EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
Claim Number: **ANUHCV 2014/0058**
Between

CARL BAYNES

Claimant/ Respondent

AND

ED MYER

Defendant/ Applicant

Before:

Raulston Glasgow — Master

Appearances:
Hugh Marshall along with Kema Benjamin for the claimant/respondent
Dr. David Dorsett for the defendant/applicant

2014: December 12
2015: February 4;
June 16

RULING ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT

[1] **GLASGOW, M:** On October 3, 2014 the defendant herein (hereinafter the applicant) filed an application requesting the setting aside of a default judgment granted to the claimant (hereinafter the respondent) on July 4, 2014. The applicant asks that the court set aside the default judgment on the grounds that –

(1) Exceptional circumstances exist which go to the root of the claim. In this regard it is said that the claim is one that is contrary to law because –

(a) The civil law is being utilised to enforce the criminal law in a situation where the remedy of prosecution for a crime may be best pursued for breaches of the criminal law;

(b) The applicant is not entitled to judgment "*as it is not the law that ipso facto the owner of a motor vehicle is responsible for all injury or damage done by a driver who is alleged to have driven the motor vehicle in a negligent manner.*"[1] The respondent also states that in any event the respondent was not the owner of the vehicle at the time of the accident;

(c) The default judgment is that of negligence against the respondent when the evidence discloses that the negligent acts were committed by a person who is not a party to the proceedings;

(d) There is no allegation that the driver in question was the servant or agent of the respondent or that the respondent was using the vehicle for the respondent's purposes under delegation of task or duty;

(e) The applicant has a real prospect of successfully defending the claim;

(f) The applicant has applied as soon as practicable after finding out that the judgment had been entered;

(g) The applicant has given a good reason for the failure to file a defence;

(h) It is just and equitable that the default judgment be set aside

[1] Applicant's notice of application filed on October 3, 2014

BACKGROUND

[2] As with most application of this sort, there is invariably an interesting history. The respondent is an elderly man and the owner of motor jeep registration number A34008. On July 25, 2011 he was driving his vehicle on Ffryes Hill Road, St. John's when a collision occurred with a vehicle driven by one Luis Hernandez. The vehicle driven by Mr. Hernandez bore the registration number A4436. The respondent sustained injuries caused by the impact of the crash;

[3] On January 30, 2014 the respondent commenced the present claim not against Luis Hernandez but against Ed Meyer, the applicant herein. In the claim, Mr. Baynes contends that blame for the accident should fall at the feet of Mr. Meyer since at the time the latter was the owner of the vehicle driven by Mr. Hernandez and he was obliged at law to maintain valid insurance coverage thereon. In this regard, Mr. Meyer owed him a duty to ensure that the vehicle was driven with the necessary insurance coverage. His failure to so do made him responsible for the losses flowing from the vehicular collision. Mr. Baynes claims against Mr. Meyer for special damages in the sum of $86,389.53, general damages, costs and interest;

[4] The claim and statement of claim were served on the applicant on February 4, 2014 and on the insurers on February 3, 2014. The applicant did not acknowledge service of the claim. It emerges from the evidence that at time of serving the claim, the respondent omitted service of the accompanying forms as stipulated by the rules. Amendments to the claim and statement of claim were filed on May 30, 2014. The amended pleadings along with the accompanying forms were served on the applicant and the insurers on June 2, 2014;

[5] The applicant's acknowledgment of service to the amended pleadings was filed on June 10, 2014 in which he specifically denied liability and stated his intention to defend the claim. No defence was filed. The respondent applied for the default judgment on July 4, 2014 and was granted the same on even date. The affidavit of service filed by process server Eustace Gordon on August 15, 2014 states at paragraph 5 thereof that he attempted to serve the applicant with the default judgment on July 18, 2014. Mr. Meyer informed him that he would not accept service of the default judgment until he consulted with his lawyer. He asked Mr. Gordon to return with the document after he consulted his attorneys. There is no evidence of whether the said consultation occurred but the

affidavit of service states that Mr. Gordon attempted to serve the applicant a second time. On August 4, 2014 he visited the applicant at his place of business and left the document on his desk. Mr. Gordon states the applicant is a person who is known to him. His evidence is that he informed the applicant of the nature of the document. He also reminded the applicant that on the previous attempt to serve him he indicated that he would accept service once he had consulted with the lawyers. Once again he refused service and as such the document was left on his desk;

[6] The present application to set aside the default judgment was filed on October 3, 2014.

