

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

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **SVGHCV2012/0138**
Between

**SHUNETTE THOMPSON
RONISHA FOYLE
(By her mother and next friend, SHUNETTE THOMPSON)
LATICIA FOYLE**

Claimants

AND

**DWEN JONES
DESMOND LEWIS**

Defendants

AND

Claim Number: **SVGHCV2012/0139**
Between

NATASHA CHARLES

Claimant

AND

**DWEN JONES
DESMOND LEWIS**

Defendants

Before:

Raulston Glasgow

Master

Appearances:

Patricia Marks for the Claimant

Duane Daniel along with Anneke Russell for the 1st Defendant

**2014: September 2, October 21,
November 4
2015: February 26**

RULING ON APPLICATIONS TO SET ASIDE DEFAULT JUDGMENTS

APPLICATION

- [1] **GLASGOW, M:** There are two applications filed by the defendant, Dwen Jones (hereinafter the applicant) before the court to set aside default judgments in two separate claims. The claims arose out of the same traffic incident in which all the claimants (hereinafter the respondents) received injuries for which they claimed damages. I will deal with both applications together since they are based on the same facts and history of proceedings. The only difference is the claim number attached to the two matters. The respondents oppose the setting aside of the default judgments.

BACKGROUND

- [2] The parties have set out the factual background in their submissions. However, the respondents have more ably assisted the court with a full recital of the facts as follows –

1. On September 13, 2010 all the respondents were severely injured in a motor vehicular accident. The vehicle involved in the accident is owned by the applicant but at the material time it was being driven by one Desmond Lewis who was named as the second defendant in both claims;
2. The applicant and the second defendant filed acknowledgments of service in both suits but the applicant did not file a defence in either of them. The respondents applied for default judgments in their individual proceedings against the first defendant and were granted same on August 8, 2012. Meanwhile the second defendant filed defences to both claims in which he denied any responsibility for the incident.
3. On September 25, 2012 the applicant applied to have the default judgments in both proceedings set aside pursuant to CPR 13.3(1). At the first hearing of the applications, both claims were referred to mediation but this recourse did not produce a settlement.

4. On November 20, 2012 the learned Master heard the applications to set aside the default judgments and refused both. Reasons for the decisions were issued on November 26, 2012.
5. On December 31, 2012 the applicant appealed to the Court of Appeal to have both decisions of the Master set aside. The respondents applied to have the appeals struck out as a nullity due to the applicant's failure to apply for leave to appeal. Both appeals were struck out.
6. On March 10, 2014, respondent Natasha Charles discontinued the suit against Desmond Lewis in claim number 2012/0139 and on April 11, 2014, the other respondents discontinued their suit against Mr. Lewis in claim number 2012/0138. Assessments of damages following the grant of default judgments were then conducted in both claims. Master Agnes Actie heard the trial on damages in claim number 2012/0138 on June 4, 2014 and damages were accordingly granted. Master Taylor – Alexander conducted the assessment of damages in claim number 2012/0139 on June 13, 2014 and damages were also awarded.
7. The respondents thereafter applied to the court for an examination of the means of the applicant to pay the judgment debts.
8. On September 19, 2014 the applicant filed the present applications to further set aside the default judgments. The respondents applied on October 3, 2014 to have both application struck out as an abuse of process of the court.

ARGUMENTS

Applicant's submissions

- [3] For the applicant it is said that the default judgments must be set aside because they were erroneously granted. Having regard to the fact that the claims are against two defendants and that the claims are grounded in vicarious liability, the provisions of the Civil Procedure Rules 2000 (CPR) will apply to the grant of a default judgment against one of the two defendants. CPR 12.9(2) was pleaded in aid of this submission -

(2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –

(a) can be dealt with separately from the claim against the other defendants –

(i) the court may enter judgment against that defendant; and

(ii) the claimant may continue the proceedings against the other defendants;

(b) cannot be dealt with separately from the claim against the other defendants, the court

(i) may not enter judgment against that defendant; and

(ii) must deal with the application at the same time as it disposes of the claim against the other defendants.

[4] The applicant further contends that CPR 12.9(2) (b) applies to his circumstances because his liability, if any, is dependent on the liability of Mr. Lewis, the second defendant. For this proposition counsel for the applicant cited the cases of **Crown Aluminium Limited v Northern & Western Insurance Company Limited¹** and **Kenlyn Pamela Clouden (Administratrix of the estate of Gary Clouden) v Phil Culzac and Phillip James²**.

[5] The applicant urges the court to find that the court office had no authority to grant either default judgment against the applicant since the claim against him could not be separated from the claim against the second defendant. The applicant argues that the court ought to exercise the discretion set out at CPR 13.3(2) and set aside the default judgments since the circumstances outlined above amount to “*exceptional circumstances*” for the purposes of that rule.

