

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT VINCENT AND THE GRENADINES

CLAIM NO: SVGHCV2020/0148

BETWEEN:

HELEN CHILD

Claimant

and

ST. VINCENT MOTORS LIMITED

Defendant

Appearances:

Mrs. Patricia Marks-Minors for the Claimant

Mrs. Zhinga Horne Edwards with her Ms. Chelsea Alexander for the Defendant

2021: June 29;
July 26.

RULING

- [1] **GILL, M.:** The defendant, St. Vincent Motors Limited, seeks an order to set aside the judgment in default of acknowledgement of service entered against it on 28th January 2021 in favour of the claimant, Helen Child.

Background

- [2] In a claim in negligence, the claimant alleges that on Christmas Day in 2017, she suffered injuries when a gas bottle she purchased from the defendant exploded in her home. She instituted proceedings against the defendant by claim form and statement of claim filed on 23rd December 2020.

- [3] The claim form and statement of claim and the supporting documents were served on the defendant on 29th December 2020.
- [4] The defendant failed to file an acknowledgment of service within the time of 14 days prescribed by the Civil Procedure Rules 2000 as amended (CPR 2000). The deadline date was 13th January 2021.
- [5] As a result, the claimant lodged a request and on 28th January 2021, judgment in default of acknowledgement of service was granted by the learned registrar for an amount to be decided by the court.
- [6] The defendant was served with the default judgment on 2nd March 2021.
- [7] On 9th March 2021, the defendant filed an application to set aside the judgment in default and on 6th April 2021, filed an amended application also seeking leave to file its defence.

Issue

- [8] The court must determine whether to set aside the judgment in default entered against the defendant on 28th January 2021.

Law and analysis

- [9] Part 13 of CPR 2000 deals with setting aside or varying default judgment. Notwithstanding the notice of application indicating that it was pursuant to CPR 13.2 and 13.3, learned counsel for the defendant, Mrs. Horne Edwards indicated that the defendant was not proceeding with the application pursuant to CPR 13.2. CPR 13.3 reads as follows:

(1) If Rule 13.2 does not apply [dealing with cases where the court must set aside a default judgment] 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 case may be; and*
- (c) has a real prospect of defending the claim.*

(2) *In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.*

(3) *Where this rule gives the court power to set aside a judgment, the court may instead vary it.*

[10] Unlike some other jurisdictions, at this time, the requirements under CPR 13.3(1) are conjunctive.¹ In the decision of the Court of Appeal in **Lindsay F. P. Grant and Jonel F. H. Powell v Tanzania Tobin Tanzil**,² at paragraph 9 of the judgment, Pereira CJ stated:

“It is well established, as to be considered trite, that the provisions of CPR 13.3(1) are unyielding. A failure to satisfy any one of the three conditions is fatal to the application.”

Did the defendant apply to the court as soon as reasonably practicable after finding out that judgment had been entered?

[11] The Rules do not specify what is a reasonable time within which a defendant should apply to set aside a default judgment. The court must determine whether, in all the circumstances of a particular case, the defendant acted as soon as reasonably practicable.

[12] The default judgment was served on the defendant on 2nd March 2021 at 3:30 p.m. The application to set aside the judgment was filed seven (7) days, five (5) working days, later. The parties agree that the application was made promptly. I am satisfied that the defendant has met the requirement in CPR 13.3(1)(a).

Has the defendant given a good explanation for the failure to file its acknowledgement of service on time?

[13] On the evidence before the court, the reason for the delay is premised on the procedure employed by the insurers of the defendant, Massy United Insurance Limited (MUI), with respect to handling claims made against its insured. Learned counsel for the defendant in this matter, Mrs. Horne Edwards, is legal counsel for MUI. The second supplemental affidavit of Elaine Simon Latham, legal assistant employed with the chambers of Mrs. Horne Edwards, at paragraph 9, explains that “once you are insured with MUI, you are not permitted to retain a lawyer of your choosing as the Chambers represents MUI’s interest in all legal matters”.

¹ See *Kenrick Thomas v RBTT Bank Caribbean Limited*, Civil Appeal No. 3 of 2005, St. Vincent and the Grenadines, per Barrow JA. at paragraphs 7 and 10 of the judgment

² BVIHC VAP2020/0004, delivered July 6, 2020

[14] Mrs. Latham outlines the procedure adopted when an insured such as the defendant is sued as follows:

“6. Typically, what would happen after an insured is served with court documents and they are in the hands of MUI, is that the Chambers would be sent the documents by MUI, who would indicate that MUI’s head office in Barbados had confirmed that the matter be handled by the Chambers. At that point, we would receive instructions as to whether the matter is to be defended or not, whether a settlement is to be pursued etc.

