

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2014/0005

BETWEEN:

YATES ASSOCIATES CONSTRUCTION CO LTD

Appellant

and

BRIAN QUAMMIE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Gertel Thom

Chief Justice
Justice of Appeal
Justice of Appeal

On written submissions:

Mr. Terrance B. Neale of McW Todman & Co. for the Appellant
No appearance for the Respondent

2015: May 5.

*Civil appeal – Whether learned master erred in refusing to set aside default judgment –
Whether learned master erred in the exercise of discretion*

Mr. Brian Quammie (“Mr. Quammie”) filed a claim against Yates Construction Co Ltd (“Yates Construction”) on 15th January 2014 and served it on Yates Construction’s agent on 21st January 2014. The claim was forwarded to Yates Construction on the same day. The evidence presented by Yates Construction in the lower court was that the managing director received the claim on the same day, however inadvertently overlooked same and as a result no steps were taken by it to defend the claim. An acknowledgement of service and a defence was filed on 1st April and 14th April 2014 respectively. By this time however, Mr. Quammie had filed and obtained judgment in default for failure to file defence.

Yates Construction filed an application to set aside the default judgment citing inadvertence as the reason for the failure to file the defence within time. The application was refused by the learned master on the basis that the explanation provided for the

failure to file the requisite documents in response to the claim was not a good one. Yates Construction has appealed alleging that the learned master erred in the exercise of his discretion in refusing to set aside the default judgment.

Held: dismissing the appeal and making no order as to costs, that:

1. A court may set aside a default judgment entered under Part 12 of the Civil Procedure Rules 2000 only if certain requirements are met, one such requirement being the need to provide the court with a good explanation for the failure to file an acknowledgment of service or a defence as the case may be. Where the explanation for the failure to file a defence or acknowledgment of service connotes real or substantial fault on the part of the defendant, then there has been no good explanation provided for the failure. Oversight may be excusable in certain circumstances. However, inexcusable oversight, which includes and is not limited to, administrative inefficiencies, does not amount to a good explanation. Accordingly, inadvertence on the part of Yates Construction cannot be a good explanation for the failure to file a defence and or acknowledgment of service within time.

Rule 13 of the **Civil Procedure Rules 2000** applied; **John Cecil Rose v Anne Marie Uralis Rose SLUHCVP2003/0019 (delivered September 2003, unreported) followed; The Attorney General v Universal Projects Limited [2011] UKPC 37** applied.

2. It is not open to an appellate court to dictate to a court of first instance any specific wording that must be used in rendering its judgment or for that matter making an order. Neither is it part of its function to piece apart or conflate the words of the judicial officer in order to impugn it. The learned master may have been more elaborate in his utterances than may have been necessary, nevertheless that is not a basis upon which an appellate court can interfere with the exercise of his discretion.
3. An appellate court can only disturb the exercise of the learned master's discretion if it were to conclude that the master erred in principle in his or her approach or has left out of account some aspect that he or she should have considered and as a result the decision exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong. Based on the evidence that was placed before the master, it cannot be said that in exercising his discretion he acted improperly and or erred in principle. There is therefore no basis upon which this Court can properly interfere with the exercise of the discretion.

Dufour and Others v Helen Air Corporation Ltd (1996) 52 WIR 188 followed; **Attorney General et al v Geraldine Cabey MNIHCVP2008/0008 (delivered 12th January 2009, unreported)** followed.

JUDGMENT

- [1] **BLENMAN, JA:** This is an appeal against the exercise of the learned master's discretion. At the heart of the appeal lies the complaint that the learned master exercised his discretion improperly when he failed to set aside the default judgment that had been entered against the company Yates Associates Construction Co. Ltd. ("Yates Construction") in favour of Mr. Brian Quammie ("Mr. Quammie"). There is an additional complaint against the master's costs order in the sum of \$1,000.00.

Issue

- [2] The sole issue that arises for the determination by the Court is whether the learned master erred in the exercise of his discretion when he failed to set aside the default judgment.
- [3] I will now state the factual background in order to provide the context to this appeal.

