IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2017/0300

BETWEEN:

NEIL CAVE

Claimant

and

WADE AUSTIN-MCDONALD

Defendant

Before:

Ms. Jan Drysdale Master

Appearances:

Ruggles Ferguson and Luann De Costa of counsel for the claimant

Sherrie-Ann Bradshaw of counsel for the defendant

2018: February 28

2018: March 20th

DECISION

[1] **Drysdale, M.**: The matter for consideration concerns whether an application filed on 22nd November 2017 to set aside a judgment in default of defence should be granted by the court.

Background

[2] The claimant instituted proceedings against the defendant on 13th June 2017 for defamation. The claimant asserted that the defendant had published an email to 65 pilots and members of the Leeward Islands Airline Pilot Association (hereinafter LIALPA) across the region

which email contained defamatory statements about him. Accordingly the claimant claimed injunctive relief as well as damages for the alleged defamation.

[3] The claim form and other relevant documents were served on the defendant on 13th June 2017. The defendant (in person) promptly filed on acknowledgement of service the following day disputing liability and signalling his intention to defend the claim.

[4] On 16th August 2017 the claimant filed an application for judgment in default of defence pursuant to CPR 12.10(5) with a returnable date of 25th October 2017 for the hearing of the application. The defendant was served with the application two days later on 18th August 2017.

[5] On 10th October 2017 a notice of hearing of the application fixed for 25th October 2017 was filed and served on the defendant.

[6] A notice of acting for the defendant was filed on 18th October 2017. Subsequently on 23rd October 2017, two days before the hearing of the application for inter alia default judgment, the defendant filed an application for extension of time and relief from sanctions to file his defence in the matter.

[7] The application for judgment in default of defence was heard on 25th October 2017 and granted. The court declared specifically that the email dated 16th November 2016 contained defamatory material with respect to the claimant and further ordered that the defendant be permanently restrained from publishing the said or similar words defamatory of the claimant.

[8] As a result the defendant on 22nd November 2017 filed an application pursuant to CPR 13.3 and 13.4 to set aside the default judgment.

[9] The grounds as articulated in the application are as follows:

1. The default judgment was entered on 3rd November 2017 after having been granted on 25th October 2017.

2. The applicant failed to enter a defence because the applicant was caught up in work and was only made aware that the time had passed when he was served with an application for judgement. Further the applicant had been attempting to obtain the audio recording from the Observer media where the

applicant had made the statements. However due to the passage of time was unable to obtain the audio recording.

3. The matter between the parties had been referred to the Executive of the LIALPA and the applicant was of the honest opinion that the association was attempting to resolve the matter.

4. The applicant has a real prospect of successfully defending the claim.

5. The respondent will not be prejudiced if the application is granted.

6. The failure to adhere to the rules was not intentional.

7. There is a good explanation for the failure to file the defence as prescribed by the rules.

8. No trial date has been set.

9. The application has been made promptly.

10. It is in the best interest of the administration of justice and both parties for the application to be granted.

[10] Consequent upon the application to set aside the default judgment the respondent on 12th January 2018 filed an affidavit in opposition.

Issue

[11] The sole issue for consideration is whether the court should exercise its discretion to set aside the default judgment.

Analysis

[12] The starting point of the analysis is Part 13.3. of the CPR which provides the basis for the exercise of the courts discretion in such circumstances.

[13] CPR 13.3. identifies three conditions which the defendant seeking to set aside the judgment must meet. These conditions direct that the defendant must:

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

(b) Provide a good explanation for the failure to file an acknowledgement of service or a defence; and

(c) Has a real prospect of successfully defending the claim.

[14] Barrow J in the case of **Thomas v RBTT Bank Caribbean Limited**[1] settled the issue of whether the grounds articulated therein were disconnected thereby rendering an application as satisfactory once a party had met one or more and not necessarily all of the requirements. At page 3 paragraph 7 the Learned Judge stated:

> "[i]n contrast, the discretion in the CPR is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgement"

[15] In view of the aforesaid the Learned Judge continued:

> "[i]n my view, having decided that the defendant failed to satisfy two of the three conditions that Part 13.3 specifies…it was not open to the Master to set aside a judgement that the rule says may be set aside only if the three conditions are satisfied.
>
> …If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding all default judgments. It is as simple as that."

[16] Hence the requirements being conjunctive, any failure on the part of the defendant to meet any one of the requirements will be fatal to the instant application under consideration.

[1] Civil Appeal No 3 of 2005

WHETHER THE DEFENDANT APPLIED TO THE COURT AS SOON AS REASONABLY PRACTICABLE AFTER FINDING OUT THAT JUDGMENT HAD BEEN ENTERED

[17] The application under consideration was filed on 22nd November 2017, 28 days after the order which granted judgment in default of defence.

[18] The defendant sought to convince the court that time should start to run on 3rd November 2017 as the date wherein the order was entered. This argument would have held water save for the fact that the defendant was present and represented on the date when the application was heard. Clearly then the defendant had notice of the order from 25th October 2017 and not on the date of entry. Blenman J in the case of **Tamn v Fountain Beach and Tennis Club**[2] stated "[t]he court reiterates that the Applicant who seeks to have a Default Judgment set aside must apply as soon as reasonably practicable after becoming aware of the Judgment in Default." Accordingly the defendant cannot rely on the date of entry as the start of time beginning to run in the circumstances.

