

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SVGHCV2019/0201

BETWEEN:

EDRICK JACKSON

Claimant

and

**YANKEE GIRL INVESTMENT LIMITED
WAYNE LEWIS**

Defendants

APPEARANCES:

Ms. Paula David for the Claimant

Mrs. Kay Bacchus-Baptiste for the Defendants

2020: June 30
July 23
September 24

RULING

[1] GILL, M.: On April 3, 2020, the defendants filed a notice of application to set aside a judgment in default of defence entered against them on February 27, 2020. The claimant strenuously opposes the application. After the filing of several documents, cross-examination of a witness, and written and oral submissions, this is the court's ruling on the application.

Background

- [2] On December 6, 2019, the claimant filed a claim against the defendants seeking damages for personal injuries. Affidavits of service filed by the claimant show that both defendants were served with the claim form and statement of claim on December 16, 2019. An acknowledgement of service filed on February 5, 2020 admits that the second defendant was served on December 16, 2020. A second affidavit filed on the said February 5, 2020 claims that the first defendant was served the following day, December 17, 2019. Therefore, the second defendant filed the acknowledgment of service 51 days after service of the claim on him, and the first defendant did so either 51 or 52 days after being served with the claim, both well in excess of the 14 day time limit prescribed by Rule 9.3(1) of the Civil Procedure Rules 2000 as amended (CPR 2000).
- [3] No defence having been filed, on February 27, 2020 the registrar entered judgment in default against both defendants for an amount to be decided by the court. The claimant served the defendants with the judgment in default on March 23, 2020.
- [4] On April 3, 2020, 11 days after being served with the default judgment, the defendants filed the notice of application for the judgment to be set aside and sought an order “to deem the Defence herein properly filed”. No draft of the proposed defence was exhibited to the application as required by CPR 13.4(3).
- [5] The defendants filed a defence on April 6, 2020, 14 days after being served with the judgment in default.

Issue

- [6] The court must determine whether to set aside the judgment in default entered against the defendants on February 27, 2020.

The Law

- [7] 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, 13.3 and 13.4, in submissions,

learned counsel for the defendants, Mrs. Bacchus-Baptiste, made it clear that the defendants are applying under CPR 13.3. That Rule reads:

- “(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.”

[8] CPR 13.4 requires an application to set aside a default judgment to be supported by evidence on affidavit to which must be exhibited a draft defence.

[9] Unlike some other jurisdictions, the requirements under CPR 13.3(1) are conjunctive.¹

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

[10] The Rules do not specify what is a reasonable time in 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.

[11] The default judgment was served on the defendants on March 23, 2020. Accordingly, I take that date as the date they found out that judgment had been entered. The application to set aside the

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; see also the consolidated appeals of *Public Works Corporation v Matthew Nelson and Elton Darwton* and *Public Works Corporation v Matthew Nelson*, DOMHCVAP2016/007 and DOMHCVAP2016/0008, per Pereira CJ. at paragraph 13 of the judgment

judgment was filed 11 days later on April 3, 2020. The affidavit of Lynette Jameson filed on April 3, 2020 in support of the application indicates that counsel for the defendants' secretary signed for receipt of the judgment in default but did not notify counsel until April 2, 2020.

- [12] Certainly, the court does not take this excuse for any delay in the filing of the application to mean that it was filed one day after the defendants found out that judgment had been entered. Nevertheless, on a perusal of the authorities on this point, I conclude that in the circumstances of this case, the application having been filed 11 days after service of the default judgment on the defendants, they have satisfied Rule 13.3(1) (a).

Have the defendants given a good explanation for the failure to file their defence on time?

- [13] As just mentioned, the affidavit of Lynette Jameson was filed on April 3, 2020 in support of the application. Also mentioned earlier is the fact that no draft defence was exhibited to the first affidavit. Subsequently, another affidavit of Lynette Jameson was filed on May 29, 2020, this one exhibiting the draft defence filed on April 6, 2020. Both affidavits of Ms. Jameson gave an explanation for the failure to file the defence on time.
- [14] Following that, on June 4, 2020, an affidavit of Terron Davis was filed. Mr. Davis gave an explanation for the failure to file a timely defence. This deponent was cross-examined at the hearing of the application on June 30, 2020.
- [15] In making a determination on this issue, it is useful to reproduce the relevant parts of the affidavits purporting to advance a good explanation for the purposes of Rule 13.3(1) (b).
- [16] The first affidavit of Lynette Jameson, an office clerk at the chambers of counsel for the defendants, was the only one filed with the notice of application on April 3, 2020. Paragraphs 3 to 8 of that affidavit read as follows:

***“3. I am informed that the Judgment in default was entered herein on 27th February, 2020 and was served on the Defendant on the 23rd March 2020.*”**

4. I am verily advised that at the time of the Registrar's signing the default judgment there was an Acknowledgment of Service but no Defence filed.

