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

SAINT LUCIA

SLUHCV2016/0171

BETWEEN:

GLEN GUISTE

Claimant

and

NEW INDIA ASSURANCE CO. (T&T) LTD.

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Mr. Jeannot-Michel Walters of Counsel for the Claimant
Mr. Dexter Theodore QC of Counsel for the Defendant

Parties present

2017: February 7;
March 1.

Application to set aside default judgment-whether judgment irregular under CPR 13.2-whether application made within reasonable time-whether a good explanation for failure to file defence provided-whether defence has a real prospect of success-whether there are exceptional circumstances-nature of default judgment

JUDGMENT

[1] CENAC-PHULGENCE, J: The claimant, Mr. Glen Guiste claimed damages for breach of contract of insurance alleging that the defendant company, New India Assurance Co. (T&T) Ltd. ("New India") had refused to pay by way of indemnity

the sum of $46,080.00 following the theft of his Daihatsu Terios ("the vehicle"). That claim was filed on 23rd March 2016. New India filed a defence some two months later by which time a request for judgment in default had been filed which was subsequently entered. New India now seeks to set aside the default judgment.

Background

[2] It is Mr. Guiste's case that his vehicle was covered by a comprehensive motor insurance policy during the period 16th November 2012 to 18th October 2013. The vehicle was stolen sometime in early January 2013 and he notified New India of the theft and his loss by way of a written claim. Mr. Guiste exhibited to his statement of claim an undated and unsigned letter in which he had notified New India that the scrapped shell of the vehicle had been recovered. Subsequently by letter dated 20th January 2014, Mr. Claudius Francis, loss adjustor advised Mr. Guiste that the position of New India had not changed (that the vehicle having been fitted with an immobilizer could not have been stolen).

[3] The sequence of events following the filing of the claim is as follows:

(a) affidavit of service filed on 5th April 2016 evidencing service of the claim on Mr. Andrew Chitolie, Agency Manager of New India on 30th March 2016 at 2:30 p.m.;
(b) acknowledgement of service filed by New India on 11th April 2016;
(c) (c)_request for entry of judgment in default of defence filed 6th May 2016;(d)defence filed on 21st June 2016;
(d) entry of default judgment dated 5th May 2016 and entered on 1st July 2016.

[4] The defence in the matter ought to have been filed on 28th April 2016 but instead was filed on 21st June 2016, almost two months after. No application for an extension of time to file the defence had been made.

[5] The application to set aside the default judgment was filed on 27th July 2016. It is supported by an affidavit of Mikael Bernarbe, Senior Claims Officer of New India and a certificate of exhibits. The grounds of the application are, in the alternative, that (1) the judgment is irregular and must be set aside under rule 13.2; or (2) the criteria set out in rule13.3(1) has been satisfied or (3) that there are exceptional circumstances which warrant the setting aside of the judgment under rule 13.3(2).

The Application to set aside
The first limb - whether the default judgment is irregular

[6] Rule 13.2 provides that the court must set aside a default judgment if judgment was wrongly entered if in the case of judgment for failure to defend, any of the conditions set out in rule 12.5. Rule 12.5 provides that the court office must enter judgment for failure to defend if

> "(a) …
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> (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;
> (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
> (c) the defendant has not –
> (i) filed a defence to the claim or any part of it … and
> (d) …"

[7] Once the request for judgment in default was filed, the Registrar was obligated to enter judgment once the conditions in rule 12.5 were met. Learned counsel, Mr. Theodore QC submitted that the judgment should be set aside as it is irregular. He also submitted that given the nature of the claim, regard must be had to rule 12.8 which deals with claims for a specified sum. He argued that Mr. Guiste could only have been entitled to judgment for an amount to be decided by the court and not a judgment for a specified sum as he did not produce documents which were necessary to prove the claim. Mr. Theodore QC argued that the affidavit of service filed on 29th July 2016 is clear evidence that the list of exhibits was not

served with the claim form and therefore the judgment could not have been for a specified sum. He says that there was no evidence of the value of the vehicle at the time it was stolen or of the value of the wreck when discovered.

