

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT LUCIA

CLAIM NO. SLUHCV2009/0458

BETWEEN:

ERNESCO INC.

Claimant/Respondent

And

BANK OF SAINT LUCIA LIMITED

Defendant/Applicant

Appearances:

Mr. Thaddeus M. Antoine with Ms. Thea J. Alexander for the Applicant
Ms. Veronica Barnard for the Respondent

2010: March 9, 18

- [1] This is an application by the Defendant to set aside judgment in default of acknowledgment of service ("the default judgment") obtained by the Claimant on 12th October 2009.
- [2] The application which was made on 12th January 2010 pursuant to Part 13.3 of the Civil Procedure Rules 2000 ("the CPR") specifies five grounds namely:
1. That the Defendant was not served with notice of the Claim by the Claimant.
 2. Further or alternatively, if served it was not properly done, as the Claim was simply left at the Defendant's Bridge Street Branch Office with a menial employee and not at its main office or with anybody of authority, as is normally done, who would appreciate the significance of the documents and communicate the same to Management of the Defendant.

3. That if the Defendant had notice of the Claim, they would have put in a Defence, given that the Defendant through its Solicitors, had already replied by letter dated 11th March 2008 to a letter dated 26th February 2008 from the Solicitors for the Claimant addressing the subject matter of the Claim and disputing the claims therein.
4. That at the first instance of being served with a copy of the Judgment in Default and thus notice of the Claim on the 6th day of January 2010, the Defendant informed its Solicitors and carried out investigations through Chambers of the Claimant, as to the nature of the Claim and further had a search done of the file at the High Court Registry to obtain copies of the Claim and Statement of Claim in order to prepare a Draft Defence and applied to the Court as soon as reasonably practicable.
5. That the Defendant believes that its Defence is credible and has a real prospect of successfully defending the claim.

Chronology of events.

- [3] On 15th May 2009 the Claimant filed a claim against the Defendant (Bank) alleging that the Bank had debited its current Account No.101354675-112 based on a fraudulent cheque presented for payment by one Thomas Nighya in the sum of \$20,000.00. At the material times the Claimant's account held a balance of only \$18,087.10.
- [4] The Claim was served on the Defendant on 21st May, 2009 at its Registered office at No.1 Bridge Street, Castries by leaving the said documents with Mindy Chicot an employee of the Defendant.
- [5] The Defendant failed to file an Acknowledgment of Service and consequently a request for entry of judgment in default of acknowledgment of service was filed on July 29, 2009 and obtained on 12th October, 2009.

The Application

- [6] In support of its application, the Defendant relies on the Affidavit of Estherlita Cumberbatch on 12th January, 2010. At paragraph 7 of the Affidavit the Deponent states that "it is customary and well known that, when and if, the Defendant is served with any documents or even a letter is delivered to the Defendant, that all documents are served or delivered to the main office of the Defendant on the 5th Floor of the Financial Centre, to the Corporate Secretary or the Receptionist of the 5th Floor.

The Law

[7] Part 5.7 (a) CPR provides that:

Service on a limited company may be effected-

(a) by leaving the claim form at the registered office of the company;
Counsel for the Claimant in her written submission pointed out that the registered office of the Defendant as stated by the Defendant's Notice of Registered Address filed 28th June 2001 in the Registry of Companies and Intellectual Property is No.1 Bridge Street Castries. No other Notice of Address is filed in the Registry of Companies it was further pointed out. Having complied with Part 5.7(a) of the CPR Counsel submitted the Claimant had discharged any burden laid down by the relevant law in respect of service.

[8] The Court notes that Parts 5.7(c) and (d) CPR provide alternative means of serving a claim on a limited company which are not pertinent to this case.

Setting Aside Judgment in Default

[9] Part 13.3(1) CPR states that in order for a default judgment to be set aside the Defendant must:

- (a) Apply to the court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) Give a good explanation for the failure to file an acknowledgment of service or a defence as the case maybe;
- (c) Have a real prospect of successfully defending the claim.

