

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2020/0017

BETWEEN:

Antigua Flight Training Center

Appellant

and

[1] Deidre Pigott Edgecombe

[2] Nordel Edgecombe

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE

The Hon. Mde. Louise Esther Blenman

The Hon. Mr. Paul Webster

Chief Justice

Justice of Appeal

Justice of Appeal [Ag.]

Appearances:

Mr. Warren Cassell for the Appellant

Dr. David Dorsett for the Respondents

2021: October 22.

Interlocutory appeal – Setting aside of judgment in default of acknowledgement of service - Rule 13.3(1) of the Civil Procedure Rules 2000 - Service of claim form and statement of claim without documents comprising the response pack – Rule 8.14(1) of the Civil Procedure Rules 2000 – Whether the failure to comply with rule 8.14(1) is fatal and service of claim form and statement of claim without the documents comprising the response pack must be treated as a nullity and be set aside

REASONS FOR DECISION

- [1] **WEBSTER JA [AG.]:** On 22nd October 2021, we allowed an appeal by the Antigua Flight Training Center (“the appellant”) against the order of the learned trial judge made on 4th November 2019, setting aside a judgment in default of acknowledgement of service dated 21st August 2014 and restored the default judgment with costs of the appeal to the appellant. We promised to reduce our reasons to writing and we now honour that promise. Before doing so, it is helpful to review the background of this matter.

Background

- [2] The appellant carries on business as a flight training school in Antigua. In October 2013, it entered into a contract with the respondents to provide flight, academic and ground training for the second respondent, Nordel Edgecombe. The first respondent, Deidre Pigott Edgecombe, guaranteed payment for the services provided to the second respondent. The respondents did not pay for the services provided to the second respondent and on 22nd January 2014, the appellant filed a claim in the High Court for breach of contract for non-payment for the services provided to the second respondent.
- [3] On 21st August 2014, the appellant obtained a judgment in default of acknowledgment of service against the respondents for \$209,097.83. The default judgment was served on the respondents on 17th September 2014 and 22nd September 2014 respectively. In January 2015, the respondents applied to set aside the default judgment on the ground that the appellant is an unincorporated entity. Cottle J heard and refused the application. The respondents’ appeal to the Court of Appeal against Cottle J’s decision was dismissed. The respondents applied to the Privy Council for leave to appeal against the decision of the Court of Appeal. In refusing leave to appeal, the Privy Council report dated 15th February 2017 stated that the application was dismissed because “... even assuming the order below to

constitute a final decision, [it] does not disclose any arguable case on the merits that the debt was not due.”

[4] During the period following the entry of the default judgment, there were also attempts by the appellant to execute the judgment by the judgment summons procedure and applications to commit the respondents to prison for their failure to satisfy the outstanding judgment debt.

[5] On 22nd October 2018, the respondents filed a second application to set aside the default judgment. The ground of this application was that the claim was served on the respondents without the documents required by rule 8.14(1) of the **Civil Procedure Rules 2000** (“CPR”). Rule 8.14(1) reads:

“Defence form, etc. must be served with claim form

8.14 (1) When a claim form is served on a defendant, it must be accompanied

by –

- (a) a copy of any order made under rule 8.2 or 8.13;
- (b) a defence form (Form 5);
- (c) a form of acknowledgment of service (Form 4 or 4(A));
- (d) if the claim is for money – an application to pay by installments (Form 3); and
- (e) the prescribed notes for defendants (Form 1A).”

The documents listed in sub-paragraphs (a) to (e) are commonly referred to in the decided cases as ‘the response pack’. It is not disputed that when the claim form and statement of claim were served on the respondents they did not include the documents in the response pack and that these documents were never served. On 4th November 2019, Wilkinson J granted the application and set aside the default judgment. The appellant appealed against her decision.

[6] On 24th June 2021, the respondents applied to strike out the notice of appeal on the ground that, the contract on which the claim is based is tainted with illegality. The alleged illegality is that the appellant was not licensed by the Eastern Caribbean Aviation Authority based in Antigua as a flight training operator when the contract was made in 2013, and the court’s process should not be used to enforce an

illegality. Following arguments before this Court at the hearing on the 22nd October 2021 the application was withdrawn with costs to the appellant.