ARGUMENTS

Applicant

[7] The grounds of the applicant's request have been set out above. In support of the argument that the civil court jurisdiction is being employed to enforce breaches of the common law, the claimant has asked the court to consider the dictum in the case of **Bermuda Cablevision Ltd and others v Colica Trust Co. Ltd** [2] where Lord Steyn helpfully recited the relevant legal principle that –

> *Their Lordships accept that it is a highly abnormal procedure to allow the civil law to be employed to enforce the criminal law. And there are good constitutional reasons for allowing only the Attorney-General to resort to such an unusual procedure. The criminal law is best enforced directly by courts of criminal jurisdiction, who have to try criminal cases in accordance with criminal procedure and in recognition of the protections afforded to a citizen by our system of criminal justice. Persons other than the Attorney-General do not therefore have standing to enforce, through a civil court, the observance of the criminal law as such…*

His Lordship observed that the general principle *"that where the only manner of enforcement created by a statute is the criminal law that performance cannot be enforced in any other manner"* was only excepted

[2] [1998] AC 198

where upon the true construction of the legislation the prohibition was imposed for the protection of a particular class of individuals. The second exception is where the statute creates a public right and individual members of the public suffer "particular, direct, and substantial 'damage' other and different from that which was common to all the rest of the public." [3]

[8] In respect of the contention that the owner of a vehicle is not, without more, responsible for all the losses incurred by a claimant where the vehicle was driven in a negligent fashion by a third party, the applicant relies on the case of **Morgans v Launchbury and Others**[4] for the proposition that

> *in order to fix vicarious liability upon the owner of a car... it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on "interest" or "concern" has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability... The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes.*

[9] In respect of whether he has applied as soon as reasonably practicable after finding out about the judgment, the applicant has not provided much by way of evidence as to what transpired after he was handed the default judgment. However, he does say at paragraph 10 of the affidavit in support of his application that he asked his son to deliver certain documents to Dr. Dorsett's office. His son did not fulfil his request as he fell ill shortly thereafter. The documents were only delivered to counsel's office on October 1, 2014. The application to set aside was filed thereafter on October 3, 2014. The applicant asks the court to attribute any delay in filing the application to a *"combination of sickness and forgetfulness"*.

[10] The reasons for failing to file a defence in a timely manner are more fulsome. The applicant explains that he was served with the claim on June 2, 2014 and he forwarded the same to his insurers, Bryson Insurance. Bryson Insurance referred the matter to Dr. Dorsett's office. A draft

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[3] Per Lord Diplock in Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173
[4] [1973] AC 127

defence was prepared by counsel's office and submitted to the insurers on July 1, 2014. The company sent the document to the applicant with instructions that he supply counsel's office with certain documents "pertaining to the legal status of The Sugar Mill Shop". The applicant states that he signed the draft defence and returned it to the insurers. The signed document was then referred to Dr. Dorsett's office. Dr. Dorsett requested immediately that the applicant attend his chambers to discuss the legal status of The Sugar Mill Shop. The applicant's evidence is that all of this transpired by July 4, 2014.

[11] The applicant did not attend counsel's chambers as requested. He states that he failed to attend because he was in the process of preparing for an overseas trip to receive medical treatment. He departed Antigua on July 9, 2014 and returned to the island on July 18, 2014. His evidence is that he was served with the default judgment on August 15, 2014 at which point he visited Dr. Dorsett's office to explain that he was out of the jurisdiction for a while. It was at that meeting that the applicant provided Dr. Dorsett with the requested information and documents concerning The Sugar Mill Shop.