The three requirements are conjunctive and the Defendant must satisfy all the requirements. Failure on the part of the Defendant to satisfy any of the three requirements could prove fatal to the application. Indeed the Court may only set aside a default judgment if and only if all three requirements of Rule 13.3 have been satisfied.

[10] At page 131 of the Caribbean Civil Practice the learned authors emphasize that: "These three conditions are conjunctive; each must be satisfied before the court may set aside. In *Kenrick Thomas v RBTT Bank Caribbean Ltd. (Formerly Caribbean Banking Ltd.)* (St. Vincent and The Grenadines) (Civil Appeal No.3 of 2005) 13th October 2005 (decision of single judge on paper submissions) Barrow JA stated that:

...[7] The appellant submitted that this provision (rule 13.3) specifies three conjunctive pre-conditions for setting aside. The submission is sound. "Only if" can only mean that if the three matters are not present then the court may not set aside a default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the discretion. The discretion in the English CPR is Rule 13.3 is significantly unlimited; it specifies only one matter to which the court must have regard and does not even make fulfilment of that matter a condition that the defendant must satisfy. In contrast, the discretion in CPR 2000 is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgment.

...[10] The judge dealt with reconciling this approach with the overriding objective in this way: "The overriding objective, contained in Part 1 of CPR 2000, which requires the court to apply the rules so as to deal with cases justly, is often invoked to relieve against the hardship that a strict application of the rules may cause. This court has clarified that the overriding objective does not allow the court to ignore clear rules. The language that the rule makers chose to frame Part 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further than the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified abuse that the new rules were intended to correct. The adherence to the time table provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that".

In that case, the defendant applicant had failed to satisfy two of the three conditions: he failed to apply promptly and failed to give a good explanation for the failure to file a defence. The Court of Appeal reversed the master's decision to set aside the default judgment.

In this connection, see also *Hyman v Matthews* (Jamaica) (Applications 72 and 80 of 2006) (SCCA 64/2003) per K. Harrison J.A.:

"The provisions of Part 13.3 are different from their English counterpart. In the U.K. the rules state that "that court may set aside a judgment...if" whereas in Jamaica the rules state "... only if". The word "only" makes a big difference. One should therefore be careful in relying on English authorities. In considering whether to set aside a judgment entered under Part 12, the judge has no residual discretion if any of the conditions are not satisfied.

The Issues

- [11] Did the Defendant act as soon as reasonably practicable after finding out that judgment had been entered?

At paragraph 4 of its Affidavit in support of its application to set aside the default judgment the Defendant (through Ms. Cumberbatch its Corporate Secretary) avers that it first knew of the judgment on 6th January 2010 and application to set it aside was made six days later on 12th January 2010:

- [12] In the Virgin Islands case of Earl Hodge v Albion Hodge Claim No BVIHCV2007/0098 Madam Justice Hariprashad Charles opined that a delay of 13 days was not unreasonable and the Court accepts that the delay of six days in the instant case was clearly not unreasonable.
- [13] Secondly, has the Defendant given a good explanation for its failure to file an acknowledgment of service within the prescribed time? Part 9.3(1) CPR states that the general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form. Part 9.3(4) CPR stipulates that a defendant may file an acknowledgment of service at any time before a request for default judgment is received at the court office out of which the claim form was issued.
- [14] According to the suit file the Defendant Bank was personally served by Process Server Arthur Isidore on Thursday the 21st day of May 2009 at 1:23pm at No.1 Bridge Street Castries by leaving a copy of the Claim Form filed 15th May 2009 together with other ancillary documents with one Mindy Chicot (described by Ms Cumberbatch as a menial employee of the said Bank).
- [15] Request for entry of judgment in default of acknowledgment of service was filed on July 29, 2009. According to Part 9.3(4) CPR the Defendant Bank would have been entitled to file its acknowledgment of service at any time before that.
- [16] The Bank contends, however as per paragraph 4 of Ms. Cumberbatch's affidavit that it was not until 6th January 2010 that she herself or the Bank itself first had notice of the claim at all when an officer of the Bank was served in the general lobby of the Financial Centre which houses among other entities the Defendant's main offices and Bridge Street Branch Office with a copy of a judgment in default dated 12th October 2009.
- [17] Investigations subsequently revealed that a claim had indeed been filed but left by the Claimant with a menial employee at the Branch Office of the Bank and not with any officer director or person of relevant know how and authority to deal with the claim in a responsible manner.