Factual Background

- [4] The factual matrix of this appeal is gleaned from the affidavit of Ms. Christina Yates ("Ms. Yates") in support of the application to set aside the default judgment and from the amended statement of claim and is as follows:
- (i) Mr. Quammie filed an amended claim on 15th January 2014 and served it on Mc Namara Corporate Services Limited ("Mc Namara") (who is Yates Construction's agent) on 21st January 2014;¹
 - (ii) Mc Namara forwarded the amended claim to Ms. Yates who at that time was the former managing director and majority shareholder of Yates Construction.
- [5] In her affidavit in support of the application, Ms. Yates stated that:
- "Mc Namara Corporate Services Limited forwarded the Claim to me on the same day i.e. January 21, 2014 however, I inadvertently overlooked same and

¹ According to Ms. Yates' affidavit filed 29th May 2014.

as a result no steps were taken by the Defendant [Yates Construction] to instruct lawyers to defend the claim.”²

[6] I propose to recite the other relevant sections of Ms. Yates’ affidavit.

- “5. I first became aware of the Claim on March 27, 2014 after our insurers, Caribbean Insurers Limited, forwarded to me a copy of a letter from the Claimant’s legal practitioners, J.S. Archibald & Co, advising among other things that a default Judgment had been entered against the Defendant. A copy of the letter from J.S. Archibald & Co is now shown to me and exhibited as “CY 1”.
6. I was taken by surprised at the contents of the letter and immediately responded to the effect that I was not aware of any such claim and that if same had been brought to my attention I would have instructed our lawyers, McW. Todman & Co., to take the necessary steps to protect our interest.
7. Caribbean Insurers Limited then wrote to McW. Todman & Co on March 31, 2014 to inquire whether they were in receipt of the Claimant’s Claim and whether any steps had been taken to defend the action. A copy of the letter is now shown to me and exhibited as “CU 2”.
8. McW. Todman & Co responded by letter dated April 1, 2014 advising that upon service of the Claim to Mc Namara Corporate Services Limited they forwarded same to the Defendant for further action but received no instructions to act in the matter despite a specific request to do so. A copy of the letter is now shown to me and exhibited as “CY 3”.
9. Upon being advised of this I immediately requested a copy of the Claim from McW. Todman & Co who forwarded same to my attention. This was in fact the first time that either I or the Defendant actually had sight of the Claim since as previously indicated although forwarded to the Defendant on January 23, 2014 same was overlooked through inadvertence. A copy of my letter requesting a copy of the Claim is now shown to me and exhibited as “CY 4”.
10. By letter dated April 1, 2014, Caribbean Insurers instructed McW. Todman & Co to act in the matter and to take all steps to defend the action including the setting aside of any default Judgment which may have been obtained by the Claimant. A copy of the said letter is now shown to me and exhibited as “CY 5”.

² See p. 16 of the Record of Appeal or para. 4 of the Affidavit in Support of Application to Set Aside Default Judgment.

11. An acknowledgement of service was filed on behalf of the Defendant by McW. Todman & Co on April 1, 2014 and a search conducted at the High Court Registry by McW. Todman & Co on April 2, 2014 for a Judgment in default however the court file did not indicate that an application for Judgment in Default had been made or entered by the Claimant.
12. As a result we instructed our lawyers to file a Defence in the matter at the earliest opportunity and this was done on April 14, 2014. A copy of the Defence is now shown to me and exhibited as "CY6."
13. The filed Defence was served on the Claimant on April 14, 2014. The Defendant heard nothing further from the Claimant in the matter and therefore assumed that the Defence had been validly filed and served as same had been accepted by both the High Court Registry and the Defendant.
14. On May 23, 2014 our lawyers were for the first time served with the Judgment in Default of Defence which was dated March 6, 2014 and an Affidavit in support of an application for an assessment of damages dated April 23, 2014. There was however no application for assessment of damages.
15. Upon being advised of the Judgment in default I immediately instructed our lawyers to take the necessary steps to file an application to set aside same since I was of the view that the Defendant has a good defence to the Claim and that the failure to file a Defence was due to inadvertence."