[12] Regarding the prospects of successfully defending the claim, the applicant relies on his submission that at the time of the vehicular collision he was not the owner of the vehicle in question. Ownership resided either in The Sugar Mill Shop or Mr. Hernandez. He also reasserts that at the material time Mr. Hernandez was not his servant or agent and was not using the vehicle for the applicant's purpose or under a delegation of duty or task. His defence is further that he was not under a duty to maintain insurance coverage on the vehicle as he was never the owner thereof. He submits that, in any event, a breach of the Motor Vehicles (Third Party Risks) Act does not give rise to a civil claim. A draft defence has been provided setting out these matters.

Respondent's contentions

[13] For the respondent it is said that the applicant has not satisfied the conditions set out in CPR 13.3(1) and (2). In respect of the obligation to file the application as soon as reasonably practicable after finding out that the judgment had been entered, the applicant has fallen far short of this standard. The default judgment was first served on the insurance company on July 15, 2014.

Efforts to serve the applicant on July 18, 2014 were unsuccessful since the applicant refused service of the document after being informed of its contents. Actual service of the default judgment was effected on August 15, 2014. The application to set aside the judgment was filed on October 3, 2014 some (49) days after service. According to the respondent, even if one accepts that knowledge of the judgment came to the applicant on August 15, 2014, it cannot be said that the application to set it aside was made as soon as reasonably practicable.

[14] Regarding the reasons for failing to file a timely defence, the respondent asks the court to adopt the dictum of Bannister J in **Inteco Beteiliguns AG v Sylmord Trade Inc**[5] where he opined that a good explanation is one that gives

> *an account of what has happened since the proceedings were served which satisfies the Court that the reason for failure to acknowledge service or serve a defence is something more than mere indifference to the question whether or the Claimant obtains judgment.*

[15] The amended claim was served on the applicant on June 2, 2014. The applicant acknowledged service on June 10, 2014. He was required to serve the defence within (28) days of receipt of the claim. The respondent states that the reasons for failing to file a timey defence, which reasons are set out above in this judgment, are not acceptable for these purposes. The court is asked to find that the applicant had more than ample time to visit his lawyers to provide them with the necessary instructions and documents regarding his defence before he travelled to receive medical attention. The forgetfulness of the applicant's son is also said to be an improper excuse for failing to comply with the rules. In any event, the respondent argues, the applicant could have provided the necessary instructions and documents by email or via the telephone.

[16] In respect of whether the applicant has a real prospect of successfully defending the claim, the respondent submits that the proof of insurance coverage does not suffice as conclusive evidence of ownership. The respondent relies on the statement in the accident report prepared by the police department which lists the applicant as the owner of the vehicle. Further, he asserts, it was incumbent on the applicant to file a defence and proof that he was not obligated to have insurance

[5] BVIHCM (Com) 120 of 2012

coverage to indemnify the respondent for any losses suffered by reason of the usage of the vehicle.

[17] The respondent is similarly vociferous that the court has no evidence on which it can be found that exceptional circumstances exist in this case. As far as the respondent is concerned, the applicant has not shown that he parted with ownership of the vehicle in question even if it was sold to Mr. Hernandez who had physical possession thereof. It remained the applicant's duty while ownership remained in his name to ensure that a valid policy of insurance was in place to cover any losses incurred from the use of the vehicle. He had a concomitant duty to ensure that while he remained owner of the vehicle, that it was used in a proper fashion. This latter duty included the obligation to make certain that anyone using the vehicle obtained and maintained valid insurance coverage. The failure to meet these conditions demonstrates that the applicant's request should be denied in all respects.

FINDINGS, REVIEW AND CONCLUSION

Setting aside a default judgment

[18] Where a claimant obtains a judgment in default of either defence or acknowledgment of service, the defendant may apply pursuant to CPR 13.2 or (3) for its setting aside. CPR 13.2 enumerates the conditions which dictate the mandatory setting aside of a default judgment. These stipulations address occasions where the conditions for the entry of a default judgment have not been met. The court would have no other option but to set aside the default judgment. The rules provide the court with discretionary powers to set aside a default judgment where the mandatory conditions in CPR 13.2 do not apply. CPR 13.3 may be pleaded in aid where a request is being made for the court to exercise its discretionary powers. The rule states that

> *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 acknowledgement of service or a defence as the same case may be; and

(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.