- [7] Also on 24th June 2021, more than 6 months after the appeal was filed, the respondents filed a notice of opposition to the appeal and their written submissions. Rule 62.10(3) of the CPR provides that the notice of opposition must be filed within 7 days of receipt of the notice of appeal and written submissions within 14 days of the receipt of the notice of appeal. The respondents applied in their written submissions for an order under rule 26.9 of the CPR to put matters right regarding the late filing by abridging the time for filing the notice of opposition and their written submissions. No reasons were given for the delay in the filing. The appellants opposed the application. However, the Court, in exercise of the overriding objective, exercised its discretion by allowing the notice of opposition and the respondents' written submissions to be deemed properly filed on 24th June 2021.

The Appeal

- [8] The central issue for determination in this appeal is whether the failure to comply with rule 8.14(1) of the CPR is fatal and the service of the claim form and statement of claim without the documents comprising the response pack must be treated as a nullity and be set aside. There is no gain saying that rule 8.14(1) imposes a mandatory requirement on a claimant to serve the response pack with the claim form. When the application was before Wilkinson J she heard submissions from learned counsel for the respondents, Dr. David Dorsett, that the alleged service was indeed a nullity and must be set aside. Dr. Dorsett supported his submission by reference to the cases of **Dorothy Vendryes v Dr. Richard Keane and another**¹, a 2011 decision of the Court of Appeal of Jamaica, and **Kelvin John and Honora John v British American Insurance Company Ltd.**² a decision of the High Court sitting in Antigua.

¹ [2011] JMCA Civ 15.

² ANUHCV2009/0320 (delivered 13th November 2009, unreported).

[9] In **Vendryes v Keane** the claim form was served without the documents comprising the response pack. The trial judge set aside the default judgment that was entered but went on to enter judgment (for the claimants) in exercise of his case management powers. On appeal, the court had to consider rule 8.16(1) of the Civil Procedure Rules of Jamaica, which is in substantially the same form as rule 8.14 of the Eastern Caribbean CPR. Harris JA delivered the unanimous decision of the Court. Having reviewed the provisions of the rule she opined:

“Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside.”³

And further:

“The claim form was a nullity. It cannot be restored by an order of the court. The service of the requisite documents accompanying the claim form is a mandatory requirement...The irregularly entered default judgment is defective and no order could have been made to rectify it.”⁴

[10] A similar decision was reached by Michel J (as he then was) in **John and John v British American Insurance Company Limited**. The claim form was served without the response pack on 17th June 2009. These documents were served the following day. The defendant was entitled to file a defence 28 days after service of the claim form which expired on either 16th July 2009 or 17th July 2009 depending on the date of proper service of the claim. The claimants requested and obtained a judgment in default of defence on 17th July 2009 which would have been proper if service was effected on the 17th June 2009. The defendant applied to set aside the default judgment on the ground that it was entered prematurely – the 28 day period for entering judgment did not start to run until the response pack documents were served on 18th June 2009 and therefore the defendant had until 17th July 2009 to file its defence. The earliest date that the default judgment could have been entered was 18th July 2009. The default judgment was therefore entered one day early. The learned judge acknowledged that the court has the power to cure technical errors. However, he found that:

³ Supra n.1 at para. 12.

⁴ Ibid at paras. 34-35.

“It cannot however be argued that the service of the Claim Form on the Defendant in this case was complete and proper on the 17th June 2009 when the Claim Form was served with the Statement of Claim but without the defence form, the form of acknowledgement of service, the application to pay by instalments and the prescribed notes for the defendants.”⁵

The learned judge found:

“A Judgment in Default of Defence obtained on 17th July 2009 was therefore irregularly obtained and must therefore be set aside *ex debito justitiae*.”⁶

[11] Wilkinson J was obviously persuaded by Dr. Dorsett’s arguments and the cases that he cited. The learned judge treated the failure to serve the response pack as mandatory leading to an incurably defective default judgment that must be set aside. Her finding is set out in the order setting aside the judgment. It reads “[s]o there was a failure to comply with the mandatory requirements of rule 8.14(1), the Court must set aside the judgment in default entered 21st August 2014”.