5. The lawyer of the Defendants and the Defendants were operating on very limited hours due to the COVID-19 pandemic.

6. The Secretary was ill and did not come to work. She signed for receipt of the Judgment in Default but did not notify the Defendants solicitor until the witness statement was served on the Defendants' solicitor on 2nd April 2020.

7. I am also verily advised that the Defendants applied immediately to have the Judgment set aside.

8. I am advised that the Defendants have a good defence and was unable to file the defence before due to the unavailability of the Defendants to provide instructions. The Second Defendant was out of State in St. Lucia and calls to him kept cutting out. He is the main person who was necessary to supply the details for the Defence as the facts were peculiarly within his knowledge."

[17] Paragraph 3 of the second affidavit of Lynette Jameson filed on May 29, 2020 states:

"3. Further to my affidavit of 3rd April, 2020 file herein I exhibit herewith a draft Defence of the Defence filed herein on 6th April, 2020: In addition I am informed and verily belief [sic] that all efforts to reach the Defendants especially the second defendant proved futile as the calls kept dropping. The defendants were not contacted until early April."

[18] The defendants placed great reliance on the affidavit of Terron Davis filed on June 4, 2020 and I reproduce the entire body. It reads:

I TERRON DAVIS Claims Manager of Sentry West Indian Insurances Ltd hereby make oath and say as follows:

1. I am the representative dealing with the claim by Edrick Jackson against the Defendants herein. We are the insurers for the first Defendant.

2. I recall that early in December, 2019 some documents which I believe included a Claim Form were left at my office at Sentry West Indian Insurances Ltd but that the Defendants were not served. I sent back the documents for them to be properly served.

3. ***Later towards the end of December, the Defendants brought the said documents to me at my office.***
4. ***At that time we at Sentry West Indian Insurances Ltd were remodelling and the Documents got mixed up in the general paper work as a result of the remodelling.***
5. ***Sometime in February, I saw the documents and asked our lawyer Kay Bacchus-Baptiste to enter an appearance pending the Defendants being contacted to give details for filing a defence.***
6. ***It proved very difficult to contact the Second Defendant, who was the person actually on the scene of the accident, because his number kept calling and cutting out.***
7. ***For some time now in St. Vincent cell phone calls have been dropping or cutting out after a few seconds of calling. This was the reason for the Delay in filing our very good defence. I am told and verily believe that our Attorney also had cell phone difficulties contacting the Second Defendant because of network problems.***
8. ***The foregoing is true and correct."***

[19] In response to the first affidavit of Lynette Jameson, on May 21, 2020, the claimant filed an affidavit sworn by Quincé Fergus, a legal clerk attached to the firm of counsel for the claimant. Mr. Fergus noted that the first reported case of COVID-19 in Saint Vincent and the Grenadines was announced to the public on March 11, 2020. He pointed out that the defendants were obliged to file their defence on or before January 14, 2020, two months before that announcement.

[20] With respect to the allegation of the second defendant being unavailable to instruct his solicitor because he was out of State and "calls to him kept cutting out", Mr. Fergus deposed that the photocopied pages of the second defendant's passport, which were attached to the notice of application instead of being exhibited to the affidavit of Lynette Jameson, did not support the defendants' contention that the second defendant was out of State between the date he was served with the claim and the date on which the defence fell due for filing.

Defendants' Submissions – Good Explanation

- [21] The defendants used the case of **Emmerson International Corporation v Starlex Company Limited and Sunglet International Inc.**,² which involved an application for relief from sanctions, to illustrate the “good explanation” concept. 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.”³

- [22] The meaning of ‘good explanation’ under CPR 13.3 was explored in **Inteco Beteiligungs Ag v Sylmord Trade Inc.**⁴ The learned judge, at paragraph 15 of the judgment, had this to say:

“In my judgment, the expression ‘good explanation’ where it occurs in CPR 13.3(1), 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 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.”

- [23] Learned counsel for the defendants, Mrs. Bacchus-Baptiste submitted that in this case, there was no wilful non-compliance on the part of the defendants. The defendants were not available to give the necessary instructions for the defence to be prepared before early April. Counsel stated that the defence was a mere 1½ months overdue. The unavailability of the defendants was not due to lack of diligence of an attorney nor was it oversight of the defendants. It was due to unavailability of the defendants and a very reasonable lapse because of the renovating of the insurance office.