[19] The applicant's request is for the court to exercise its discretion in accordance with CPR 13.3 (1) and (2). The first issue to be resolved, evidently, is whether he has applied for the default judgment to be set aside as soon as reasonably practicable after finding out about it. For obvious reasons it would be impossible for the rules to offer any concrete assistance on what is a reasonable period of delay to bring the setting aside application. The assessment of whether the applicant applied with the appropriate promptness would have to flow from the available facts.

Has the applicant applied as soon as reasonably practicable?

[20] I have no hesitation in finding that the applicant failed to apply to the court within a reasonable period after finding out about the judgment. The rules make it clear that time begins to run from the time a defendant finds out "that judgment had been entered." In this case, the applicant became aware of the judgment on July 18, 2014 when the process server attempted to serve him and he refused service on the grounds that he wanted to consult his attorney. The process server's evidence is that the applicant refused to accept service after being told the nature of the document that was to be served on him. This evidence was not challenged by the applicant. The setting aside application was filed on October 3, 2014, some (77) days after the applicant became aware of the default judgment. A delay of (77) days, without more, is quite unreasonable.

[21] The respondent is a lot more generous. The respondent asks the court to assess the period from the date of actual service of the default judgment on the applicant. He was served with the document on August 14, 2014. An assessment of the time in which he made this application would

mean that it was filed within (50) days of service[6]. No proper reason has been provided for the lengthy delay to bring the application in either scenario. At paragraph 7 of the affidavit in support, the applicant speaks of instructing his son to take documents to Dr. Dorsett's office. The evidence indicates that the son could not take the document due to ill health. I cannot see how this can, by any stretch of imagination, amount to an account that would suffice to make the delay reasonable. The court has been moved by the applicant. His evidence is that as far back as July 2014, Dr. Dorsett's office asked to meet with him to discuss a defence in this case. He did not attend the office. Even after he was served with a default judgment, he took no speedy action to address the issues confronting him in these proceedings. Such conduct is untenable and does not approximate anywhere near to what was expected of the applicant.

[22] The applicant is required to satisfy the court that he has met all the conditions of CPR 13.3(1) before the application to set aside the default judgment is granted thereunder. He has failed on the first limb of CPR 13.3(1) and as such the court cannot exercise the discretion granted pursuant to CPR 13.3(1). I will consider the other limbs for completeness sake.

Is there is a good explanation for the applicant's failure to file a defence?

[23] The applicant has not satisfied this court that he has a good explanation for failing to file a defence within the time limited by the rule. His evidence discloses that he was asked to attend counsel's chambers to give instructions about the filing of a defence. He never attended counsel's chambers or gave the instructions. His excuse is that he had to leave the island for medical reasons. The respondent is right to ask the court to regard this offering as a lame excuse. There is no reason provided as to why the applicant could not or did not attend his lawyer's offices before leaving the island for medical treatment on July 9, 2014. There is equally no evidence as to why he did not attend to this case after he returned from his travels. As the respondent accurately points out, instructions could have been provided to counsel via email or over the telephone. The application will also fail for the applicant's failure to provide a good explanation as to why a defence was not filed in a timely manner.

[6] The respondent states that the applicant was served on August 15, 2014. However, the affidavit of service says clearly that he was served on August 14, 2014. The applicant states that he was served "on or about August 15, 2014'. The affidavit of service was not challenged and as such August 14, 20014 is taken to be the date of service.

Does the applicant have a real prospect of successfully defending the claim?

[24] It is rather unfortunate that the applicant did not act with the required haste to defend this action. For the several reasons which will follow, I agree that his defence is quite formidable and stands a real chance of succeeding.