[12] Wilkinson J was not directed to and did not refer in her decision to the 2014 decision of the High Court sitting in Dominica in **Lawrence Anselm v Hildreth Balthazar and another**⁷ where Glasgow M [Ag.] (as he then was) reached a different conclusion on the effect of a failure to serve the response pack with the claim form, and the decisions of the Court of Appeal and High Court of England in **Rajval Construction Ltd. v Bestville Properties Ltd.**⁸ and **Asia Pacific (HK) Limited and others v Hanjin Shipping Co. Ltd.**⁹ respectively. All three cases resolved the issue of the non-service of the response pack by finding that it is an irregularity and not a nullity, and the Court has a discretion in appropriate cases to let stand a default judgment where there has been non-compliance with rule 8.14 or its English equivalent.

[13] In a carefully reasoned judgment delivered on 19th May 2014 in the **Balthazar** case, Glasgow M [Ag.] carried out a detailed analysis of the relevant provisions of the CPR

⁵ Supra n.2 at para. 13.

⁶ Ibid at para. 14.

⁷ DOMHCV2013/0201 (delivered 19th May 2014, unreported).

⁸ [2010] EWCA Civ 1621.

⁹ [2005] EWHC 2443 (Comm).

and the two English cases referred to in the preceding paragraph and concluded that the failure to serve the documents comprising the response pack, while mandatory, does not nullify the service of the claim form and the court has a discretion to treat the error as an irregularity and uphold the service and the resulting default judgment.

[14] To sum up on the decided cases, there is a decision of the Eastern Caribbean High Court¹⁰ and a decision of the Court of Appeal of Jamaica¹¹ that say that non-compliance with rule 8.14 or its equivalent makes the service of the claim form invalid and any resulting default judgment must be set aside. On the other hand, there is the decision of the High Court sitting in Dominica¹² and the English cases referred to above that say that the requirement to serve the response pack with the claim form in accordance with rule 8.14 is mandatory, but a failure to do so is an irregularity that can be cured. It is trite that none of these cases are binding on this Court. We had to decide whether to follow the cases cited by Dr. Dorsett and treat the failure to serve the response pack with the claim as a nullity and find that the learned judge was correct to set aside the default judgment that was entered in 2014, or follow **Balthazar** and the English cases that treat the failure to serve the response pack as an irregularity that can be cured by the court in appropriate cases.

[15] The starting point in our analysis was to consider the provisions of the CPR that are relevant to this decision. Rule 8.14(1) which provides for the mandatory service of the response pack is set out in paragraph 5 above. The failure to serve the response pack is a serious defect that should not be underestimated. As Glasgow M [Ag.] pointed out in paragraph 26 of his judgment in **Balthazar**:

“My opinion is that it cannot be an insubstantial matter that the CPR places an obligation on the Claimant to serve the response forms along with the claim form and statement of claim. The forms are to assist the defendant, especially one who may be a litigant in person, to file the necessary responses to the claim. The provisions of the CPR on service of the

¹⁰ Supra n.2.

¹¹ Supra n.1.

¹² Supra n.7.

response forms are not enacted in superfluity or for parties to obey at their whims. Parties must comply with all relevant rules of the CPR when conducting proceedings in the Courts.”

This is an accurate statement of the obligation created by rule 8.14. However, it should be noted that although the rule is couched in mandatory terms, it does not contain an express sanction for failing to comply with the obligation.

- [16] Part 12 deals with default judgments. Rule 12.4 sets out the procedure for cases where the court must enter judgment for failure to file an acknowledgment of service. Rule 12.4 provides that:

“The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –

- (a) the claimant proves service of the claim form and statement of claim;
- (b) the defendant has not filed –
 - (i) an acknowledgment of service; or
 - (ii) a defence to the claim or any part of it;”

- [17] Rule 13.2 (1) deals with cases where the court must set aside a default judgment. The rule provides that:

“The court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because in the case of –

- (a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or
- (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.”

In this case, the respondents’ position is that the condition in rule 12.4(a) was not satisfied because there was no proper service of the claim and the default judgment must be set aside under rule 13.2(1).

- [18] Rule 13.3(1) deals with cases where the court may set aside or vary a default judgment. The rule provides:

“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 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.

(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.”

