EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: ANUHCV 2013/0528

Between :

NATHAN DUNDAS

Claimant

AND

VALARIE HARRIS POLE

Defendant

Before:
Mr. Raulston Glasgow — Master

Appearances:
Dr. David Dorsett of counsel for the Claimant/Respondent
Leon Symister of counsel for the Defendant/Applicant

2014: October 5;
November 22;
2015: February 2

RULING ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT

BACKGROUND

[1] **GLASGOW, M:** The claimant (hereinafter the respondent) instituted proceedings against the defendant (hereinafter the applicant) by way of a claim form and statement of claim filed on August 13, 2013. The respondent claimed damages and other relief for harm suffered to his reputation and for distress and embarrassment flowing from libel and slander allegedly issuing from the applicant.

The claim form and statement of claim were served on the applicant on October 24, 2013 and she acknowledged service thereof on November 5, 2013. However, the applicant failed to file and serve a defence in the time limited by the CPR.

[2] Prompted by the respondent's lack of response to the claim, the respondent applied on April 24, 2014 for the entry of a default judgment on such terms as the court deemed fit. When the application for the default judgment came up for hearing on May 19, 2014, the applicant was given an opportunity to amend the application. The application was further heard on June 25, 2014 at which time the applicant's was represented even though the application had not been served on her. The court noted that there was no application for an extension of time to file the defence and indeed the time to file a defence had expired. Judgment in default of defence was therefore entered for the respondent.

[3] The extant application was filed on July 04, 2014 wherein the applicant seeks the setting aside of the default judgment in reliance on CPR 13.3(1) and 13.4[1]. The application is supported by an affidavit sworn by the applicant and the affidavit of one Tassion Brown –Baker, legal clerk in the office of counsel for the applicant. The deponents assert that the application satisfies the provisions of CPR 13.3(1) in that the applicant applied as soon as reasonably practicable after finding out that judgment had been entered, has a good explanation for failing to file a defence and has real prospect of successfully defending the claim.

ARGUMENTS

[4] In respect of promptness, the applicant and the respondent agree that the applicant applied promptly after finding out the default judgment had been entered. As recited herein above, the default judgment was granted on June 25, 2014. The applicant applied on July 4, 2014, some (10) days thereafter for it to be set aside. I find the concession by the respondent to be commendable since there is nothing on the facts of this case to suggest that the (10) delay was unreasonable.

[1] The applicant failed to set out the grounds on which she made her application except to state the provisions of the CPR on which she made her application and a reliance on the administration of justice. Applicants are reminded that they must recite the grounds on which they seek to rely (CPR11.7(1)).

[5] Consensus ended at promptness. The parties disagree on whether the applicant met the requirements of the other limbs of CPR 13.3(1). The applicant submits that she has a good reason for failing to defend the claim. In her affidavit, which contents are confirmed by the affidavit of Ms. Brown - Baker, the applicant states that she was served with the claim form and statement of claim on October 24, 2013. These documents were delivered to her lawyer who duly filed an acknowledgment of service on or about November 5, 2013. The applicant asserts that on or about November 5, 2013 she supplied her attorney with answers to the allegations made in the respondent's pleadings and counsel was instructed to file the necessary defence to the claim. The applicant says she sought and received assurances that a defence would be filed. She specifically requested these assurances since she was aware that her counsel *"is the Chairman of the United Progressive Party and that elections were pending..."*[2] Counsel assured her that the conduct of her matter would be referred to another attorney while he was out of office and that the applicant would be contacted if necessary.

[6] The applicant further deposes that she enquired about the status of her matter. Counsel's office advised her that she would be contacted *"when the matter comes up."* The applicant says that if she had been informed that a defence was not filed, she would engage another attorney to file the same while her counsel was out of office. On June 26, 2014 she was advised by counsel that a default judgment had been entered against her. Her view is that she did everything within her power to defend this claim.