7. I would then obtain the relevant information from MUI for the purpose of completing the acknowledgement of service form, such as the date of service and whether the name of the defendant is correctly stated. The form would then be completed, signed by Counsel as legal practitioner for MUI’s insured and then filed. This has been the procedure that has been followed by MUI ever since the Chambers began representing it.

8. Once the acknowledgement of service is filed, Counsel would subsequently make contact with the insured for the purpose of getting further details on the circumstances of the accident in order to draft a defence. There is usually no contact between the insured and the Chambers prior to this.”

[15] Mr. Michael Gun-Munro, managing director of the defendant, in his affidavit, indicates that on 29th December 2020, the same day the defendant was served with the claim form and statement of claim, he immediately contacted Mrs. Tamara Brackin, managing director of MUI. He states that she told him that she was not in office and that the staff was in mandatory quarantine because one of their employees had been exposed to COVID-19. However, Mr. Gun-Munroe says he was directed to leave the documents with the security guard at the entrance to the office and the documents would be passed on to her.

[16] Mrs. Brackin’s evidence is that the documents were forwarded to her and knowing the importance of acting swiftly, on 30th December 2020, she sent the documents to MUI’s head office in Barbados for review and advice, the standard procedure for claims such as the instant one. Her affidavit reveals, as mentioned by Mr. Gun-Munro, that the local office was closed owing to COVID-19 mandatory quarantine measures from 29th December 2020 to 11th January 2021.

[17] In relation to the head office in Barbados, Mrs. Brackin gives an account of certain COVID-19 restrictions imposed by the Government of Barbados, including restrictions on the movement of people in and around the island from 31st December 2020 to 14th January 2021. Certain

guidelines including 'work from home' arrangements were in place. Therefore, she states that the head office in Barbados was operating with a skeletal staff and for limited hours per day. She is aware, she deposes, that there was in place at the head office, a work system that utilised staff on rotation so that employees worked two days per week in one week and three days per week in the following week and then two days per week in the next and so on. At paragraph 9 of her affidavit, Mrs. Brackin swears as follows:

"9. The unfortunate result was that the proper follow-up on the court documents in the instant case was overlooked and no acknowledgment of service or defence was filed on the Defendant's behalf."

[18] Learned counsel for the defendant, Mrs. Horne Edwards, submits that given that the defendant was required to take the claim form to its insurers, who would then send it to their head office in Barbados, and in light of the inevitable disturbance in the usual work routine of both the local and the head office, the failure to file an acknowledgement of service within time is understandable and the reasons given are valid and amount to a good explanation. Counsel urges upon the court that the effects of the disruption of business operations at both the local and regional levels of the defendant's insurer, and the fact that it was the insurer who was responsible for the conduct of the defendant's claim, are factors that cannot be overstated in playing a central role in the claim against the defendant somehow slipping through the cracks when it reached the head office.

[19] Mrs. Horne Edwards points out that the defendant, through Mr. Gun-Munro, acted with due dispatch by taking the claim to the insurers immediately. Counsel directed the court to paragraph 6 of Mr. Gun-Munro's affidavit where he states that he "sincerely believed that the insurers were handling the claimant's claim and would have filed the necessary documents in response to the claim".

[20] Counsel relies on the case of **Gotson Warrican v Ronnie Trotman and Another**³ where, in a similar situation, the learned master accepted the defendants' explanation as a good one. At paragraph 34 of the decision, the learned master stated:

"[34] I am satisfied, on the basis of the evidence, the Defendants had taken the necessary steps to move the matter forward, and did show an interest in defending the matter. I am satisfied that the Defendants' explanation is plausible and reasonable. They heeded the wise counsel of the bailiff and

³ Claim No. 290 of 2012 (Saint Vincent and the Grenadines), delivered May 30, 2014

acted swiftly in attending their insurers....Their explanation shows involvement and interest in the matter, although their interest and involvement, and that of their insurers could, and should have been at a higher level. The fact that neither the lawyer nor the insurers never (*sic*) got back to them should have been a cause for concern. They should not just sit there and form “the impression,” as they claim, “that the matter was being dealt with”. Nevertheless, I accept their explanation.”