[19] Having regard to the fact that Part 13.3 does not set any particular timeframe for making these orders any decision on whether the defendant acted as soon as reasonably practicable must encompass an analysis of the relevant facts in addition to the length of time taken to file the application.

[20] With this is mind the court takes cognisance of the conduct of the defendant in relation to these proceedings. As indicated previously the defendant immediately following the service of the claim form upon him filed an in person acknowledgement of service.

[21] The defendant indicted that liability was disputed and as such pursuant to the form would have been put on notice that the time for the filing of a defence was 28 days from the service of the claim form on him. The prompt action of the defendant in filing the acknowledgement of service is indicative of the defendant fully appreciating the significance of the matter and the need to act with expedition.

[2] AXAHCV0067/2009 pg12 paragraph 61

[22] Notwithstanding the defendant failed to file the requisite defence. This afforded the claimant the opportunity to file an application for judgment in default of defence almost five weeks after the expiration of time for filing the defence.

[23] Whilst the court takes notice that the defendant initially acted in person when the acknowledgement of service was filed, based on the notice of acting filed on 18th October 2017 seemingly it took the defendant two months from being served with the application for judgment to retain counsel to represent him in the matter.

[24] Clearly the defendant was cognisant of the consequences of failing to file a defence by 18th August 2017 when the application was served on him. Yet the defendant waited until the 23rd hour and 59 minute before the hearing of the application to retain counsel and thereafter to file an application for extension of time and relief from sanctions.

[25] Having regard to the above it is patently clear that the defendant did not act with any measure of promptitude and certainly cannot be deemed to have acted within a reasonably practicable time in bringing this application.

[26] Even if the court were to disregard the entire timeline leading up the hearing of the application for default judgment, the defendant still waited 28 days to file the instant application to set aside the judgment. In the case of **Tamn v Fountain Beach and Tennis Club**[3] Blenman J denied a similar application on the basis that 5 weeks fell outside the remit of what could be considered as reasonably practicable. Also in the case of **Hodge v Hodge**[4] a delay of 13 days was deemed sufficient for the court to refuse such an application.

[27] Further the defendant has provided no explanation for the 28 day delay and as such there is nothing extenuating which the court can consider to mitigate the delay in filing the application.

[28] Accordingly I find that the defendant has not acted within a reasonably practicable time in seeking to set aside the default judgement. Having regard to the fact that the requirements are conjunctive on that basis alone the application fails. However because of the nature of this case I will also propose to examine whether the defendant may have satisfied ground 2 of CPR 13.3.

[3] Ibid fn2
[4] BVIHCV2007/0098

WHETHER THE DEFENDANT HAS PROFFERED A GOOD EXPLANATION FOR THE FAILURE TO FILE A DEFENCE

[29] The explanations provided by the defendant are threefold. Firstly the defendant submits that he was caught up with work and therefore genuinely forgot about the proceedings. Secondly that he was attempting to obtain a copy of the audio recordings relevant to the matter and thirdly that he thought that the matter would have been resolved with the assistance of LIALPA which agency the matter had been referred to.

[30] As it relates to the defendant's lapse in memory on account of work, the court does not find that this is a good excuse. The case of **Casimir v Shillingford and Pinard**[5] has long since established that pressure of work is not a good explanation. Whilst it is acknowledged that the aforesaid case dealt with an attorney utilising the excuse of pressure of work the principle remains unassailable especially in circumstances where a party is clearly aware of the significance of non-compliance.

[31] As it relates to the defendant's suggestion that he was attempting to retrieve the audio files from the Observor, I also find this not to be a good explanation. The claim in the matter concerns an email circulated by the defendant. In any event the defendant would have been aware that any audio recording which may have been necessary to his defence would have been required once he received the pre-action letter in February almost 6 months before the commencement of proceedings. Furthermore there being no denial that the defendant sent the email which contained the statements complained about it is difficult to understand how the failure to obtain an audio recording wold impede the defendant in filing a defence promptly.

[32] The defendant's final explanation of discussions between a third party and the claimant I also find not to be a good explanation. The defendant wishes the court to accept that non court sanctioned discussions between parties or agents for the respective parties should cause the time for compliance to stop.

[5] 10 WIR 269

Again this is clearly within the context of the defendant being made aware of the requisite time period for compliance as well as the consequence of any failure. Moreover the defendant has save his assertion not provided the court with one scintilla of evidence to suggest that he may have been induced, misled or influenced by the claimant or anyone into thinking that based on the alleged discussions that the matter would not be pursued. Clearly if the defendant had erroneously come to that conclusion he would upon being served with the application for default judgment on 18th August 2018 been made aware that the claimant continued to pursue this matter before the courts. Yet the defendant did nothing until the application was shortly to be decided.

[33] Therefore I find that the defendant has also failed to meet the requisite threshold for proffering a good explanation for failing to file a defence in the manner contemplated by the CPR.

[34] The conjunctive nature of these requirements therefore renders the failure of the defendant to have applied promptly and to provide a good explanation as fatal to his application to set aside the default judgment.

Order

[12] Based on the foregoing I make the following order:

1. That the application to set aside the default judgement is dismissed.
2. Costs to be assessed if not agreed.

Jan Drysdale

Master

By The Court

Registrar