[18] Paragraph 7,8 and 9 of the said supporting affidavit of the Bank's Corporate Secretary encapsulate the reason or explanation for the Defendant's failure to file an acknowledgment of service and read thus:

7. That it is customary and well known that, when and if, the Applicant is served with any documents or even a letter is delivered to the Applicant, that all documents are served or delivered to the main office of the Applicant on the 5th Floor of the Financial Centre, to the Corporate Secretary or the Receptionist on the 5th Floor.

8. That I am assured and verily believe that if the Applicant had notice of the Claim, they would have put in a Defence, given that the Applicant, through its Solicitors, had already replied by letter dated 11th March 2008 to a letter dated 26th February 2008 from the Solicitors for the Respondent addressing the subject matter of the Claim and disputing the claims therein.

9. That Applicant having notice of the Claim instructed its Solicitors to apply to the Court as soon as reasonably practicable to set aside the Judgment in Default.

[19] The affidavit concludes at paragraph 11 by asserting that the Defendant/Applicant believes that its defence is credible and has a real prospect of successfully defending the claim.

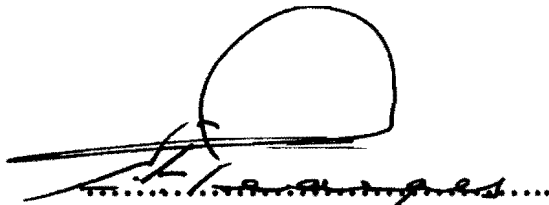
[20] As I see it there is no doubt in my mind that on a plain ordinary construction of Rule 5.7(a) CPR that the Defendant Bank was properly served with the claim form statement of claim and other associated documents on 21st May 2009 by leaving a copy of same at its registered office No.1 Bridge Street Castries. The affidavit of service of the process server Arthur Isidore attests to that fact and is unchallenged. Failure by the Bank to file an acknowledgment of service within the prescribed period or permitted time is in my view plainly due to the absence or lack of proper or adequate internal supervisory/organizational and or administrative structures/mechanisms within the Defendant's institution. It is my considered view that having regard to all the circumstances that the explanation proffered by the Defendant for its failure to file an acknowledgment of service does not pass muster.

[21] I therefore hold that the application to set aside the default judgment entered on 12th October 2009 fails and is accordingly dismissed. Bearing in mind that the three requirements of Part 13.2(1) CPR which must be satisfied in order to set aside a default judgment are conjunctive failure on the part of the defendant to meet the requirement of Rule 13.3(1) (b) is therefore fatal to the Defendant's application.