[7] The respondent opposes the application. His view is that the applicant has not provided a good reason for failing to file a defence. In oral submissions which were later supplemented with authorities, counsel for the respondent submitted that the lack of diligence by counsel in the conduct of litigation has not been accepted by our courts has a good explanation for non-compliance with procedural requirements. Counsel relied on the cases of **Shillingford v Casimir and Pinard**[3] and **Rose v Rose**[4]**.** In **Shillingford** the court ruled that counsel's failure to file a notice of appeal in time because of the *"the pressure of work"* was not a sufficiently *"good and substantial reason"* for the court to exercise its discretion to extend the time for the appellant to file

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[2] Paragraph 5 of the applicant's affidavit filed on July 4, 2014.
[3] 10 W.I.R 269
[4] SLUHCVAP 2003/0019

a notice of appeal. In **Rose,** Sir Denis Byron also found that a lack of diligence by counsel whether due to the pressure of work or a failure of proper communication between counsel and client, did not suffice as good reason for a delay in meeting the timelines set out in the rules.

[8] The applicant further argued that her defence has a real prospect of success. A defence was filed on July 4, 2014 wherein the applicant denies publishing the words in question. In the alternative she contends that the words were spoken on an occasion of qualified privilege and further that the words were *"fair comment made on a privileged occasion on a matter of public interest."* The respondent submits that no such defence has been made out on the pleadings.

FINDINGS AND CONCLUSION

[9] The application has been made pursuant to CPR13.3(1) which states the following –

> *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) (b)Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and*
>
> *(c) (c) Has a real prospect of successfully defending the claim.*
>
> *(2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.*
>
> *(3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.*

[10] The applicant must satisfy the court that all (3) elements of CPR 13.3(1) have been met before the relief sought is granted[5]. There is no disagreement that the applicant has met the first condition. The application was filed a mere (10) days after she found out that the default judgment had been

[5] Kenrick Thomas v RBTT Bank Caribbean Limited, SVGHCVAP 2005/0003

entered. In all the circumstances, I find that this was an entirely reasonable time within which to make the necessary application to set it aside.

[11] The applicant's reasons for failing to file a defence within the time limited by the rules have been set out above. Counsel for the applicant provided a number of authorities to buttress his argument that the court ought to exercise the discretion in CPR 13.3(1) where the defence was not filed due to lack of diligence on the part of counsel or his office. Counsel relied on the following –

1. **Elvis Wyrie v Alvin G. Edwards et al**[6]**.** In that case, the court of appeal allowed an appeal of the high court judge's decision to refuse to set aside a default judgment. I do not see how this decision assists the applicant. The court of appeal did not overrule the judge's ruling that "*challenges experienced in obtaining documents necessary to avoid embarrassment in his defence*" did not amount to a good reason for failing to file a timely defence. Rather, the court of appeal ruled that exceptional circumstances subsisted which were of such a nature that the court should exercise the discretion enacted in CPR 13.3(2). The learned justices of appeal found that the granting of a default judgment to a non – applying party and on terms which were not available as a matter of law or on the pleadings were sufficient to amount to exceptional circumstances on the facts of the case under review. There was no finding that the dilatory conduct of counsel sufficed for those purposes;

2. **Graham Thomas v Wilson Christian trading as Wlicon Construction**[7]**.** This authority also offers little assistance to the applicant. In **Graham Thomas,** Michel J (as he then was), found that the applicant provided sufficient information on which the court could find that he had provided a good explanation for failing to file a defence within time. The applicant in that case also had a real prospect of successfully defending the claim. The stipulation as to timeliness in filing the application to set aside the default judgment had not met. The court looked at the reasons pleaded for failing to comply with the rules and found that they were cogent enough to amount to exceptional circumstances as contemplated by CPR 13.3(2). None of those reasons were that counsel or his office failed to adequately pursue the client's interest. The "*juxtaposition of the defendant's impecuniosity, ignorance and indisposition, which together*