[6] Alternatively, the applicant applies to have the court consider the applications pursuant to CPR 13.3(1) for the second time. This time around the applicant supplies a different reason for failing to file a defence. He complains that his previous attorneys had not properly advised him as to the proper course of action to take to answer the claim. In that regard, the applicant contends that his previous counsel ought to have canvassed the fact that he had a complete defence to the action because he could not, as a matter of law, be held vicariously liable for the accident caused by the

¹ [2011] EWHC 277

² SVGHCV 2011/0466

second defendant. Counsel should have applied for the claim to be struck out against him. If that course of action was followed then the time for filing a defence would not have expired. The failure to file a defence was therefore no fault of the applicant.

- [7] In terms of the explanation for the delay in filing the present applications, the applicant argues that his insurers recently took over this case. The insurers' review of the matter revealed that the claim had not been properly presented by previous counsel in that counsel failed to file the necessary application to strike out the claim and in fact never canvassed his defence. His present solicitors are seeking to set matters straight.
- [8] In terms of the prospect of successfully defending the claim, the applicant relies on the cases of **Morgans v Launchbury**³, **Avis Rent-a Car Ltd v Maitland**⁴ and **O'Carrol Baynes v Wesley Williams and Keith Cruickshank**⁵. The foregoing authorities establish that the owner of a vehicle is not liable for any damage caused by one who hires the said vehicle except if it is being used for "*the owner's purposes, under delegation of a task or duty*"⁶ In this claim the applicant could not have been held liable since the second defendant had use of the vehicle by virtue of a hire agreement. The applicant was merely the owner of the vehicle and its driver, the second defendant was not the employee, servant or agent or in any way using the vehicle for the applicant's purposes. The applicant therefore submits that he has satisfied the cumulative requirements of CPR 13.3(1) and is entitled to have the default judgments set aside thereunder.
- [9] Finally, the applicant deals with his awareness that these applications are indeed the launch of a second attempt at removing the default judgments. He posits that there is no estoppel against this further attack "*because a default judgment is a procedural order and not a judgment on the merits of the case. Had judgment been given at the end of the trial the First Defendant would have been barred from bringing a fresh challenge to the judgment having tried unsuccessfully previously.*"⁷

³ [1973] AC 127. See also Lord Denning at page 255 of the Court of Appeal decision [1971]2Q.B 245

⁴ (1980) 32 WIR 294

⁵ SVGHCV 2001/483

⁶ Lord Wilberforce at page 135 of *Morgans v Launchbury*, supra note 3

⁷ Page 8 of the applicant's submissions filed on October 3, 2014

[10] The applicant relies on the cases of **Evans v Bartlam**⁸, **Antigua Commercial Bank v Louise Martin**⁹ and **Vehicles and Supplies Ltd et al v Financial Institutions Services Ltd**¹⁰ for the proposition that “until and unless the Court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”¹¹ The state of the law is therefore thus that -

*This being only the second application to set aside the default judgment and an application based on new and different grounds or grounds that have further been expanded it cannot be said to be an abuse of process. Although there was an appeal filed by the First Defendant on December 31, 2012 this was struck out as a nullity as no leave was sought. A different situation may have resulted if the Appeal had been heard on its merits and denied. As this was not what has happened it is open to the First Defendant to apply afresh for the judgment in default to be set aside. The application therefore cannot be an abuse of process.*¹²

Respondents' arguments

[11] The respondents ask the court to strike out the applications. They plead that the applicant's approach should not be countenanced as the principles of res judicata and abuse of the court's process are patently applicable to the facts. The respondents rely on the following submissions –

1. The applicant is seeking to retry a matter which was decided upon by the court on August 8, 2012;
2. The foregoing alone amounts to an abuse of process but it is compounded by the fact that the matters have progressed to the enforcement of judgment phase without any proper appeal. The proper venue for the applicant is the Court of Appeal. The applicant has not

⁸ [1973] AC 473

⁹ Civil Appeal 2007/0022

¹⁰ [2005] UKPC 24

¹¹ At page 480

¹² Applicant's submissions at page 8

approached that court because the inordinate delay of over (2) years since the last attempt to set aside the default judgment would not be “looked upon favourably by the Honourable Court...”¹³ The applicant is therefore “seeking to circumvent the correct channel through which he can challenge the decision of the Learned Master, clearly misusing the Court’s process as it relates to the setting aside of the default judgment.”¹⁴

- [12] In response to the assertion that it is now the insurers who have retained counsel by way of subrogation to appear in the matter and file these applications, the respondents contend that the applicant has retained counsel throughout the proceedings and his insurers have always been apprised of the proceedings through counsel who held a watching brief but is now appearing on behalf of the applicant. In this regard the respondents asks the court to consider **Wytcherely v Andrews**¹⁵ where Lord Penzance admonished the following –

“There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.”