[7] That was the nature of the evidence that was presented to the learned master in support of the application to set aside the default judgment. It is important to recite the relevant aspects of the order.

Master's Order

[8] The relevant aspects of the learned master's order are as follows:

- "2. In terms of the reasons for failure to file an acknowledgement of service or defence, the court finds that the explanation is not a good one. The applicant depones at paragraph 4 of the affidavit of Christina Yates that it received notice of the claim on January 21, 2013 but inadvertently overlooked the notice and took no action in response. At today's hearing counsel for the applicant expanded on this assertion by producing information which indicates that the notice

was sent via email from his office to the applicant. Counsel's office served as the registered office of the applicant.

3. The applicant's evidence is that it did nothing about the email until March 27, 2014 when Ms. Yates received a call from insurers for the applicant. Counsel submits that the oversight in reading the email or addressing it was "human error" or fallibility which ought to be excused. I disagree. The applicant is a corporate entity which ought to conduct its affairs with more diligence and scrupulous regard to serious matters especially litigation. It cannot be the case that a vigilant respondent is to bear the consequences of the inattention on the part of the applicant. Administrative insouciance for more than six (6) weeks with regards to the email cannot be a good explanation for the purposes of the CPR. A corporate entity, or even individuals, ought to have arrangements in place for more careful conduct of their affairs. By the time the applicant got its house in order, a request for judgment in default of acknowledgment of service and defence had been filed and the default judgment was granted. The reason for not acting sooner to file an acknowledgment of service or defence being inadequate, the application to set aside the default judgment will be refused."

[9] It is in relation to paragraph 3 of the master's order that Yates Construction complains that the error was made in the exercise of the discretion.

[10] **Grounds of Appeal**

Ground 1

The learned master failed to properly exercise his discretion in the matter since he erroneously held that mere inadvertence, in this case human error, in overlooking email correspondence could not be a good reason for the failure to file a defence in a timely manner and as such form a proper basis for the exercise of the court's discretion under CPR 13.3.

Ground 2

The learned master failed to properly exercise his discretion in the matter since he erroneously held that the test under CPR 13.3 demanded some sort of balancing exercise specifically whether a vigilant claimant should be made to bear the consequences of the inattention of the defendant as distinct from whether the

inattention of the defendant provided a sufficiently good reason for the failure to file a defence.

Ground 3

The learned master failed to properly exercise his discretion in the matter since he erroneously concluded that the inadvertent failure of an officer of the claimant to read a letter forwarded via email was not reflective of a human error but evidence that the claimant did not conduct its business affairs with due diligence and scrupulous regard for serious matters especially litigation matters.

Ground 4

The learned master failed to properly exercise his discretion in the matter since he erroneously concluded, without basis, that “administrative insouciance”, for more than six (6) weeks, was the reason for the claimant’s failure to not file a defence in the matter as opposed to a simple human error in overlooking an email correspondence in circumstances where several emails would be sent to Yates Construction on a daily basis and the overlooking of a particular email correspondence would usually not be brought to the attention of the officer of the claimant unless a reminder or a request for a response was sent by the sender which did not happen in this particular case.

The law

[11] In relation to the setting aside of a default judgment, rule 13.3 of the **Civil Procedure Rules** (“CPR 2000”) stipulates that 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 acknowledgment of service or a defence as the case may be; and
- (c) has a real prospect of successfully defending the claim.

[12] It is trite that sub sections (a), (b), (c) of rule 13.3 must be read compendiously. In this regard, there is no complaint from Mr. Neale in relation to the learned master's approach to sub sections (a) and (c). Indeed, learned counsel Mr. Neale submitted that the master erred when he concluded that Yates Construction having satisfied subsections (a) and (c) of rule 13.3 failed to satisfy the requirements of good explanation for failure to file an acknowledgment of service or defence. It is on this basis that Mr. Neale implores the Court to set aside the master's order.