- [21] The claimant is of a contrary view. Learned counsel for the claimant, Mrs. Marks-Minors submits that not a scintilla of evidence has been provided to the court to explain what measures were in place for business to continue during the office closures or what measures were taken by the insurer to follow up with its head office. Counsel posits that it was Mr. Gun-Munro’s duty to ensure that the matter was being dealt with, especially given the seriousness of this court matter. His responsibility did not end on taking the documents to the insurer. It is the defendant’s responsibility through its representative to ensure that the relevant documents are filed. Equally, Counsel says, the insurers must be held to a high standard as they are very much aware of the significance of timelines and should have been more pro-active in ensuring that all deadlines were met.
- [22] As it relates to the head office being placed on restrictions, Mrs. Marks-Minors argues that COVID-19 has been an issue the entire world has had to deal with and adjust. Businesses have been forced, since early 2020, to implement ‘work from home’ measures to ensure that they continue to operate and to be able to earn so that their operations are not forced to close. Counsel contends that in this modern age of technology, the defendant’s local insurer and the insurer’s head office must have the means, competence and resources to keep abreast of its responsibilities so that these reasons are not good enough to meet the threshold required under the CPR 2000.
- [23] Mrs. Marks-Minors proffers that the explanation given on behalf of the defendant by Tamara Brackin, that the court documents were overlooked, is the same reason rejected by the learned master whose decision not to set aside the default judgment obtained by the respondent was upheld by the Court of Appeal in **Yates Associates Construction Co Ltd v Brian Quammie**.⁴ In that case, the managing director of the appellant company inadvertently overlooked the claim with the result that no step was taken to defend it. The Court of Appeal agreed with the learned master

⁴ BVIHCVAP2014/0005

that the reason proffered for the non-filing of the acknowledgment of service or the defence was the inadvertence of Ms. Yates, which was not a good explanation.

[24] In **Emmerson International Corporation v Starlex Company Limited and Sunglet International Inc.**,⁵ which involved an application for relief from sanctions, the “good explanation” concept was addressed. At paragraph 53 of the judgment, Blenman JA stated, “The question of what constitutes good explanation for the purpose of CPR 26.8(2) (b) is fact sensitive.” Her Ladyship went on to adopt the pronouncements of Davis-White J [Ag.] (as he then was) in **QVT Fund V LP et al v China Zenix Auto International Group et al** when he said,

“The quality of the explanation has to be viewed against all the circumstances and not simply by reference to the question of whether all was done that could have been done. A ‘good explanation’ is a universal standard, in the same way that the duty of care in negligence is, but what is required to discharge that standard will depend on the particular facts and circumstances.”⁶

[25] At paragraph 54, Blenman JA restated the oft-quoted pronouncement of Lord Dyson in **Attorney General v Universal Projects Ltd** as follows:

“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.”

[26] It is evident that Mr. Gun-Munro acted with much diligence and efficiency in contacting MUI immediately on the defendant being served with the claim. Subsequent to that, however, there is no evidence of any effort on his part to follow up. He left it to the insurers to handle it. It appears that the insurers left it to the head office to handle it. The head office blames COVID-19 restrictions for not handling it. In the circumstances, is this an excusable oversight? In my view, it is not.

[27] At the time the claim was served in December 2020, the entire world was in the throes of the pandemic. Since March 2020, this region has been subjected to several restrictions resulting in most operations, including court systems, being conducted virtually. This has become the norm. Most are performing outside of the normal work environment. We have learned to function in a new normal. In December 2020/January 2021, just short of a year under COVID-19 restrictions, it cannot be a good excuse that an insurance company, presented with a serious claim by an insured, neglects to instruct counsel to put in an acknowledgment of service because the claim was

⁵ BVIHCVMAP2018/0044

⁶ BVIHC(COM) 2014/0026, at paragraph 27 of the judgment

overlooked because employees were in office two or three times a week. This may have been considered a good excuse earlier on in the pandemic when this different way of life was all new. That is not the case now. Besides crying oversight, the defendant has not explained to the court what exactly had to be done and could not be done owing to the lockdown that caused it not to file an acknowledgment of service. Surely, one did not have to go to an office to access the documents or to consult on them.

[28] I differ from the approach taken by the learned master in the **Gotson Warrican** case. Notwithstanding the policy and procedure imposed on the defendant by the insurers, Mr. Gun-Munro or another representative of the defendant should have followed up to ensure compliance with the rules. Save to say that I see no compelling reason why an insured in the position of the defendant is barred from engaging legal counsel directly on a matter such as this, on the urging of the Court of Appeal in **Yates**,⁷ that the court show more restraint in comments proffered in rendering judgments, I shall refrain from going any further.