- [13] In terms of res judicata, the respondents repeat the oft cited dictum of Wigham VC in **Henderson v Henderson**¹⁶ wherein he instructed that

... “where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction the Court requires the parties to that litigation to bring forward

¹³ Applicant’s written submissions at page 3

¹⁴ Ibid

¹⁵ (1871) L.R. 2 P & D 327 at 328

¹⁶ (1843) 3 Hare 100 at page 115

their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

- [14] In **Chastanet ets a Teissedre Bordinet Exports v Stanley Leoanire trading as LNJ Trading Food Distributors**¹⁷, her Ladyship Harriprashad – Charles, quoted the terms of the doctrine as stated in **Hoystead v Commissioner of Taxation**¹⁸

"Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents of the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

- [15] The respondents ask the court to find that the doctrine of res judicata applies to this case since the parties are the same, the remedy sought by the applicant is the same and the grounds relied on are merely an expansion of what was presented in the previous application to set aside the default judgment. The respondents argue that "*no new evidence*" has been presented which could not have been proffered in the prior setting aside proceedings. In this regard the respondents view the default judgments as now final and conclusive since there are no appeals therefrom. The matters, they assert, have been raised on the first applications to set aside and are now conclusively determined by the court. They cannot be re-litigated before a court that pronounced upon them or considered in any manner by a court of co-ordinate jurisdiction.

- [16] In respect of abuse of process, the respondents submit that the applications are a collateral attack against the previous decisions of Master Taylor – Alexander in which she refused to set aside the default judgments. The applicant was fully represented at those proceedings and "*had control over*

¹⁷ SLUHCV 1997/0566

¹⁸ [1926] AC 155

the evidence which he wished to put before the Honorable Court.” For these propositions, the respondents rely on the case of **Dion Friedland v Charles Hickox**¹⁹, where Master Tabor repeated the following well known exhortation in **Hunter v Chief Constable of West Midlands Police**²⁰ –

“the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending plaintiff reached by a court of competent jurisdiction in previous proceedings in which a plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the court.

*My Lords, collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the applicable principle is, in my view, simply and clearly stated in those passages from the judgment of A.L Smith LJ in *Stephenson v Garnett* [1898] 1 Q.B 677 and the speech of Lord Halsbury LC in *Reichel v Magrath* (1899) 14 App Cas 665 which are cited by Goff LF in his judgment in the instant case. I need only repeat an extract from the passage which he cited from the judgment of A.L Smith in *Stephenson v Garnett* [1898] 1 Q.B 677 at 680-681: the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question has been already decided by a competent court.”*

- [17] The respondents also submit the following extracts from the cases of **Reichel v Magrath**²¹ and **Halsbury’s Laws of England**²² to buttress their argument that the applications should be dismissed as an abuse of the court’s process. Lord Halsbury LC had this to say on the topic in **Reichel v Magrath**²³ –

¹⁹ AXAHCV 2012/0039

²⁰ [1989] 3 ALL ER 727

²¹ (1899) 14 App Cas 665

²² Volume 12, 5th Edition, paragraph 1166

²³ Supra, note 21

I think it would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigants were to be permitted by changing the form of the proceedings to set up the same case again.

The recital from **Halsbury's Laws of England**²⁴ is to the following effect –

The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be a retrial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions or that there should be collateral challenges to judicial decisions. There is a danger, not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. The principles of res judicata, issue estoppel and abuse of process have been used to address this problem.

ANALYSIS AND CONCLUSION

[18] A default judgment is not an act of finality against an errant defendant. Subject to procedural guidelines and evolving case law principles, the same court that entered judgment is empowered to remove it and permit the defendant to present an answer to the claim. The applicant has properly repeated the law to the effect that “until and unless the Court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”²⁵ In **Strachan v the Gleaner Company Limited and Dudley Stokes**²⁶ Lord Millet observed that

“A default judgment is one which has not been decided on the merits. The Courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down rigid rules to govern the exercise of the discretion...”

²⁴ Supra, note 22

²⁵ See *Evans v Bartlam*, supra note 8. See also *Antigua Commercial Bank v Louise Martin and Vehicles and Supplies Ltd et al v Financial Institutions Services Ltd*, supra, notes 9 and 10

²⁶ [2005] UKPC 33

[19] In our jurisdiction, a defendant may apply pursuant to CPR 13.2 and 13.3 for the court to set aside a default judgment. CPR 13.2 enacts the circumstances in which the court must set aside a default judgment. CPR 13.3 encapsulates the court's discretion to so do. The applicant relies on CPR 13.3 which states -

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.