[25] The first limb of the defence is in respect of the averment in the statement of claim that the proceedings have been brought due to the applicant's alleged breach of a duty *"to ensure that there was in place a policy of insurance in respect of ... Luis Hernandez that meets the requirements of the Motor Vehicles Insurance (Third Party Risk) Act Cap 288 of the Laws of Antigua."*[7] The respondent asks the court to find that he has suffered loss as a result of the applicant's "negligence and/breach of statutory duty". The applicant asserts that the respondent is seeking to invoke a civil law jurisdiction in respect of a breach of statute which carries a penalty. The recital of the law as stated by Lord Diplock in **Lohrho**[8] remains good law. The respondent has made little by way of rebuttal of this submission by the applicant. The pleadings do not assist me to determine whether the respondent in fact falls within either of the exceptions to the general common law principle recited by Lord Diplock. Indeed the section of the Act relied on by the respondent has not even been stated on the pleadings or in their submissions. It is apparent that he relies on section 3 of the Act which states viz.

> ***3.*** *(1) Subject to the provisions of this Act, it shall not be lawful for any person to use, or cause or permit any other person to use, a motor vehicle on a public road unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.*
>
> *(2) If a person acts in contravention of this section, he shall be liable to a fine not exceeding three thousand dollars or to imprisonment for a term not exceeding three months or to both such fine and imprisonment and a person convicted of an offence under*

[7] Paragraph 2 of the statement of claim filed May 30, 2014
[8] Supra note 3

this section shall (unless the court for special reason thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification) be disqualified for holding or obtaining a driver's licence under the Vehicles and Road Traffic Act, for a period of twelve months from the date of the conviction. A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a driver's licence shall for the purposes of the Vehicles and Road Traffic Act, be deemed to be disqualified by virtue of a conviction under the provisions of that Act.

[26] Vehicles used for Government or local authority purposes are exempted from the provisions of section 3.

The defence in respect of the claim for negligence/breach of a statutory duty

[27] In order to decide whether the respondent's claim could be maintained, it is first necessary that the court resolves whether Parliament intended that a private claim could be brought for a breach of section 3. As Lord Diplock explained in **Lonrho**,

> *"… the question whether legislation which makes the doing or omitting to do a particular act a criminal offence renders the person guilty of such offence liable also in a civil action for damages at the suit of any person who thereby suffers loss or damage, is a question of construction of the legislation.*
>
> *"…where an Act creates an obligation, and enforces the performance in a specified manner... that performance cannot be enforced in any other manner…where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence to perform the statutory prohibition for which the Act provides, there are two classes of exception to this general rule.*
>
> *The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, …*

As Lord Kinnear put it in Butler (or Black) v. Fife Coal Co. Ltd. [1912] A.C. 149, 165, in the case of such a statute:

"There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute... We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons there arises at common law a correlative right in those persons who may be injured by its contravention.

The second exception is where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J. in Benjamin v. Storr (1874) L.R. 9 C.P. 400, 407, described as "particular, direct, and substantial" damage "other and different from that which was common to all the rest of the public." Most of the authorities about this second exception deal not with public rights created by statute but with public rights existing at common law, particularly in respect of use of highways. Boyce v. Paddington Borough Council [1903] 1 Ch. 109 is one of the comparatively few cases about a right conferred upon the general public by statute. It is in relation to that class of statute only that Buckley J.'s oft-cited statement at p. 114 as to the two cases in which a plaintiff, without joining the Attorney-General, could himself sue in private law for interference with that public right, must be understood. The two cases he said were: "... first, where the interference with the public right is such as that some private right of his is at the same time interfered with... and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right." The first case would not appear to depend upon the existence of a public right in addition to the private one; while to come within the second case at all it has first to be shown that the statute, having regard to its scope and language, does fall within that class of statutes which creates a legal right to be enjoyed by all of Her Majesty's subjects who

wish to avail themselves of it. A mere prohibition upon members of the public generally from doing what it would otherwise be lawful for them to do, is not enough.