[29] The reasons given for the defendant's failure to file an acknowledgment of service in the prescribed time constitute an oversight or inadvertence, which the Court of Appeal has repeatedly held, does not amount to a good explanation⁸ and in the circumstances of this case, I do not consider it to a good one. Therefore, I rule that the defendant has not met the threshold in CPR 13.3(1)(b).

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

[30] Exhibited to the affidavit of Elaine Simon Latham in support of the application to set aside the default judgment is the defendant's draft defence. The draft defence denies negligence on the part of the defendant and annexes a report dated 12th February 2018 and signed by one Artis Davis on a letter headed "Supreme Investigative and Security Services Inc." The report consists of nine (9) paragraphs over less than three (3) pages, mostly relating what the claimant allegedly said, and concludes as follows:

"We are of the view that there was a leakage from the gas cylinder in the area of the regulator which triggered the explosion. Mrs. Child stated that she was preparing Christmas Dinner when the 25lbs gas cylinder finished. Her son Brandon Child changed the cylinder to a similar cylinder so that Mrs. Child could

⁷ BVIHCVAP2014/0005, per Blenman JA at paragraph 29

⁸ See Michael Laudat and the Attorney General of the Commonwealth of Dominica v Danny Ambo HCVAP 2010/016, per Edwards JA at paragraph 14

continue her cooking. After the cylinder was changed she relit the stove and shortly after she began to smell a high level of gas. She then proceeded to open the cabinet where the cylinder was stored to investigate. It was then that there was an explosion.”

Based on the sequence of events we have concluded that when the gas cylinder was changed the regulator was not properly affixed to the cylinder hence the leakage. This caused a buildup of gas in the cabinet where the cylinder was stored and as it was opened by Mrs. Child the escaping gas exploded and was ignited by the stove flames thus injuring Mrs. Child. According to Brandon Child the regulator and the hose were purchased from St. Vincent Motors Ltd. This was told to the author of this report on February 16, 2018 when I collected his statement.”

- [31] In the circumstances, the defendant contends that the draft defence raises issues that the defendant ought to be given the opportunity to prove on evidence before a tribunal of fact rather than being determined by the default of the defendant in filing an acknowledgment of service.
- [32] The claimant submits that the draft defence does not disclose a reasonable prospect of success. The claimant alleges that the defence is very bare-boned and holds no merit. It is issued by its own investigator and the report does not disclose a fulsome investigation. The claimant asks the court to note that this report was in existence since February 2018 and clearly shows not only that the defendant has no good reason for the delay, but also its content reveals that the defence has no real prospect of success.
- [33] The essence of the draft defence is the conclusion in the report that there was a gas leak as a result of the regulator not being properly affixed to the cylinder when it was changed by the claimant's son. This is the extent of the defence to the negligence complained of. In my view, this is woefully inadequate to sustain a defence. First, the author of the report has not even been identified as an expert qualified or competent to give this kind of evidence. Further, there are absolutely no details in the report as to how or why the author came to the conclusion that the regulator was improperly affixed. It is common knowledge that these small gas cylinders are changed by householders without the need for installation or assistance from a professional or employee of the seller. That being the case, there must be room for some minor error by the consumer without the great probability of a disaster such as occurred with the claimant. Therefore, it is not too remote for one to conclude from the said report that the gas cylinder was, in fact, defective. It is difficult to see how the defendant can establish its case in these circumstances. As

far as this court is concerned, the defence does not have a real prospect of success and I rule that the defendant has not satisfied the requirement in CPR 13.3(1)(c).

- [34] The defendant has failed to meet the conjunctive and requirements of CPR 13.3(1) to enable the court to set aside the default judgment. This is fatal to the application unless the defendant can bring itself within CPR 13.3(2) by demonstrating exceptional circumstances warranting the exercise of the court's discretion in its favour.⁹

Exceptional circumstances

- [35] The defendant submits that in the event the court is not minded to set aside the default judgment under CPR 13.3(1), then it ought to set it aside pursuant to CPR 13.3(2) given the exceptional circumstances that existed both in relation to the local office and the head office of the defendant's insurers at the time the claim was served on the defendant. I agree with the submission by the defendant that while CPR 13.3(2) is not specifically mentioned in the application, this does not prevent the court from considering, from the evidence led, whether the circumstances are of such an exceptional nature so as to justify setting aside the default judgment.¹⁰
- [36] Under this head, the defendant relies on the same set of circumstances put forward as a good explanation for the failure to file the acknowledgment of service under CPR 13.3(1)(b), that is, the circumstances that were visited upon MUI's office and that of its head office at the relevant time set out in the affidavit of Tamara Brackin.
- [37] In **Carl Baynes v Ed Meyer**,¹¹ the discussion by Pereira CJ on exceptional circumstances is instructive. At paragraph 26 of the judgment, Her Ladyship explained as follows:

