12th May 2009.

(e) On 2nd June 2009, Counsel for the defendant indicated to the court that she had filed an application for leave to file a defence on even date and acknowledged that it had not been served on either the claimant or her attorney

(f) The Judge did not allow the defendant to proceed with his application for an extension of time to file his defence and proceeded to enter judgment for the claimant.

(g) On 16th June 2009, the defendant applied to the Court of Appeal for leave to file an appeal against the Order of the Judge. This application for leave was withdrawn by the defendant on 6th July 2009.

(h) On 19th June 2009, the defendant filed this instant application to set aside the aforesaid judgment.

[5] Learned Counsel for the claimant relying largely on her written legal submissions urged that a court of coordinate jurisdiction did not have the authority to dismiss the judgment of a judge of parallel jurisdiction as this would be tantamount to exercising appellate jurisdiction. The defendant's recourse in such circumstances Counsel argued was to appeal the decision. I fully agree and this is illustrated in the Privy Council Appeal No. 22 of 2004 – Leymon Strachan v The Gleaner Company Ltd et al.

[6] Judgment in the instant matter Counsel contended was entered on 2nd June 2009, by the High Court of Justice. The defendant now asks this same court to set aside its judgment thus in effect requesting the court to exercise an appellate jurisdiction which it plainly cannot do. The defendant's application is before a court of co-ordinate jurisdiction which does not have the jurisdiction to dismiss its own

judgment: (Leymon Strachan v The Gleaner Company Ltd et al Privy Council Appeal No. 22 of 2004 at paragraphs 15, 16, 17, 32, 33) which merit replication.

In that case Lord Millett in delivering the opinion of Her Majesty's Board held that:

> "15. There is no doubt that section 258 of the Judicature (Civil Procedure Code) Law of Jamaica gives a judge of the Supreme Court power to set aside a default judgment, whether it be a judgment for damages which remain to be assessed (which is interlocutory) or for liquidated damages (which is final). The question for decision in the present appeal, therefore, is not whether the judgment which Walker J purported to set aside was interlocutory or final, but whether it was a default judgment. That depends on whether the interlocutory judgment for damages to be assessed was spent when the damages were assessed or (to put it another way) whether it was superseded or overtaken by the final judgment for a liquidated sum; and if so whether the final judgment can be said to be a default judgment when the defendant appeared at and participated in the hearing to assess damages.
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> 16. In their Lordships' opinion these questions are easily answered if three points are borne in mind. The first is that, once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 citing *Lunnon v Singh* (unreported) 1 July 1999, EWCA. If he wished to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata.* The second is that, whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss. The third is that the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of such damages which remains to be determined.
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> 17. Accordingly it cannot be said that a judgment (whether after a contested hearing or by default) for damages to be assessed is spent once damages are assessed; it remains the source of the plaintiff's right to damages. Nor can it be said that in such a case the interlocutory judgment is overtaken or superseded by the final judgment for a liquidated sum; it would be more accurate to say that it is completed and made effective by the assessment. By entering final judgment for the amount of the damages awarded by the jury, Bingham J gave combined effect to the default judgment on liability and the quantification of damages by the jury.

> 32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the *Padstow case*) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it.
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> 33. In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was *res judicata.* As a judge of co-ordinate jurisdiction Smith J had no power to set it aside."

[7] Unless set aside by a court of competent jurisdiction the default judgment in keeping with the Privy Council decision in Isaacs v Robertson (1984 3 All ER 140 (PC) stands and continues to subsist. On that basis Counsel submitted that the default judgment entered by the Judge on 2nd June 2009 stands unless and until reversed by the Court of Appeal. I fully concur. In any event the time for appealing had long expired as per Civil Procedure Rules 2000 part 62.5.

[8] Learned Counsel for the claimant further contended in the alternative that if the court were of the opinion that it had jurisdiction to set aside its own judgment then under part 13.3 CPR 2000 the defendant must:

(a) Apply to the court as soon as reasonably practicable after discovering that judgment had been entered

(b) Give a good explanation for failure to file an acknowledgment of service or a defence (as in the instant case)

(c) Have a real prospect of successfully defending the claim

The three requirements it was pointed out are conjunctive and the defendant it was pointed out must satisfy all of them. Failure to do so is fatal to the application and is clearly spelt out in part 13.3(1) CPR. In short the court may only set aside a default judgment if and only if all three requirements of Rule 13.3 have been satisfied.

[9] This is clearly illustrated in Kenrick Thomas v RBTT Bank Caribbean Ltd (formerly Caribbean Baking Ltd) Civil Appeal No. 3 of 2005 St. Vincent and the Grenadines in which Barrow JA sitting as single judge on paper submissions stated:

> "(7) The Appellant submitted that this provision (rule 13.3) specifies three conjunctive pre-conditions for setting aside. The submission is sound. "Only if" can only mean that if the three matters are not present then the court may not set aside a default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the discretion. The discretion in the English CPR is Rule 13.3 is significantly unlimited; it specifies only one matter to which the court must have regard and does not even make fulfillment of that matter a condition that the Defendant must satisfy. In contrast, the discretion in CPR 2000 is severely limited, it specifies three conditions that the Defendant must satisfy before the court is permitted to set aside a default judgment.
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> (10) The Judge dealt with reconciling this approach with the overriding objective in this way: "The overriding objective, contained in Part 1 of CPR 2000, which requires the court to apply the rules so as to deal with cases justly, is often invoked to relieve against the hardship that a strict application of the rules may cause. This court has clarified that the overriding objective does not allow the court to ignore clear rules. The language that the rules makers chose to frame Part 13.3(1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further than the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified abuse that the new rules were intended to correct. The adherence to the time table provided by the Rules of Court is essential to the orderly conduct of business and importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that."

In that case, the defendant applicant had failed to satisfy two of the three conditions: he failed to apply promptly and failed to give a good explanation for the failure to file a defence. The Court of Appeal reversed the master's decision to set aside the default judgment.

In this connection, see also Hyman v Matthews (Jamaica) (Applications 72 and 80 of 2006) (SCCA 64/2003) per K. Harrison J.A.:

> "The provisions of Part 13.3 are different from their English counterpart. In the U.K. the rules state that "the court may set aside a judgment…if" whereas in Jamaica the rules state… "only if". The word "only" makes a big difference. One should therefore be careful in relying on English authorities. In considering whether to set aside a judgment entered under Part 12, the judge has no residual discretion if any of the conditions are not satisfied."

[10] I personally entertain no doubt whatsoever that the defendant has failed to satisfy the three conjunctive requirements of part 13.3 CPR to justify the court setting aside the default judgment entered on 2nd June 2009. For one thing the defendant's explanation for his failure to file his defence within the time prescribed as set out at paragraphs 7 and 8 of his Notice of Application is palpably without any merit and does not in my view constitute a good explanation for his failure to do so and further a delay of more than a year in doing so is wholly unacceptable.

[11] And as regards the defendant's prospects of success no realistic case has in my view been advanced. As I see it the defendant is without doubt legally obliged to make full restitution and compensation to the claimant for the loss and damage she has incurred as a direct result of the defendant's complete failure to carry out the necessary repair work to the claimant's vehicle which he had contracted to do.

[12] In the result the defendant's application to set aside the judgment made on 2nd June 2009 is dismissed and consequent leave to defend the claim is refused with costs to the claimant in the sum of $2,500.00.

Ephraim Georges
High Court Judge [Ag.]