- [22] That could suffice to dispose of this matter but in view of its importance I will move on to the fifth ground of the application namely that the Defendant believed that its Defence is credible and has a real prospect of successfully defending the claim. This corresponds with the requirement of Rule 13.3 (1) (c).
- [23] The gravamen of the Defendant's defence is that it had acted in good faith when it cashed a cheque for \$20,000.00 drawn on the Claimant's current account albeit that there was only \$18,087.10 on the account so as not to embarrass the claimant company and indeed its Managing Director Mr. Ernest by not returning a \$20,000.00 cheque for insufficient funds by a mere \$1,912.90 being aware that the nature of the Claimant's business was such that the account fluctuated and that the Claimant would soon make good the overdrawn balance as it had in fact done on several occasions in the past.
- [24] The Defendant further contended (at paragraph 8) that the Claimant argued that it did not issue a cheque to Mr. Nighya and the Defendant also admits that Thomas Nighya had been arrested and charged, presumably for forgery.
- [25] Relying on the Privy Council decision of *Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank Ltd and Others* 1986 AC 80 (PC) reversing the Court of Appeal of Hong Kong, learned Counsel for the Claimant submitted that good faith in banking was not an appropriate defence.
- [26] In that case the Judicial Committee in allowing the appeal held at page 81 paragraphs D, E and F that in a case where English law was applicable, the Judicial Committee would follow a decision of the House of Lords, and, accordingly, as established by authority, the only duties in connection with the operation of a current bank account that a customer owed to his bank, in the absence of express agreement, were a duty to exercise due care in drawing cheques so as not to facilitate fraud or forgery, and a duty to notify the bank immediately of any unauthorized cheques of which he became aware; that no wider duty, requiring a customer to take reasonable precautions in the management of his business to prevent forged cheques being presented to the bank for payment, or to take such steps as a reasonable customer would to check the periodic bank statements in order to be able to notify the bank of any items which were not, or might not have been, authorized, could be implied into banking contracts as a necessary incident of the relationship of banker and customer; and that, therefore, the banks were not relieved by any breach of duty by the company from having to bear the loss occasioned by the forged cheques.
- [27] It was further held at paragraph H that since the company was not in breach of any express or implied duty owed to the banks it was not estopped from asserting that the accounts had been incorrectly debited, and that, accordingly, the banks not having authority to pay the forged cheques or debit them to the company's accounts had to pay those sums to the company together with interest from the date the writ was issued even though the accounts were not interest bearing.

- [28] In that case Tai Hing Cotton Mill was a customer of 3 banks, and maintained with them a current account. The banks honoured by payment on presentation some 300 cheques totaling approximately HK\$5.5 million which on their face appeared to have been drawn by the company and to bear the signature of Mr. Chen, the company's managing director who was one of the company's authorized signatories to its cheques. The banks in each instance debited the company's current account with the amount of the cheque. These cheques, however, were not the company's cheques. They were forgeries. In each, the signature of Mr. Chen had been forged by an accounts clerk employed by the company, Leung Wing Ling. The central issue in the appeal was upon whom the loss arising from Leung's forgeries was to fall, the company or the banks. The question of general principle is as to the nature and extent of the duty of care owed by a customer to his bank in the operation of a current account.
- [29] Lord Scarman in delivering the opinion of her Majesty's Board noted at page 106A that:
- “One can fully understand the comment of Cons J.A. that the banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection. But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This a risk of the service which it is their business to offer”.
- [30] And the learned Law Lord pointedly goes on to declare at page 106H that “The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible.
- [31] On that eminent authority learned Counsel for the Claimant maintained that the cheque presented for payment by Mr. Nighya being a forgery was not an act of the Claimant and the Defendant has to bear its loss for honouring this forged cheque. Tai Hing Cotton Mill is absolutely clear. The Claimant having informed the Defendant that the cheque was a forgery had discharged his duty to the Defendant. The Defendant having wrongly debited the Claimant's account without its express permission despite having tried to reach Mr. Ernest (Ms Cumberbatch has admitted the Defendant could not make contact with the Claimant) is no (proper) defence. Good faith is not a defence in this instance due diligence is not either.

- [32] I finally agree and the Defendant's defence in my view is clearly without merit and has no prospect of succeeding and would consequently fail. It follows therefore that the Defendant has not satisfied the condition set out at Rule 13.3 (1) (c) CPR also and the conjunctive requirements of Part 13.3 CPR.
- [33] Application to set aside judgment in default of acknowledgment of service entered on 12th October 2009 is dismissed with costs to the Claimant/Respondent in the sum of \$1,500.00.

A handwritten signature in black ink, appearing to read 'Ephraim Georges', is written over a horizontal dotted line. Above the signature is a large, hand-drawn oval shape.

Ephraim Georges
High Court Judge (Ag)