[8] Counsel for the claimant, Mr. Walters argued in response that the judgment was not irregular and that all the necessary documents were served even if the affidavit of service does not indicate the list of exhibits.

[9] I cannot see how rule 13.2 will avail the defendant. At the date of the request for entry of judgment in default of defence, the Registrar had to be satisfied that certain conditions had been satisfied. There was an acknowledgement of service filed by New India. Therefore, evidence of service was not an issue as New India had acknowledged service. Counsel cannot now complain of an alleged absence of service of the list of exhibits. Secondly, the period for filing the defence had expired and no defence had been filed at the date when the request was filed. The conditions having been satisfied, the Registrar was obliged to enter judgment. The judgment being entered for a specified sum as opposed to an unspecified sum is not an issue which can be dealt with under rule 13.2. The conditions to be satisfied are clear and I find that they were all met. This ground therefore fails.

[10] Before proceeding, I must comment on Mr. Theodore QC's submission in relation to the fact that the affidavit of service did not indicate that the list of exhibits was served. In as much as I have indicated that this point is not material,[1] I must highlight a growing tendency not to pay attention to the contents of affidavits of service. An affidavit of service is the only way that evidence of service is proven and so care must be taken to indicate all relevant particulars including listing of all documents served on a party. Evidence of service cannot be engaged from the bar table.

[1] See paragraph 9 above.

The Application to set aside

The second limb - whether the application satisfies the conditions in rule 13.3(1)

[11] New India also applies to set aside the default judgment pursuant to rule 13.3(1) of CPR which provides as follows:

> "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."

Barrow JA in the case of Kenrick Thomas v RBTT Bank Caribbean Ltd.[2] has made it pellucid that the conditions set out in rule 13.3(1) are conjunctive and must all be satisfied in order for a default judgment to be set aside.

(a) Whether the application was made as soon as reasonably practical

[12] Mr. Theodore QC submitted that the application had been made in a timely manner. In the affidavit in support of the application, New India averred that it had not yet been served with the default judgment. However, the court record reflects two affidavits of service showing service of the default judgment on the Chambers of Theodore & Associates on 4th July 2016 at 4:00 p.m.[3] and on New India on 7th July 2016. Mr. Gusite in his affidavit in reply said that New India did not act in a timely manner in filing his application to set aside but provided no support for this submission.

[13] In the absence of any evidence to controvert the evidence of service of the default judgment on New India and on counsel's chambers, the application was filed 20 days after New India and 22 days after Mr. Theodore's chambers would have

[2] SVGHCVAP2005/0003, delivered 13th October 2005.
[3] According to rule 6.6 of CPR, the deemed date of service would be 5th July 2016 since the document was served at 4:00 p.m. on 4th July 2015.

been made aware of the existence of the judgment. Mr. Theodore QC referred to the case of Clement Johnson v Peter Celaire et al[4] in support of his submission that the lapse in the case at bar was reasonable and not inordinate. In that case, the period was a 23 day lapse and Actie M did not consider that this was an inordinate amount of time. There is no need to spend much more time on this aspect as the Court is of the view that 20 days is not an unreasonable time lapse before filing an application to set aside.

[14] The Court is generally more concerned where a defendant knowing of the existence of a default judgment is dilatory in applying to set it aside over a long period. The main consideration is that a claimant should not get a judgment only for it to be challenged long after its entry thereby depriving him of the fruits of his judgment. I therefore find that the application was made as soon as was reasonably practical and the delay in making it was not inordinate.

(b) Whether the defendant has provided a good explanation for the failure to file a defence

[15] The reason proffered by Mr. Bernarbe, Senior Claims Officer of New India for its failure to file a defence in time is that the file was inadvertently filed away in the filing cabinet at the office of its legal practitioner, Mr. Theodore QC before the deadline for filing of the defence was entered into the computer system. It was only on 20th June 2016 when the file was retrieved from the cabinet on a routine check that it was realized that the deadline for filing the defence had expired. That was almost two months after the expiry date for filing the defence. New India says that it was always its intention to defend the claim. Interestingly, the defence was filed on 21st June 2016, one day after the finding of the file which had been put away and was filed without counsel filing an application for an extension of time to file same. The question is whether this suffices as a good reason?