² BVIHCVMAP/0044

³ BVIHC(COM) 2014/0026, at paragraph 12 of the judgment

⁴ BVIHCM(COM) 120 of 2012

- [24] Mrs. Bacchus-Baptiste explained that the reference to COVID-19 was in relation to the reason the application to set aside was not filed before it was actually done, and to support the contention that it was filed as reasonably practicable after finding out that judgment was entered. This explanation by counsel sought to clarify that the reasons advanced in the first affidavit of Lynette Jameson concerning COVID-19 were not to be construed as reasons for the failure to file the defence on time.
- [25] Mrs. Bacchus-Baptiste posited that on the quotations from the authorities cited, it is palpably clear that the defendant has a good explanation in all the circumstances of this case.

Claimant's Submissions – Good Explanation

- [26] Learned counsel for the claimant, Ms. David, posited that in relation to the explanation, the defendants are making up the case as they go along. In the first affidavit of Lynette Jameson, which was filed with the application, there was no mention of documents having been misplaced. If the explanation now being offered in relation to the insurance office is true, one would have expected it to be offered at the very outset. In any event, Ms. David argued, the new explanation does not constitute a good explanation as decided by our courts.
- [27] On the premise that first affidavit of Lynette Jameson was being put forward as the explanation for the failure to file the defence on time, the claimant concluded that the evidence amounted to “difficulty with communicating with client” or “secretarial incompetence”. Ms. David referred to the case of **Yates Associates Construction Co Ltd v Brian Quammie**⁵ where 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 upheld the decision of the learned master not to set aside the default judgment obtained by the respondent. The court of appeal agreed with the master 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.
- [28] The affidavit of Terron Davis presents some concerns. At paragraph 5 of the affidavit, Mr. Davis swore that sometime in February, he saw the documents and asked their lawyer to enter an

⁵ BVIHCVAP2014/0005

appearance pending the defendants being contacted to give details for filing a defence. In cross-examination, in answer to Ms. David, he said he sent all the documents to the lawyer at the same time, he had not sent them to her before. Therefore, Ms. David contended, the fact that the acknowledgments of service for both defendants were dated December 2019 is extremely odd.

[29] On June 30, 2020, at the beginning of the cross-examination of Lynette Jameson, connectivity issues arose from Ms. Jameson's location at the chambers of counsel for the defendants. (This matter was conducted via Zoom in accordance with COVID-19 regulations.) The matter was adjourned to July 23, 2020 for continuation of cross-examination of Ms. Jameson. However, on that date, Ms. Jameson was not present. Ms. David elected to forego the cross-examination and get on with the matter. The court then proceeded to hear the submissions.

[30] In relation to the reasons advanced by Mr. Davis, Ms. David argued that even if the court were to believe that the claim form and statement of claim were misplaced in the course of renovation, that explanation would not constitute a good one. Counsel used the **Emmerson** case cited by Mrs. Bacchus-Baptiste to the claimant's advantage and referred the court paragraphs 54 and 55 of the judgment. 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.”

[31] Before concluding that there was no discernible error of law in the conclusion of the learned judge's finding that the good explanation limb had been satisfied in that case, Her Ladyship reasoned this way at paragraph 55:

“The judge's conclusions on the factual context do not indicate that there was any misapprehension of law, mistake by counsel, lack of diligence, heavy volume of work, difficulty in communicating with client, or secretarial incompetence. Those observations must be accorded the proper place since **Laudat v Ambo**, upon which Emmerson relied, is authority for the proposition that this Court has consistently held that those matters do not amount to good explanation.”

[32] In light of foregoing, Ms. David found it difficult to see how this case assists the defendants. Counsel submitted that the evidence offered in the affidavit of Lynette Jameson amounts to

administrative inefficiency or secretarial incompetence and 'difficulty in communicating with client'.

- [33] In relation to the evidence of Terron Davis that the insurance company was being remodelled and the documents got mixed up in the general paper work, Counsel stated that this was the same species of inadvertence that was disapproved in the **Yates** case. Ms. David summarised that the defendants' application should be dismissed as they have not provided the court with a good explanation for failing to file a defence on time.

