

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

SLUHCV 2005/ 557

LEONARD OGILVY

Claimant

Vs

VIRGIN ATLANTIC

Defendant

**Appearances: M. Kenneth Monplaisir Q. C. for Defendant
Claimant in Person**

.....
**2005: December 2nd
December 9th**
.....

DECISION

MASON J

[1] Before the court is an application by the Defendant for an order:

- i) to set aside the default judgment of 27th October, 2005 entered in favour of the Claimant, and
- ii) that leave be granted the Defendant to file and serve a defence

[2] The facts giving rise to the application are as follows::

On 8th August, 2005 the Claimant filed a claim against the Defendant seeking damages for breach of contract as a consequence of being denied boarding the Defendant's aircraft on Sunday 7th August, 2005.

- [3] The Defendant filed an Acknowledgement of Service on 22nd August 2005.
- [4] On 26th August, 2005 the Defendant filed an application for a declaration for an order that the court had no jurisdiction to try the claim.
- [5] While this application was pending a hearing, the Claimant on 14th October, 2005 filed a request for entry of judgment in default on the grounds that no defence had been filed and the time for doing so had expired.
- [6] An order in these laws was granted and filed on 24th October, 2005.
- [7] The date of 18th November 2005 was set for the hearing of assessment of damages.
- [8] On 31st October 2005, the application disputing the Court's jurisdiction was heard and the decision was given on 7th November 2005.
- [9] The Order of the Court was:
 - 1. Application to strike out Claimant's case dismissed
 - 2. Date for assessment of damages that is 18th November, hereby vacated
 - 3. Assessment of damages set for 2nd December, 2005
 - 4. Application for judgment in default to be set aside for hearing on 2nd December, 2005
 - 5. Costs to the Respondent/Claimant in the sum of \$1,000.00.
- [10] In the present application, Counsel for the Defendant made reference to Part 13.3 of the CPR 2000 and suggested that it be read with Part 26.8.

[11] Part 13.3 deals with cases where the court may set aside or vary a default judgment. Part 26.8 deals with the from sanction.

[12] Part 13.3 in part provides:

- (a) applies to the court as soon as reasonably practical 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 successfully defending the claim

2. If this rule gives the court power to set aside a judgment, the court may instead vary it.

[13] The argument for the Defendant in relation to Part 13.3 (1) (a) and (b) was that since the issue of the lack of jurisdiction of the Court was pending before the Court, it could not be said that the Defendant was too late in filing its defence for this was the reason for the delay.

[14] In addition, states Counsel, the Defendant did not want it said that by filing a defence, it was acquiescing in the jurisdiction of the court.

[15] Counsel contends further that attention must be paid to Part 9.7 and in particular Part 9.7 (7) which, states that if no application under this rule (rule relating to the procedure for disputing the Court's jurisdiction) the court does not make a declaration, it (a)and (b) must make an order as to the period for filing a defence.

[16] It was on this that the Defendant was relying and so the Claimant is seeking a default judgment was acting prematurely.

[17] With respect to Part 13.3 (1) (c) Counsel for the Defendant is of the belief that the Defendant has a real prospect of successfully defending the claim since the matter turns

on the question of fact as well as a contractual obligation and that the Defendant would show that it was clear that the Defendant's employees were following procedure in denying boarding to the Claimant.

[18] He continued that under Part 1.1, the court in applying Part 13.3 was bound to take into account the overriding objectives of the rules and that by allowing the default judgment to be set aside would allow the matter to be dealt with justly.

[19] Counsel for the Claimant contends that the default judgment was properly entered because there is nothing which prevents a Claimant from entering a default judgment in spite of there being a jurisdictional point being raised before the court.

[20] Counsel submits that since it is not made apparent that the person swearing the Affidavit on behalf of the Defendants is duly authorized so to do, this in effect means that the application is not supported by Affidavit as is required by CPR and so is not properly before the court and the application must be dismissed.

[21] To support his intention, Counsel referred to Section 17 of the Companies Act, Article 318 to 320 of the Civil Code and the case of Tesco Supermarket V Matthew (1971) 2AER 271.

[22] Counsel seeks to refute the Defendant's claim concerning Part 13.3 by stating:

- (1) that the question of jurisdiction being before the court is not a good explanation for failure to file a defence,
- (2) that there is no assertion in the Defendant's affidavit that the application to be set aside the judgment was made as soon as was practicable and
- (3) that while the Applicant may have an arguable case, it does not have a real prospect of successfully defending the claim.

- [23] It must be mentioned here that all three requirements of Part 13.3(1) must be satisfied before the court will set aside a default judgment. It must also be noted that the authority of the court is of a discretionary nature.
- [24] Part 13.3 (1) has already been set out.
- [25] With regard to the requirement that the Defendant must apply to the court as soon as reasonably practicable after finding out that judgment had been entered Part 13.3 (1) (a), judgment was entered by the Claimant on 24th October. While hearing of the jurisdictional point was pending - it had been filed on 26th August, 2005 with a hearing date of 31st October 2005 - the Claimant got his judgment entered.
- [26] While it is accepted that there is nothing to prevent the application for the default judgment being made while the point of the court's jurisdiction was pending, the Claimant would not have been prejudiced in any way if he had awaited the outcome of that hearing.
- [27] I am minded to accept the explanation given for the failure by the Defendant to file a defence albeit it was a mistaken belief: Part 13.3 (1) (b).
- [28] Counsel for the Defendant explained that it did not want it said that it was acquiescing in submitting to the jurisdiction of the court by filing a defence.
- [29] This mistaken belief is not to any mind enough reason to refuse and set aside the judgment.
- [30] The learning gleaned from Blackstone's Civil Practice 2004 at Para 19.4 is that "Although the CPR do not address the point explicitly, taking any step in the claim other than acknowledging service and applying under Part 11 (our Part 9.7) to contest the court's jurisdiction is extremely dangerous. Any such action may constitute a voluntary submission to the jurisdiction of the English courts. It was held in the case that applying for an extension of time for service of a defence, without any reference to an intention to

contest jurisdiction, constituted a submission to the jurisdiction. In another case it was held that service of a defence and a counterclaim accompanied by an express challenge to the jurisdiction did not constitute a submission".

With regard to Part 13.3 (1) (C) i.e. that the Defendant has a real prospect of successfully defending the claim, it is difficult from the court at this stage to decide this because apart from the question of the contractual obligation on the part of the Defendant, the integral part of the case will be determined based on factual evidence.

[31] As has been quite rightly said, Part 13.3 is discretionary on the part of the court.

[32] I am of the opinion that the overriding objective demands that the default judgment be set aside in order that the merits of the defence be determined.

ORDER

1. That the default judgment of 24th October, 2005 be set aside
2. That leave be and is hereby granted to the Defendant to file and serve its defence by 16th January, 2006.
3. That this matter be set down for hearing on 17th March, 2006.
4. That costs in the sum of \$1,000 be paid by the Defendant to the Claimant.
5. That Claimant and Defendant file and serve relevant statements on or before 3rd February, 2006.

Sandra Mason Q.C.
HIGH COURT JUDGE