[4] DOMHCV2014/0130.

[16] Mr. Theodore QC referred to the case of Inteco Beteiligungs AG v Sylmond Trade Inc. where Bannister J said[5]

> "…The expression 'good explanation' is not an easy one. … In my judgment, the expression 'good explanation,' where it occurs in CPR 13.3(1), means an account of what has transpired since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."

Mr. Theodore QC submitted that the failure to file the defence was in no way meant as disrespect to the court and New India was not indifferent as to whether a judgment had been entered or not. Counsel also referred to the Court of Appeal decision of Sylmond Trade Inc. v Inteco Beteiligungs AG[6] where the Court agreed with Bannister J that the defendant had not provided a good explanation for its failure to file the defence. Mr. Theodore QC invited the Court to find that the explanation provided was a good one.

[17] Counsel, Mr. Walters submitted that the explanation provided by New India was not a good one because it was incumbent on legal practitioners to keep track of timelines and to follow up on them. Counsel also pointed to the fact that the defence was filed on 21st June 2016, there having been no discussions with Mr. Guiste's counsel about an extension of time to file same. Mr. Walters referred the Court to the case of The Marina Village Limited v St. Kitts Urban Development Corporation Limited[7] in support of his submission.

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[5] Inteco Beteiligungs AG v Sylmond Trade AG, BVICM (COM) 120 of 2012 at para15, delivered 9th May 2013.
[6] BVIHCMAP2013/0003, delivered 24th March 2014.
[7] SKBHCVAP2015/0012, delivered

[18] In the Court of Appeal case of Sylmond Trade, Justice of Appeal Michel agreed with Bannister J that the explanation provided by the defendant did not amount to a good one. However, Michel JA went on to say that "none of the parties to the appeal had taken issue with the definition of 'good explanation' as given by the learned judge and so he would not attempt, for present purposes, to interfere with it." It is to be noted that the learned Justice of Appeal did not make a pronouncement on the correctness or otherwise of Bannister J's definition.

[19] I fail to appreciate how the decision of Bannister J assists New India in this case. In Inteco v Sylmond at the High Court, Bannister J was faced with a defendant who had casually dealt with the claim, had failed to instruct its registered agents and did not take any steps to answer. Hence Bannister J's statement that the good explanation must come from the defendant and that it may be offered by someone authorized by the defendant to do so, and it needs to explain why the defendant had failed to take the necessary steps.

[20] Bannister J's statement must be weighed against the case of The Marina Village to which counsel Mr. Walters referred. In that case, the defendant had provided a post office box as its registered office address, had given evidence that the box was not manned regularly and therefore the claim did not come to the company's immediate attention. The Court of Appeal held that the defendant by its own deliberate action had not ensured that there were adequate administrative arrangements in place to access correspondence sent to its post box in a timely manner and so the Court found that it had not provided a good explanation. The appellant in this case (being the defendant in the court below) had also sought to rely on Bannister J's definition of 'good explanation' in Inteco to say that the appellant was not indifferent to the risk that judgment might be entered. The Court made no comment on this.

[21] In the Court of Appeal decision of Sylmond Trade, Michel JA referred to the Privy Council case of The Attorney General v Universal Projects Limited.[8] Lord Dyson said:

> "First, if the explanation for the breach i.e. the failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describ**e a good explanation as one which "properly" explains how** the breach came about simply begs the question of what is a **"proper" explanation. Oversight may be excusable in certain** circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency. (my emphasis)

In addition, our Court of Appeal has on many occasions held that lack of diligence on the part of the attorney,[9] secretarial incompetence,[10] or inadvertence[11] are not good reasons for delay.