[28] A perusal of section 3 does not suggest to me that *"Parliament intended that breach of the relevant statutory duty should be actionable by an individual harmed by that breach*[9]. My assessment of section 3 leads me to conclude that it imposes obligations on the motoring public in general to obtain and maintain valid policies of insurance over vehicles used by themselves or others using the same at their instance. The section also attaches severe penalties for any breaches of the said obligations. There is nothing therein to suggest that Parliament intended enforcement of the section by any other means than the instituting of criminal charges and the imposition of the stated penalties for violating the terms thereof. It is, of course, accepted that the mere presence of a criminal sanction is not, in all cases, entirely dispositive of the issue. Parliament may have intended that, in addition to the imposition of criminal sanction, a protected class could also bring private claims for losses suffered as a consequence of the breach of the statute. However such a construction must still hinge on showing that Parliament enacted the obligation "*for the benefit or protection of a particular class of individuals*" Lord Browne – Wilkinson explained the principle in **X and others (Minors) v Bedfordshire County Council**[10] –

> *The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does*

[9] Clerk and Lindsell on Torts, 12th edition, paragraph 9-13. See Lord Borne-Wilkinson in X(Minors) v Bedfordshire CC[1995] AC 663 at 731 for a fuller discourse on the differences between a private law cause of action and public law actions for the enforcement of statutory duties; also RCA Corporation and another v Pollard [1983] Ch. 135; and Bermuda Cablevision Ltd and others v Colica Trust Corporation Co Ltd [1998] AC 198

[10] [1995] AC 663

provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: see Cutler v Wandsworth Stadium Ltd [1949] 1 All ER 544, [1949] AC 398 and Lonrho Ltd v Shell Petroleum Co Ltd [1981] 2 All ER 456, [1982] AC 173. ***However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.*** *Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see Groves v Lord Wimborne [1898] 2 QB 402, [1895-9] All ER Rep 147.*(Bold emphasis mine)[11]

[29] I have not found that such a construction exists in the statute. The second exception to the general rule as explained by Lord Diplock is also inapt in these circumstances for the fact that the pleadings do not show that there is a public right being interfered with in such a manner that the respondent's private rights are thereby affected or that, while his private rights are not being affected, the breach of the public right is such that he has incurred *"particular, direct, and substantial" damage "other and different from that which was common to all the rest of the public."*[12]The respondent could not bring this action for a breach of section 3 of the Act.

The defence in respect of liability for the acts of Mr. Hernandez

[30] The other ground of the defence is equally forceful. It is by now a well established legal principle that the owner of a vehicle is not liable for the acts of the driver of the same except where it is shown that the driver was the servant or agent of the owner or as it is said, using the same for *"the owner's purposes, under delegation of a task or duty"*[13]. Equally, the applicant will have a strong answer to the claim if he demonstrates that at material time, he was not or no longer the owner of the vehicle.

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[11] See also London Transport Board v Upson [1949]AC 155; Calveley v Chief Constable of the Merseyside Police [1989] AC 1228

[12] Lonrho supra at note 3

[13] Morgans v Launchbury, supra at note, Avis Rent-a- Car v Maitland (1980) 2 W.I.R 294 and O'Carrol Baynes v Wesley Williams and Keith Cruickshank SVGHCV 2001/483

[31] I will first deal with the assertion that the applicant was not the owner of the vehicle at the material time. I will then examine, if he was the owner, whether his proposed defence in that regard has a real prospect of success.

The assertion that at the material time the applicant was not the owner of the vehicle

[32] In his affidavit in support of the application, the applicant alluded to the fact that the vehicle was registered in the name of a separate entity called The Sugar Mill Shop. The court has been presented with an insurance cover note in which The Sugar Mill Shop is listed as the insured in respect of a vehicle bearing the registration number of the vehicle forming the subject of the claim. I find that the statements in this document, by themselves, do not suffice as proof that what is contained therein was, at the material time both (i) accurate; and (2) conclusive proof of ownership of the vehicle by The Sugar Mill Shop.