[19] On a plain reading of rule 13.2(1) the court is mandated to set aside the default judgment only if it is satisfied that there was a failure to comply with rule 12.4. Rule 12.4 requires the claimant to serve the claim form and statement of claim on the defendant. But was there a failure to comply with rule 12.4 in this case? Rule 12.4 does not mention service of the documents in the response pack and there is no breach of the rule if these documents are not served with the claim form and statement of claim. Rule 12.4 does not make service of the response pack a precondition to obtaining a default judgment. If this was intended it would have been a simple matter of the drafters of the CPR adding the documents comprising the response pack to rule 12.4(a). They did not do so and it is not to be implied as a precondition. Accordingly, a failure to serve these documents does not trigger the mandatory provisions in rule 13.2(1). The undisputed evidence in this case is that the claim form and statement of claim were served on the respondents. Therefore, there was compliance with rule 12.4 and the situation that Wilkinson J was dealing with on the set-aside application was one where there was a procedural irregularity in the service of the claim due to a failure to comply with the mandatory requirement in rule 8.14(1). As an irregularity, and not a nullity, the learned judge was not obliged to set aside the default judgment pursuant to rule 13.2. The effect of the failure to comply with rule 8.14 and the way that the court should have dealt with the application to set aside the default judgment is illustrated by the cases referred to above. She should have considered the application as if it was made under rule

13.3(1) and decide whether it satisfied any or all of the criteria in the rule, and then decide how to exercise her discretion.

- [20] Turning to the cases, **Rajval Construction** involved an application to set aside a judgment in default of appearance for failure to serve the response pack with the claim. Glasgow M [Ag.] dealt with this decision, as well as the **Asia Pacific (HK) Ltd v Hanjin**, in his judgment in **Balthazar** and opined at paragraph 25:

“The Court in **Rajval**, then, rightly so in my view, looked at the discretionary powers set out in those rules to consider whether it may set aside the judgment in default. The discretionary remedies are not in exact terms as in the O.E.C.S but the point is underscored that the Court may proceed to exercise a discretionary jurisdiction w[h]ere the requisites of the mandatory rules on setting aside are not met. In **APC Asia Pacific Cargo (HK) Ltd & Ors v Hanjin Shipping Co. Ltd & Ors**, Clarke J had this to say about the non - service of a response pack, *‘The failure to serve a response pack was a failure to comply with the rules but of itself, it signifies no more than that that which ought to have been done on service was not done. It was a procedural irregularity: a technical mistake of the kind that in Harrigan v Harrigan ... was not treated as affecting the real substance of the matter.’*”

- [21] Glasgow M [Ag.] went on to consider what should happen when there is a failure to comply with the provisions of the CPR. At paragraph 27 he said:

“The foregoing notwithstanding, the question arises as to what is to happen when there is non-compliance with the provisions of the rules. A distinction must be drawn between those cases in which the rules prescribe a sanction.....for non-compliance with the rules on service of the response forms. As was said by the Privy Council in **[The Attorney General of Trinidad v Keron Matthews]**, *‘Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose’.*”

The learned master’s reference to the **Keron Matthews**¹³ case is apposite. In that case the Attorney General did not file his defence to the claim within the time prescribed by the Civil Proceedings Rules of Trinidad and Tobago. Mr. Matthews applied for judgment in default of defence and the Attorney General applied for an extension of time to file his defence. At first instance, Gobin J decided that the failure to file a defence within the period fixed by the rules did not automatically attract any

¹³ [2011] UKPC 38.

sanction and the court had a discretion to extend the time for filing the defence which she ordered. The majority of the Court of Appeal reversed her decision finding that there was a sanction for the failure to file the defence on time and the conditions for relief from sanctions in Part 26 of the Civil Proceedings Rules had not been satisfied. The Court of Appeal set aside Gobin J's order extending the time for the filing of the defence and entered judgment in default of defence in favour of Mr. Matthews.

[22] On appeal to the Privy Council, the Board considered the principles relating to implied sanctions in the Civil Proceedings Rules ('the Rules') of Trinidad and Tobago. The Board rejected the submission of learned counsel for Mr. Matthews that where the Rules prescribe a mandatory time limit for taking a step, the step is not taken within the prescribed time, and if the party in default does not apply for an extension of time, there is an implied sanction that the defaulting party can no longer take the step.