Analysis

- [34] First, the entire explanation of the defendants' failure to file a timely defence in this case was not clear-cut from the outset. The first affidavit in support of the application to set aside the default judgment, filed on the same date as the application, April 3, 2020, revealed that the failure was because of the unavailability of the defendants to give instructions. The second affidavit filed on May 29, 2020 by the same deponent reiterated the difficulty in contacting the defendants, particularly the second defendant. The third affidavit sworn on June 4, 2020 by Terron Davis also supported the evidence of difficulty in contacting the second defendant, and introduced the aspect of the documents being mixed up because of the remodelling of the insurance company.
- [35] I note that the last two affidavits on behalf of the defendants were filed after the response affidavit of the claimant was filed on May 21, 2020. Nevertheless, I accept the explanation or clarification given by Mrs. Bacchus-Baptiste that the references to COVID-19 and the conduct of the secretary were in relation to the filing of the application to set aside, and not to give an explanation for the failure to file the defence on time.
- [36] I can conclude, therefore, that the defendants have advanced two reasons that the defence was not filed on time;
- (1) difficulty in contacting the defendants, in particular, the second defendant, and
 - (2) the misplacing or mixing up of documents during the remodelling of the insurance office of the insurers of the first defendant.

- [37] It is clear to me that these reasons fall squarely into the categories repeatedly determined by our courts as not good explanations for the failure to file a timely defence.
- [38] The dropping of calls resulting in the late filing of a defence cannot be acceptable as a reason why counsel was unable to take instructions to file the defence. The means of communication available in today's world give ample opportunity for attorney and client to conduct business in order to meet deadlines or otherwise. Technical problems experienced on phone calls do not suffice as a good explanation in this case.
- [39] I am aware that not all cases of administrative inefficiency can be deemed fatal as a good explanation. However, I am of the view that the explanation of the defendants for the documents and the remodelling amounts to administrative deficiencies or administrative difficulties or oversight, inexcusable in my view in the circumstances. Further, the evidence in this case is that the defendants themselves were served with the claim form and statement of claim in December 2019. Yet, Mr. Davis swore that sometime in February (2020), he saw the documents and asked their lawyer to enter an appearance.
- [40] To my mind, the evidence does not allow the court to deviate from the plethora of cases on this issue. The defendants have not given a good explanation for the failure to file their defence on time and so, have failed to satisfy the requirement in Rule 13.3(1) (b).

Do the defendants have a real prospect of successfully defending the claim?

- [41] I have no hesitation in answering this question in the affirmative. In fact, the claimant did not make submissions disputing this limb. The claim alleges that as a result of the negligent driving of the second defendant of a truck owned by the first defendant, the claimant was pinned between two trucks at the Kingstown Container Port. As a result, the claimant suffered injuries and claims substantial damages.
- [42] The proposed defence alleges that it was the claimant's negligence and recklessness that caused the incident. It reveals the claimant forced his truck into a narrow space, alighted from it and tried to

get back into it on the blind side of the second defendant. The second defendant could not see the claimant who did nothing to warn that he had recklessly stopped where there was not enough room to pass. On a perusal of the documents, I am of the view that the defendants have a real prospect of defending the claim. They have satisfied the requirement in Rule 13.3(1) (c).

Discussion

[43] In establishing two of the limbs, the defendants have not satisfied the conjunctive requirements of CPR 13.3(1). On that basis, the default judgment should not be set aside.

[44] In a recent decision of the Court of Appeal, **Lindsay F. P. Grant and Jonel F. H. Powell v Tanzania Tobin Tanzil**,⁶ 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.”

[45] I am mindful of the overriding objective of CPR 2000, as amended, to enable the court to deal with cases with matters justly. I am also aware of the overuse or misuse of this provision as “a plaster to cover all sores of omission”.⁷

[46] A similar situation arose in **Louise Martin v Antigua Commercial Bank**⁸ where 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

⁶ SKBHCVP2020/0004

⁷ See *Kenneth Harris v Sarah Gerald*, Civil Appeal No. 3 of 2003 (Montserrat), per Gordon JA. at paragraph 9 of the judgment

⁸ ANUHCV1997/0115

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.”⁹

[47] The claimant in this case has validly obtained judgment in default. The defendants have not satisfied the necessary requirements of the Rules to set it aside. The defendants did not advance any submission pursuant to CPR 13.2 that exceptional circumstances exist in this case to allow the court to set aside the default judgment. Nevertheless, I find that there are no such circumstances in this case.

Conclusion

[48] 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 defendants did not give a good explanation for the failure to file the defence on time.
- (3) The defendants have a real prospect of successfully defending the claim.

[49] Therefore, the defendants have not satisfied the conjunctive requirements of CPR 13.3(1).

⁹ Ibid at paragraph 31 of the judgment

Order

- [50] The application to set aside the judgment in default is refused.
- [51] The defendants shall pay the claimant costs of this application in the sum of \$1500.00.
- [52] The matter shall be listed for assessment of damages on a date to be notified by the court office.

Tamara Gill
Master

By the Court

Registrar