"What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it must 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'. It must be something more than simply showing that a defence put forward has a realistic

⁹ See the consolidated appeals of *Public Works Corporation v Matthew Nelson*, and *Elton Darwton and Public Works Corporation v Matthew Nelson* DOMHCVAP2016/0007 and DOMHCVAP2016/0008, per Pereira CJ at paragraph 13

¹⁰ See *Graham Thomas v Wilson Christian* ANUHCv 2011/0629, delivered July 13, 2012

¹¹ ANUHCvAP2015/0026

prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant to be deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail or the defence being put forward is a “knock out point” in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive.”

- [38] The above reasoning of Pereira CJ was respectfully endorsed by the Privy Council.¹²
- [39] Mrs. Horne Edwards makes it clear that the defendant is not just saying the fact of COVID-19 is an exceptional circumstance, but that the court should consider, in particular, that this was a lockdown situation, making the oversight excusable.
- [40] Mrs. Marks-Minors counters that there is no compelling reason here to convince the court to bring this matter under CPR 13.3(2). Counsel submits that both the insurer and the defendant had the option to reach out to the claimant to seek an extension of time to file the defendant’s documents, or to apply to the court for an extension of time if the parties could not arrive at an agreement. Counsel further submits that the rules are in place to safeguard the position of both the claimant and the defendant and it would set the wrong precedent to set aside the default judgment when the insurer and the defendant have flouted the rules of the court.
- [41] The court having determined that the defendant has failed to meet the requirement of a good explanation for the failure to file the acknowledgment of service on time under CPR 13.3(1)(b), I am of the view that the same point is being “dressed up” as an exceptional circumstance for consideration of the court under CPR 13.3(2). As dealt with earlier, well into the restrictive situation of the pandemic, lockdowns did not prevent the daily operations and functioning of most organizations. At the time of the service of the claim, measures in place to deal with inconvenience and limitations of lockdowns allowed for adequate communication and access to information to allow the defendant to comply with the rules.

¹² Meyer v Baynes [2019] UKPC 3, per Lord Kitchin at paragraph 17

[42] None of the situations highlighted by Her Ladyship in **Carl Baynes** in the non-exhaustive list of instances that may amount to exceptional circumstances exists in the instant case. I can find nothing else in the evidence to ground an exceptional circumstance under CPR 13.3(2).

[43] I am mindful of the overriding objective of CPR 2000 to deal with cases justly. I am also aware of the overuse or misuse of this provision as “a plaster to cover all sores of omission”.¹³

[44] In **Louise Martin v Antigua Commercial Bank**¹⁴ Thomas J. refused an application to set aside a default judgment when he found that the defendant had satisfied two of the three requirements of CPR 13.3(1), including the limb that the defendant had a real prospect of defending the claim. In justifying the decision to dismiss the application to set aside the default judgment, the learned judge quoted the following excerpt from Civil Procedure (The White Book), 2003 Vol. 1:

“The discretionary power to set aside is unconditional. The purpose of the power is to avoid injustice. The major on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other compelling reason why judgment should be set aside or he should be allowed to defend the claim. The defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with Pt 12: this is not something the court will do lightly.”¹⁵

Conclusion

[45] The claimant in this case has validly obtained judgment in default. The defendant has not satisfied the necessary requirements of the Rules to set it aside. In summary, I find as follows:

- 1) The defendants applied to the court to set aside the default judgment as soon as reasonably practicable after finding out that judgment in default had been entered.
- 2) The defendant did not give a good explanation for the failure to file the defence on time.
- 3) The defendant does have a real prospect of successfully defending the claim.
- 4) No exceptional circumstances exist in this case to allow the court to set aside the default judgment.

¹³ See *Kenneth Harris v Sarah Gerald*, Civil Appeal No. 3 of 2003 (Montserrat), per Gordon JA. at paragraph 9 of the judgment

¹⁴ ANUHCv1997/0115

¹⁵ Ibid at paragraph 31 of the judgment

Order

[46] Based on the foregoing, it is hereby ordered as follows:

- 1) The application to set aside the judgment in default is refused.
- 2) The defendants shall pay the claimant costs of this application in the sum of \$1500.00.
- 3) I shall proceed to give directions on the assessment of damages.

Tamara Gill
Master

By the Court

Registrar