

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

Claim No: ANUHCV2021/0312

BETWEEN:

CHERYL JACKSON

Claimant

and

IRA BARRIERO

Defendant

APPEARANCES:

Aisha K. McLean for the claimant

Eunica Anthony-Victor for the defendant

**2022; July 7
September 13**

ORAL DECISION

[1] **GARDNER HIPPOLYTE, M:** This is an application by the defendant to set aside a default judgment under the Civil Procedure Rule (CPR) 13.3 (1).

BACKGROUND

[2] The instant claim was filed on the 12th August 2021, the defendant was served on the 8th September 2021 and subsequently filed an acknowledgment of service. The time to file the defence was due and the defendant having not filed the same, the claimant requested and obtained judgment in default on the 18th October 2021. This is a vehicular accident where the claimant indicates she was hit at the rear of her vehicle by the defendant.

[3] The clerk in the defendant's attorney chambers filed an affidavit in support of the application to set aside the judgment. The main thrust of the affidavit by the clerk is that in the absence of a police report the defendant's attorney was desirous of visiting the scene and interviewing the passengers who were in the defendant's vehicle at the time of the accident. Due to COVID 19 restrictions and scheduling difficulties it was not possible to obtain the police report and to meet the witnesses before

the time expired to file a defence. Accordingly, Counsel for the defendant requested from her colleague on the 18th of October 2022, an additional 7 days to file the defence. The attorney for the defendant did not receive an affirmative response and filed this application 5 days after judgment was granted.

- [4] A draft defence has also been attached to the affidavit in support to set aside the defence. The draft defence states that whilst the defendant hit the claimant at the rear of her vehicle, he denies he was the cause of the accident. That the accident was caused by the “**driver of R3232, who thrust his hand out of his window and flagged down the driver of another vehicle travelling in the opposite direction, while abruptly yanking his vehicle to the extreme left side of the road. As a result the defendant swerved slightly to the right to avoid colliding, with it at which time the driver unexpectedly yanked his vehicle back to the right causing it to move directly in the path of the defendant’s vehicle. The sudden movement of the vehicle caused the defendant to apply his brake but he could not avoid the impact which left a small indentation to the rear left portion of the vehicle R3232.**”

- [5] I will now go on to substance of the application.

CIVIL PROCEDURE RULE 13.3

- [6] CPR 13.3(1) specifies the three conditions which a defendant must satisfy before a default judgment can be set aside¹. It is also settled law that the conditions are conjunctive². The court will now turn to consider the three conditions.

APPLIES TO THE COURT AS SOON AS REASONABLY PRACTICABLE

- [7] The judgment in default of defence was granted on the 18th October 2021, and the application to set aside was filed on the 25th October 2021. The defendant applied to the court for the judgment to be

¹ 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 the judgment has 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 As per Barrow JA at paragraph 7 of **Kenrick Thomas v RBTT Bank Caribbean Limited**, Saint Vincent and the Grenadines Civil Appeal No 3 of 2005 (delivered 13th October 2005, unreported) and **Public Works Corporation v Mathew Nelson** consolidated with **Elton Darwton et al v Mathew Nelson** as per Pereira CJ at paragraph 13.

set aside 5 days after it was granted. The court accepts that this was as soon as reasonably practicable after finding out judgment was entered. Counsel for the defendant has referred to **Ernesco Inc. v Bank of Saint Lucia Ltd SLUHCV 2009/0458** at paragraph 12 where Justice E. Georges (Ag) indicated that a period of six days was not unreasonable. Similarly, counsel for the claimant concedes that this period of 5 days is reasonable and refers the court to comparable case law³ where a period of 7 days was held to be a reasonable period.

[8] In the circumstances I find that this component of the three-pronged test has been satisfied.

GOOD EXPLANATION FOR THE FAILURE TO FILE A DEFENCE

[9] The defendant has submitted that the reasons for the failure to file the defence on time was due to failing to obtain the police report and interview the witnesses who were passengers within the requisite time. The underlying cause was COVID 19 restrictions and scheduling challenges in facilitating the same.

[10] The affidavit in support is provided by the clerk of the attorney's chambers. The information contained therein touched and highlighted the administrative work being carried out by the attorney in chambers, and accordingly I will allow the contents of the affidavit in support of the application.