[6] ANUHCVAP 2014/0008
[7] ANUHCV 2011/0629

conspired to strip him of the financial capacity, the legal familiarity and the mental acuity to do that which the rules required of him within a determined timeframe" were found to be sufficiently exceptional circumstances to warrant the setting aside of the default;

3. The Belizean case of **Serafin Castillo v Fruta Bomba Ltd and Antonio Luis Aguilar**[8]**.** The applicant does not receive much help either from this decision when the facts of that case are reviewed. In **Castillo,** an acknowledgment of service was served on the claimant without first being filed. This was due to inadvertence on the part of the administrative personnel in the office of the applicant's counsel. The court found that the lapse was not fatal in that regard. The facts on this application are different in that there was no defence filed or even served on the respondent until after the default judgment was entered;

4. **Rose v Rose.** As stated above at paragraph 7, the court in **Rose** found that a lack of diligence by counsel whether due to the pressure of work or a failure of proper communication between counsel and client did not suffice as a good explanation for failing to comply with the procedural rules;

5. The Botswana case of **Regardas v Martins**[9]. The procedural rules in that country required that on an application to set aside a default judgment, the applicant must, inter alia, *"give reasonable and acceptable explanations for the default."* The applicant in that case was able to demonstrate that he had given his attorneys full instructions to defend the claim but this was not done. The court found that *"where the attorney's actions were singularly the cause of the failure to file a plea, the court should allow the applicant to defend the claim."*

[12] The respondent's position on the applicant's explanation for failing to file and serve a defence timeously have been set out in this judgment at paragraph 7. While I agree with the respondent on the posture of the court in such cases as **Rose** and **Shillingford,** I believe that there are some distinguishing features highlighted by the applicant herein that ought not to be dismissed without some contemplation. In **Rose**, the applicant for the extension averred that he had difficulty communicating with his lawyer as the reasons for the delay. This clearly was a less than

[8] Belize High Court Claim No. 180 of 2011
[9] 2004 (2) BLR 404 (HC)

satisfactory disposition to his case. In **Shillingford,** the lawyer put the fault at his door step as being entirely due to the pressure of work. This, again, in my view, was a less than proper response. In the case at bar, I find that more profound reasons are presented. The **Regardas** case is not binding but I find immense common sense in the approach taken by the court in that decision. Like In **Regardas,** the applicant herein gave full instructions to her counsel. Her evidence is that she followed up with the attorney's office. I pause to say that this kind of diligence was not apparent in the **Rose** case for instance. The applicant's evidence is that the attorney's office reassured her that her case was being managed by another attorney and that she would be contacted when needed. Further inquiry revealed that the attorney failed to prosecute the matter as promised and a default judgment flowed from the lack of diligence. This litigant was not lackadaisical about her matter. None of what transpired resulted from a less than assiduous deportment from the applicant. This is not to say that a claimant who has equally pursued his or her claim sedulously is to be left to the caprice, dalliance, indifference or negligence of the defendant or counsel. Rather, the peculiar facts of this case demonstrate that the scrupulous attention of the applicant to the conduct of her matter was met with inexcusable heedlessness on the part of counsel's office. I find therefore that on these particular facts, the respondent has provided a good explanation for the failure to file a defence within the time limited by the rules.

[13] There was not much argument on whether the applicant has a real prospect of successfully defending the claim. The applicant filed a defence at the same time as her application. Applicants are again reminded that this approach is not countenanced by the rules. The court's permission is being sought and ought to be obtained before a defence is filed in these circumstances. A draft defence filed along with the application is the more appropriate step[10]. The applicant's defence is that the statements were issued on an occasion of qualified privilege and/or were fair comment made on a privileged occasion on a matter of public interest. The respondent argues that the defence has not been made out.