[22] I find that the explanation given by New India for its failure to file a defence cannot amount to a good one. As Lord Dyson said, oversight may be excusable in certain circumstances but I do not find that this is one. This is further supported in my view by the fact that once the legal practitioner discovered this administrative error, steps were not taken to secure an extension of time to file a defence but a defence was simply filed albeit almost two months out of time. To my mind, it must be that a legal practitioner is to be held to an even greater standard than an ordinary litigant especially in a case where the result could lead to the setting aside of a judgment.

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[8] [2011] UKPC 37 at para 23.
[9] See Rose v Rose, SLUHCVAP2003/0029, delivered 22nd September 2003; Casimir v Shillingford (1967) 10 WIR 269.
[10] Mills v John [1995] 3 OECS Law Reports 597; Anthony Clyne v The Guyana and Trinidad Mutual Insurance Company Limited GDAHCVAP2010/0011, delivered 5th May 2010.
[11] Vena Mc Dougal v Reno Romain, DOMHCVAP2008/0003, delivered 7th April 2008.

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

[23] Counsel for the claimant, Mr. Walters submitted that New India did not file a draft defence with the application to set aside as mandated by rule 13.4(3). He also submitted that the defence filed on 21st June 2016 had not been served on Mr. Guiste. Counsel, Mr. Theodore QC argued that the defence is on the record and so there was no need to exhibit it to the application. In fact, he submitted one must not be a slave to the rules. That may be the case but the rules must not be flouted unnecessarily. Indeed there is no evidence of this defence being served on Mr. Guiste. It is not attached to the application. How then must the claimant respond to New India's assertion that it has a real prospect of success? Learned counsel, Mr. Theodore QC submitted that the defence was not filed in time and therefore it is a nullity and nothing can turn on a nullity so that there was no need to serve it on the claimant. Yet, counsel wishes to move the Court to accept this same defence to prove that the defendant had a real prospect of success. To my mind the two submissions are incompatible.

[24] In the event that I am incorrect in my analysis above, I will look at the defence presented in the defence filed on 21st June 2016 and also to the affidavit filed in support of the application. The affidavit in support simply refers to the defence filed on 21st June 2016.

[25] New India's defence is that Mr. Guiste must prove that his loss was caused by an insured peril and he had failed to discharge that burden since his vehicle having been fitted with an immobilizer which is designed to prevent the vehicle from being hot-wired or driven away made it impossible for the vehicle to have been stolen. This is a bald statement. Mr. Theodore QC submitted that it was Mr. Guiste's responsibility to show that despite the presence of the immobilizer the vehicle could have been driven away.

[26] What is required is for New India to show that it has a realistic and not a fanciful prospect of success.[12] Mr. Guiste would have to prove that the vehicle was stolen which he did by virtue of his report to the insurance company and also the Police Report. If the insurance company wishes to dispute the claim and allege that the vehicle was not stolen, then it is for them to provide the evidence to show this.

[27] The fact of a vehicle being fitted with an immobilizer cannot without more mean that the vehicle cannot be stolen. An engine immobilizer is dubbed as 'a state-of-the-art anti-theft system'. The engine will only start if the code in the chip inside the key matches the code in the vehicle's immobilizer but this is in relation to starting the engine. It would appear that it is possible for a vehicle fitted with an immobilizer to be stolen even without the keys as it could be moved without being driven away or hot-wired as for example if it is hoisted onto another vehicle. The engine would not have to be started for that purpose. Those who specialize in the business of vehicle theft would I am sure be well versed with the many ways to bypass an immobilizer to sustain their illegal business.

[28] In my view therefore, the defence offered by New India does not have a realistic prospect of success as there is nothing in the defence which points definitively to the assertion that the vehicle was not stolen. It is mere speculation that because the vehicle was fitted with an immobilizer *it could not have been stolen.* Mr. Guiste has proved that his vehicle was stolen and as his counsel submitted it did not matter how the vehicle was stolen. It would have been different if Mr. Guiste had lost one of the keys to his vehicle and had not notified the insurance company of the increased risk to the insured property.