[11] It was also stated in the affidavit that no police report was received with the statement of claim and that the defendant's attorney as far back as January 2020 sought to obtain further information to substantiate the amount claimed in damages by the claimant. However, nothing further was received.

[12] Counsel for the defendant has referred the court to **Ken-I Young v The AG of St. Vincent and the Grenadines**⁴ where scheduling difficulties was accepted as a good explanation for failing to file a defence. Additionally, the defendant also relied on the learning provided by Bannister J in **Inteco Beteiligungs AG v Sylmord Trade Inc** which was referred to in **Alexandre Monchatre Mariana Ranali v Freedom Limited**⁵. Justice Bannister identified that the expression "good explanation" -

³ Forest Springs Limited v Blue Waters St. Lucia Limited SLUHCV 2017/0137 issued March 7, at paragraph 24

⁴ SVGHCV2014/0226 at paragraph 6

⁵ ANUHCV2015/0646

“means an account of what has happened 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 judgement. The explanation may be banal and yet be a good one for the purposes of CPR 13.3.”

[13] The counsel for the claimant has proffered that the explanation provided is not a good explanation. Alternatively, it is suggested that guidance can be gleaned from **Public Works Corporation v Mathew Nelson consolidated with Elton Darwton et al v Mathew Nelson**⁶ where the Honourable Chief Justice Pereira highlighted that administrative difficulties or deficiencies do not amount to a good explanation and a previous decision of the Court of Appeal was referred to in that judgment. Examples were given⁷ of when Counsel do not have a good explanation which will excuse non-compliance with an order or practice direction.

[14] I agree with the case law provided by counsel for the claimant. I also do not consider the list to be exhaustive and it is instructive to this court. I am of the view that explanation provided by the defendant as to why the draft defence was not submitted on time as falling within the category of examples provided in **Public Works Corporation**⁸. Further there is no letter attached to support the assertion that a police report was requested, and it would have also been appropriate for the application to have exhibited what if any were the relevant protocols in effect for COVID 19 at that time.

[15] In relation to interviewing of witnesses, alternative arrangements could have been facilitated since counsel felt it was a necessary component in drafting the defence. Whilst I appreciate that COVID-19 has hampered the ease of conducting business it has also taught us that there are other options available to facilitate meetings and transactions.

⁶ DOMHCVAP 2016/0007 7 DOMHCVAP 2016/0008 at paragraphs 14, 19, and 20.

⁷ Michael Laudat et al v Danny Ambo DOMHCVAP2010/0016 as per Edwards JA paragraph 14

“ Finally, we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of the law, mistake of the law by counsel; lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.

⁸ Ibid at footnote 6

[16] Counsel for the defendant has also argued that a request was made to counsel for the claimant on the 18th of October 2021 for an extension of time to file the defence and this was refused. However, it should be noted that when this request was made for the extension of time to file the defence, the ***request for default judgment in default of defence*** had already been posted on the portal on the 16th October 2021 and was deemed filed on the morning of 18th of October 2021. In my opinion this does not assist the defendant in his argument that he had a good explanation.

[17] I therefore find that a good explanation has not been made out and the defendant fails on this ground.

HAS A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM

[18] Since the test is conjunctive, it is not necessary to consider this ground, however for completeness I have considered the draft defence which is referred to above. Based on the draft defence the defendant is asserting that the main cause of the accident is because of the actions of driver of the vehicle R 3232. That the defendant was reacting to the driving of vehicle R 3232.

[19] This is a defence that raises issues of contributory negligence as opposed to denying liability. therefore, the defendant can address this at the hearing of the assessment of damages.

CONCLUSION

[20] Accordingly, having failed on two limbs under CPR 13.3, the application to set aside the default judgment is refused.

[21] For the abovementioned reasons the order of the court is as follows:

1. The defendant's application to have the default judgment set aside is refused;
2. The court office to issue a date for directions for the assessment of damages;
3. Costs to be agreed if not assessed;
4. The defendant to draw file and serve this order.

Charon Gardner-Hippolyte
High Court Master

BY THE COURT

REGISTRAR