[33] There is also a letter dated April 8, 2014 written by the applicant in his capacity as managing director of The Sugar Mill Shop and addressed to the Antigua and Barbuda Transport. The letter states that it gives authority to the applicant's son to transfer the vehicle's registration from The Sugar Mill Shop to Mr. Hernandez. As with the insurance cover note, this letter does not carry matters much further. An invoice dated April 11, 2014 giving details of the sale of a vehicle registered as "C-4436" is also placed into evidence. The invoice states that the sale is between the applicant and one Giancarlo Bettini on behalf of Mr. Hernanadez. The invoice bears the stamp of an entity called "Trans Caribbean Marketing". I am not certain how the applicant wishes the court to conclude that this is invoice evidences a sale between The Sugar Mill Shop and Mr. Hernanadez when the applicant is listed as the vendor and the registration number in question is not the same as that of the vehicle in question. Additionally, the invoice appears to be one issued by an entity that is not The Sugar Mill Shop.

[34] The applicant has placed a bank statement before the court. The statement lists the account holder as an entity called "Blue Cap Enterprises Limited" which is trading as "Trans Carib MKT". A sum of $34904.72 was deposited into the said account on April 8, 2014. This sum is equivalent to the sum

stated on the invoice. This bank statement does not help the applicant for the same reasons I expressed in respect of the invoice. At the highest, the bank statement may demonstrate that the sum due under the invoice was paid a few days before it was drawn up into the account of the entity called "Trans Caribbean Marketing". These two latter documents do not assist the court to conclude that sale of vehicle registration number A-4436 was concluded between The Sugar Mill Shop and Mr. Hernandez.

[35] The respondent argues that the registration information in respect of the vehicle ought to have been provided to the court in cases of this sort. I would not entirely agree that the registration documents are always required. As Cumberbatch J properly stated in **Ginelle Jerome v Errol Felix and others** [14], proof of registration may not be entirely conclusive of ownership. Other evidence may be provided to show that ownership resided in another person. In the Jerome proceedings, the claimant sued several defendants for injuries caused as a result of a traffic collision involving a vehicle registered in the name of the applicant but driven by another defendant. The applicant argued that at the time of the accident he had sold the vehicle to another of the defendants. The applicant provided evidence that he had sold the vehicle and sought to have the vehicle's registration transferred from his name to that of the other defendant to whom it was sold. This process was incomplete at the date of the accident through no fault of the applicant. By that date, the applicant had also secured the cancellation of the insurance policy held in his name in respect of the vehicle. At the date of the incident the vehicle registration still remained in the applicant's name but there was clear evidence that he had parted with ownership of the vehicle. The defendant to whom the vehicle was sold also placed evidence before the court, by way of his defence, that he was the purchaser and owner of the vehicle on the day in question. On the applicant's request to have the claim struck out against him, the claimant argued that the registration remained in the applicant's name and as such he was the owner and ought to account for what transpired. In agreeing with the applicant and striking out the claim against him, Cumberbatch J reasoned correctly that registration was only prima facie evidence of ownership which evidence could be rebutted by proof that actual ownership resided elsewhere.

[36] The logic in **Jerome** applies to this case in the sense that the applicant could have placed evidence before the court, besides the registration certificate, to show conclusively that at the date of the incident, ownership of the vehicle resided in The Sugar Mill Shop or had been transferred to Mr. Hernanadez. However, there is no evidence before this court that satisfies me that the vehicle

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was owned by the Sugar Mill Shop or that the registration was transferred to Mr. Hernandez at the time of the accident. I have already stated my views on the evidence provided to the court in this regard. That leaves the statement in the police report that the vehicle belonged to the applicant. This is a definitive statement from a state official which has not been refuted by anything placed before the court by the applicant. The production of the registration information to show ownership by The Sugar Mill Shop or a statement from Mr. Hernandez that he was the owner as at the date of the incident (as in **Jerome**) might have gone a long way to assist the applicant's case.

Does the applicant's defence stand a real prospect of succeeding even if ownership resided in his name?

[37] The answer to this question is yes based on the authority of **Morgans v Launchbury** and the line of cases recited above which hold it to remain good law. I do not find that there any averments of any sort on the statement of claim that at the material time, Mr. Hernandez was using the vehicle as the applicant's servant or agent or under a delegation from him of a task or duty. The lack of such pleadings is fatal to the action against the applicant.

[38] Notwithstanding the strength of the defence, the applicant does not succeed on his application to set aside the default judgment pursuant to CPR 13.3(1) due to his failure to meet all the procedural conditions therein set out. It remains to examine his request to see if he satisfied the requirements of CPR 13.3(2).