[12] Swain v Hillman [2001] 1 All ER 91.

[29] The conclusion of the matter is that New India has failed to satisfy the Court that it had a good explanation for failure to file its defence and also that it has a realistic prospect of success and therefore the application to set aside pursuant to rule 13.3(1) of CPR fails.

The Application to set aside
The third limb-whether there are exceptional grounds

[30] Rule 13.3(2) of CPR allows the court to set aside a default judgment if the defendant satisfies the court that there are exceptional circumstances. The rules do not define exceptional circumstances. Counsel, Mr. Theodore QC submitted that the judgment should be set aside on the ground of exceptional circumstances as allowing the judgment to stand would result in the defendant being unjustly enriched since his claim is for the insured sum and does not factor in the salvage value of the vehicle when it was discovered. Counsel, Mr. Walters submitted in response that this could not amount to exceptional circumstances. He pointed to the fact that Mr. Guiste had insurance coverage up to a certain amount so that the insured value of the vehicle was known at the time of the loss, the salvage value was also known and so it was no mathematical feat to calculate what Mr. Guiste would have been entitled to. There was no case of unjust enrichment.

[31] Mr. Theodore QC referred to The Marina Village case in support of his submission on the unjust enrichment point but respectfully, I am unable to see how this is a case of unjust enrichment as the insurance company as Mr. Theodore rightly pointed out from the start would have been entitled to take into account the salvage value of the vehicle when compensating the claimant for his loss. I also do not see that this is a case where grave injustice would result if the judgment were not set aside. The application to set aside pursuant to CPR 13.3(2) fails.

The nature of the default judgment

[32] Learned counsel, Mr. Theodore QC submitted that given the nature of the claim, regard must be had to rule 12.8 which deals with claims for a specified sum of money which is the premise upon which Mr. Guiste applied for the default judgment. However, rule 2.4 defines what a specified sum is and this case does appear to be one of a specified sum. Counsel argued that what should have been applied for was for an amount to be quantified by the court on assessment.

[33] Rule 2.4 defines specified sum as 'a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract'. Mr. Guiste's statement of claim did not exhibit the contract of insurance, the value of the vehicle at the time of the loss or evidence of the salvage value of the vehicle which would have been necessary to ascertain the amount by way of indemnity which ought to be paid under the policy. In essence the amount claimed was not proven. That being the case, the judgment could not have been a judgment for a specified sum and should have been entered for an amount to be decided by the court.

[34] Mr. Walters submitted that under rule 13.3(3) of CPR, the court has power to vary a judgment instead of setting it aside. In the interest of justice and taking into consideration the overriding objective, this seems to be a case where the Court can vary a judgment which has been entered for a specified sum when it ought rightly to have been entered for an amount to be decided by the Court.

Conclusion

[35] In the circumstances and for all the reasons set out above, I make the following order:

(1) The application to set aside the judgment in default of defence dated 5th May 2016 and entered on 1st July 2016 is refused with costs to the claimant in the sum of $500.00 to be paid within 21 days of today's date.

(2) The judgment in default of defence dated 5th May 2016 and entered on 1st July 2016 is varied to read "No defence having been filed by the defendant herein, it is this day adjudged that judgment be entered for the claimant for an amount to be decided by the court."

(3) The assessment of damages shall be conducted on a date to be fixed by court office, giving the parties at least 42 days' notice of the date, time and place for the hearing.

(4) The claimant shall file and serve witness statements and written submissions in support of the assessment of damages within fourteen (14) days of service of the notice of assessment in accordance with rule 16.2(b).

(5) The defendant shall indicate whether it wishes to be heard after filing the necessary notice within seven (7) days of the claimant's service of written submissions in accordance with rule12.13 and if necessary file and serve witness statements and written submissions in accordance with rule 16.2(c).

It is certainly my hope that the parties will seek to conclude the matter of the assessment through discussion as this is a simple matter which ought not occupy too much of the Court's calendar.

Justice Kimberly Cenac-Phulgence
High Court Judge