[23] The Board examined the provisions of the Rules in Trinidad and Tobago relating to the filing of a defence and opined that there is no rule which states that if a defendant fails to file a defence within the time specified by the Rules, no defence may be filed thereafter unless the court permits. The Rules do, however, make provision for what the parties may do if the defendant fails to file a defence within the prescribed period. Rule 10.3(5) provides that the defendant may apply for an extension of time and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. The opinion of the Board was delivered by Lord Dyson who, after rejecting the notion of an implied sanction, continued:

"It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose."¹⁴

¹⁴ Supra n.13 at para. 16.

[24] The **Keron Matthews** case dealt with the principles of implied sanctions and the consequences of a failure to file a defence within the prescribed time. These principles apply with equal force to this case where the default was a failure to comply with rule 8.14 of the CPR. The rule does not impose a sanction for non-compliance with rule 8.14 and the case of **Keron Matthews** (as followed in **Balthazar**) makes it clear that the court should not imply a sanction. A finding that a failure to serve the documents in the response pack with the claim form makes the service a nullity has the effect of implying a sanction in rule 8.14 where none exists. Also, it imposes another precondition to obtaining a default judgment under rule 12.4 when this is not required by the rule and ought not to be implied. This is precisely what the Privy Council said should not be done. Were it the intention of the rule makers to impose a sanction for non-compliance with rule 8.14, the rule would have said so. Examples of rules where specific provision is made for sanctions are given by Lord Dyson in **Keron Matthews** and I adopt them with the necessary modifications. The examples are rule 29.11(1) which says that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits; rule 28.13(1) which provides that a party who fails to disclose documents by the date ordered may not rely on or produce such documents at the trial; and rule 32.12(1) which provides that a party who fails to disclose an expert witness' report may not use the report or call the expert witness at trial unless the court gives permission. These are sanctions that are expressly included in the CPR and a failure to comply with any of them triggers the sanction and the breaching party must apply under rule 26.8 for relief from sanctions.

[25] Pulling all the strings together we found that a failure to comply with the mandatory requirement in rule 8.14 of serving the documents in the response pack with the claim form and statement of claim is an irregularity and not a nullity. If the claimant proceeds to enter a judgment in default of acknowledgment of service as in this case, the defendant can apply under rule 13.3(1) to set aside the default judgment and the court will consider the criteria in rule 13.3(1) for setting aside a default judgment and exercise its discretion in accordance with the CPR and the overriding

objective. What the court cannot do is to mechanically set aside the default judgment as a nullity. The learned judge in this case, not having been alerted to the relevant authorities, took the wrong turn in setting aside the default judgment as a nullity without considering whether the circumstances gave rise to her having a discretion to exercise pursuant to the discretionary factors in rule 13.3(1) as distinct to her having no discretion under rule 13.2. This Court therefore set aside the learned judge's order made on 4th November 2019 and restored the default judgment entered on 21st August 2014.

[26] This conclusion sufficiently disposed of the appeal. For completeness we will address briefly how we say this application should have been dealt with and how the discretion should have been exercised. The criteria for setting aside a default judgment when the court has a discretion is found in rule 13.3(1) which is set out in paragraph 18 above. Applying the principles in rule 13.3(1) we noted that the respondents delayed for more than six years after being served with the default judgment in September 2014 to file the current application. This was an inordinate and inexcusable delay especially having regard to the fact that the respondents had made a prior attempt to set aside the judgment and could have included the alleged breach of rule 8.14 as an additional ground of that application. Further, the respondents have not provided any explanation for the inordinate delay in applying to set aside the default judgment for breach of rule 8.14 and there is no evidence that they have any real prospect of successfully defending the claim. In fact, the Privy Council noted in its report in February 2017 that the respondents' application "... does not disclose any arguable case on the merits that the debt was not due". Further still, this Court noted that the respondents had never attempted to challenge the merits of the appellant's claim in any of the numerous applications and proceedings before the High Court. All of their challenges have been grounded in alleged procedural beaches.

[27] The respondents would not have satisfied any of the three criteria in rule 13.3(1), far less all three, and there are no exceptional circumstances that would have

invoked the Court's wider discretion in rule 13.3(2). To the contrary, we found that the belated application in October 2018 was nothing short of an abuse of the Court's process.

[28] In all the circumstances we allowed the appeal, set aside the order of the learned judge dated 4th November 2019 and restored the default judgment dated 21st August 2014 with costs of the appeal to the appellant fixed in the sum of \$3,000.00 payable by 31st December 2021.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal

By the Court

Chief Registrar