Do exceptional circumstances exist in this case?

[39] CPR 13.3(2) was enacted as amendment to the CPR of which amendment it is said that

> *"it was primarily to dilute the rigidity of our own Rule 13.3(1) and to bring it more in line with the English Rue by providing greater latitude to our judges to find the justice of the case rather than merely to find presence or absence of three set prerequisites that the new sub-rule (2) of Rule 13.3 was introduced, The amended Rule 13.3, after setting out the rigid provisions of 13.3(1), then introduces a new 13.3(2) which states that – " 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"[15].

[40] A clear statement on what are exceptional circumstances is not discernible from the cases for the simple reason that, I would surmise, such general words are intended to endow the court with a broad discretion that may only be circumscribed by the peculiar facts of each case. In **Inteco Beteiligungs AG v Sylmod Trade Inc**[16] which was approved on appeal in **Sylmord Trade Inc v Inteco Beteiligungs AG**[17], Bannister J observed that

> *For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained*

[41] Indeed the Court of Appeal in the case of **Elvis Wyre et al Alvin G. Edwards et al** [18] found that the applicant was successful in showing compelling reasons as to why he should be permitted to defend the claim. In that case, it was found that the grant of a default judgment (1) to a party who did not apply for the same; and (2) in circumstances where the relief granted was not available in law or on the pleadings were both compelling reasons that went to the "*bases of the claim and if correct will result in dismissal of most of the claim"*[19]. For these reasons it was found that exceptional circumstances were present and the appeal was allowed.

[42] I am similarly of the view that compelling reasons subsist in this case for the applicant to be permitted to defend the claim. Based on the analysis and for the reasons set out above at paragraphs 23 to 36 of this judgment, I am of the view that a claim for breach of statutory duty is not available to the respondent in this action. I am similarly of the view, for the reasons stated that the respondent has not shown that the applicant is responsible as owner for the actions of Mr. Hernandez, the tortfeasor. I consider such matters to be exceptional circumstances for the

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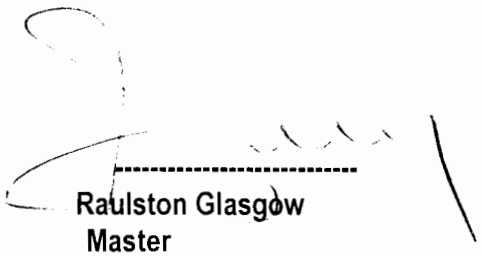
[15] Per Mitchell J in Graham Thomas v Wilson Christian trading as Wilcon Construction, Claim No: ANUHCV 2011/0629
[16] Claim No: BVIHCM (Com) 120/2012 at paragraph 31
[17] BVIHCMAP 2013/003
[18] ANUHCVAP 2014/0008
[19] Ibid at paragraph 43

purposes of CPR13.3 (2) since they go the core of this action and may, in all likelihood, result in the dismissal of the claim. In the circumstances I would order that the applicant is successful on the grounds that the default judgment must be set aside due to the prevalence of exceptional circumstances.

[43] I am aware that the outcome has taken away the benefit of a default judgment held by the respondent from as far back as July 4, 2014. He has also applied since October 10, 2014 to have his damages assessed. The respondent has acted appropriately in both bringing and pursuing a claim which he felt is legitimate. He was entitled to treat the inaction of the applicant as an acknowledgment of the claim. As a consequence of the callous manner in which the respondent has conducted these proceedings, the respondent has been put to the additional expense of defending a regularly entered judgment. The respondent's costs must be borne by the applicant in the circumstances. I assess those costs in the sum of $3500.00 which must be paid before the case management conference in this case. The applicant may file and serve his defence within (28) days of the date of this ruling. The matter will take its usual course thereafter in accordance with the CPR. This is an unless order. If the costs ordered in this ruling are not paid by the date of the case management conference, any defence filed by the applicant will be struck out and judgment will be entered for the respondent. I am indeed grateful for all the assistance offered by counsel.



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