[14] The defences were particularised in a detailed fashion and narrate the following allegations –

[10] CPR 13.4(3)

1. The applicant and the respondent were directors of the Antigua and Barbuda Tourism Authority (the Authority). The applicant was the Authority's Deputy Chairperson, member of the Finance Committee and a signatory on the Authority's bank account. The respondent served in the additional post of president of the Antigua and Barbuda Cruise Tourism Association (the Association);

2. On February 14, 2013, the board of the Authority appointed (4) persons to attend a cruise tourism convention scheduled to take place in Florida, USA. The respondent was appointed to represent the Association;

3. The board decided to advance certain expenses to the respondent "*which would not have been repaid by the Association*";

4. Subsequent to the February 2013 meeting the respondent called the applicant and asked if she could sign a *"per diem cheque'* from the Authority to cover his trip to the convention. The respondent refused on the grounds that a per diem was not one of the expenses approved by the board. The applicant later learnt that the cheque was signed by another signatory to the Authority's bank account;

5. A later conversation with a member of the Association disclosed that the respondent was given a per diem by the Association whenever he travelled to conventions;

6. At a later meeting of the Authority on March 28, 2013, the applicant enquired of the respondent whether he was receiving financial support from the Association when he travelled to conventions. The respondent denied the same. The applicant then informed the meeting of the information she received from the member of the Association. The applicant then stated that it is her view that she had a legal, moral and social obligation to communicate the information to the members of the Authority. This obligation attached to her as member who was concerned with matters of finance.

[15] The applicant is required at this stage to demonstrate her defence is not a fanciful or hopeless one. In **Earl Hodge v Albion Hodge**[11], Harriprashad J recited the learning in **International Finance Corporation Utexafrica S.p.r.l**[12] which states the principle thus

The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying it is hopeless, whereas to say that the case has a realistic prospect of success suggests something better than that it is merely arguable. That is clearly the sense in which the expression was used in the Saudi Eagle and, in my view, it is also the sense in which it was used in Rule 13.3.1 (a). There are good reasons for that. A person who holds a

[11] Claim No. BVIHCV2007/00098
[12] [2001] ALL ER 101

regular judgment, even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside."

[16] Taking the allegations as stated, I cannot find that the defence is a fanciful one. Allegations of financial impropriety are matters that the applicant had an obligation to confront not only as a board member but as one who dealt with the board's finances. The board, in turn, had a right to receive such reports. At the very least, therefore, I find that the defence is more than a merely arguable one which the applicant should be permitted to present at trial.

[17] Having met the requisites of CPR 13.3(1), the applicant is successful on her application to set aside the default judgment and the default judgment is accordingly set aside. This step is not taken lightly. As was stated in **International Finance Corporation Utexafrica S.p.r.l**[13], *A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason.* The claimant has had judgment in his favour from June 2014. It is my view that the manner in which these proceedings were conducted by the applicant, through no fault of hers, dictate that a costs award should be made in favour of the respondent (CPR 64.6(6). I was minded to consider that any costs awarded to the respondent should be paid by her legal practitioner as wasted costs in accordance with CPR 64.8(1)(a), 64.8(2)(a) and 64.9(1). Counsel or his office's conduct in this matter led to an unfortunate series of event that could have been avoided without great effort. I assess this conduct as the type of negligent act or omission contemplated by CPR 64.8(2). The laxity in this regard occasioned the entry of a default judgment against the applicant for which both litigants have had to incur costs on this application to have it set aside. In the course of the hearing, counsel for the applicant conceded that his office did not adequately represent the applicant's interest when it came to the filing of the defence. Counsel offered that his office would pay any costs awarded against the applicant. This concession is wholly appropriate. I therefore award costs of $1000.00 to the respondent which costs must be paid by the legal practitioner for the applicant. The defence has been filed and served and as such CPR 13.5 does not operate. Pursuant to CPR 13.6(2), the court office is to set a date for the case management of this matter and notify the parties of such hearing.

[13] Supra, n12.