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

[20] The applicant's grounds for this reliance have been set out extensively above in this judgment. I find that the reasons provided by the applicant for presenting these applications are of particular significance. I agree with him that CPR 12.9 must be considered when a request is made to enter a default judgment in cases of this nature. The mere fact that the applicant was the owner of the vehicle would not be sufficient in law to find against him in negligence²⁷. His liability was contingent on finding that the second defendant was driving as his servant or agent or for his purposes. As Master Actie correctly stated in **Kenlyn Pamela Clouden (Administratrix of the estate of Gary Clouden) v Phil Culzac and Phillip James**²⁸, it would be nigh impossible to separate claims of this nature against two or more defendants. The claim against the owner would of necessity have to await the outcome of the claim against the driver. As such the default judgment may have been erroneously entered.

[21] One may commiserate with the applicant that a pre-emptive strike was not made against the claims with this defence as its weaponry or that it was not utilised as a ground in the first application to set aside the default judgments. As correctly argued by the applicant, the court retains the jurisdiction

²⁷ See *Morgans v Launchbury*, *Avis Rent-a Car Ltd v Maitland* and *O'Carrol Baynes v Wesley Williams and Keith Cruickshank*, supra notes 3 to 5.

²⁸ Supra, note 2

to set aside a default judgment for the reasons stated by the applicant at paragraph 3 to 8 of this judgment. But the issues have to be looked at a lot more closely. This is the second attempt to set aside the default judgment. The parties to the proceedings and the issues are the same. The applicant has been represented by counsel from the time of service of the claims although he now argues that his insurers are involved. Nonetheless, the facts expose that the insurers have been notified of the action. There is evidence that counsel for the applicant appeared earlier in the proceedings with a watching brief on behalf of the insurers. Even if the insurers deny that they were thus engaged in the suits, the unassailable evidence is that they were aware of the proceedings but were content to sit by and let the applicant litigate with the knowledge that they have an interest herein. I find that that the undesirability of these applications are compounded by the fact that the applicant had the information on which he wishes to rely to set aside the default judgments in his bosom from the time that the claims were served on him. Why he chose not to present this information previously has not in any manner been satisfactorily explained. I have no hesitation in relying on the sage counsel of Vice Chancellor Wigram's in **Henderson v Henderson**²⁹ that

“ the plea of res judicata applies ... not only to points which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

- [22] The incisive elucidation of Lord Shaw in **Hoystead v Commissioner of Taxation**³⁰ recited above in this judgment is also apposite –

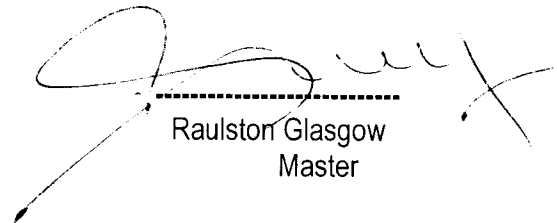
“Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted”

²⁹ Supra, note 16

³⁰ Supra, note 18

[23] In addition to the applicability of the plea of res judicata, I find that these applications represent the quintessence of an abuse of the court's process. The applicant previously applied to set aside these default judgments and was unsuccessful. He then appealed against the refusal to set aside the default judgments and was further unsuccessful. The question having been disposed both on the application to set aside the default judgment and the appeal therefrom, the defendant has artfully launched another assault in respect of the same issue. These further proceedings are therefore an impermissible effort to attack the judgment of the court against the applicant. As Lord Halsbury's LC said in **Reichel v Magrath**³¹ such conduct amounts to a "*scandal to the administration of justice*". I have found above that the applicant had the further information in his bosom and chose not to put it forward. He should not be permitted to continuously attack the default judgments until such time as "*legal ingenuity is exhausted*"³².

[24] As was stated in **International Finance Corporation v Utehalirica S.p.r.l** – "*A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason*"³³ The respondents have had default judgments in their favour since August 2012. The quanta of those judgments have been assessed and are of the nature of orders which the respondents are rightly seeking to enforce as judgments for money to be paid. It must be said that the applicant has, by means of the previous applications to set aside the default judgments and appeal therefrom, unsuccessfully attempted to reverse these coercive rulings against him. For the reasons set out above, the applicant's further applications to set aside the default judgments are hereby refused on grounds of res judicata and on the basis that they amount to an abuse of the court's process. The applications are accordingly dismissed. The respondents to the application to set aside the default judgment filed in claim number 2012/0138 are awarded costs of \$1500.00, being \$500.00 to each respondent. The respondent, Natasha Charles is awarded costs of \$500.00 assessed on the application to set aside the default judgment in claim number 2012/0139.



Raulston Glasgow
Master

³¹ Supra, note 19

³² Per Lord Shaw in *Hoystead v Commissioner of Taxation*, supra note 18

³³ [2001] All ER 101