[13] It is the law that the appellate court can only disturb the exercise of the learned master's discretion if it were to conclude that the master erred in principle in his or her approach or has left out of account some aspect that he or she should have considered and as a result the decision exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong.³ This principle was enunciated by Sir Vincent Floissac in the case of **Dufour and Others v Helen Air Corporation Ltd**⁴ which was quoted and followed by this Court in **Attorney General et al v Geraldine Cabey**⁵ where Gordon JA pointed out that Sir Vincent Floissac's words have "been quoted and followed in this court on occasions too numerous to count". He went on to recite the following:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."⁶

[14] Gordon JA examined each condition:

³ Tafern Ltd. v Cameron-MacDonald and Another Practice Note [2000] 1 WLR 1311; Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188; Edy Gay Addari v Enzo Addari BVIHCVAP2005/0002 (delivered 27th June 2005, unreported).

⁴ (1996) 52 WIR 188.

⁵ MNIHCVAP2008/0008 (delivered 12th January 2009, unreported).

⁶ At para. 16.

"The first condition was explained by *Viscount Simon* L.C. in **Charles Osenton & Co. v Johnston** (1941) 2 AER 245 at 250. There, the noble Lord Chancellor said:

"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

The second condition was explained by *Asquith L.J.* in **Bellenden (formerly Satterthwaite) v Satterthwaite** (1948) 1 AER 343 at 345 in language which was approved and adopted by the House of Lords in **G v G** (1985) 2 AER 225 and which I have gratefully adopted in this judgment. *Asquith L. J.* said:

"...We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

- [15] Based on the evidence that was provided in the affidavit it is clear that the reason that was proffered for the non-filing of the acknowledgment of service or the defence is the inadvertence of Ms. Yates. The learned master clearly found that this was not a good explanation. This holding accords with the well-established jurisprudence of this Court and cannot be impugned. In **John Cecil Rose v Anne Marie Uralis Rose**,⁷ Byron CJ referred to the case of **Casimir v Shillingford et al**⁸ in stating "we have expressed the view on many occasions that the lack of diligence of an attorney is not a good reason for delay". Further, in the more recent Trinidadian case of **The Attorney General v Universal Projects Limited**⁹ the claimant had applied for and was granted judgment in default against the defendant for failure to file a defence. The explanation provided for the failure

⁷ SLUHCVP2003/0019 (delivered September 2003, unreported).

⁸ (1967) 10 WIR 269.

⁹ [2011] UKPC 37.

appeared to have been that the defendant's State attorneys thought that outside counsel should be retained and that authorisation for this course should be obtained from the Solicitor General. This took time because there was no Solicitor General and the approval of the Attorney General was required. As a result, a defence could not have been filed within the requisite time period. The Board held that:

"First, if the explanation for the breach i.e the failure to serve a defence ... connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. 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."¹⁰

- [16] Learned counsel Mr. Neale has quite properly accepted that the basis of the master's refusal to set aside the default judgment was that Yates Construction had failed to provide a good reason for so doing as the reason proffered by Yates Construction namely, mere inadvertence, was not a good one.
- [17] In seeking to impugn the master's decisions, Yates Construction has indicated both in its notice of appeal and written submissions a number of matters which they allege are facts found by the master. These are the matters that were referred to in paragraph 3 of the order. I do not share the view that the master made those findings of facts. Rather, he was commenting on the evidence which was before him and analysing it with reference to the critical point of mere inadvertence. While it is true that the master need not have been so expansive in comments, he however cannot be faulted for his analysis of the evidence. And, what is incontrovertible is that he was of the considered view that mere inadvertence was not a good explanation. In so concluding, his decision comports with a plethora of authorities from this Court. Accordingly, the decision of the master cannot be faulted.

¹⁰ At para. 23.

- [18] For the sake of completeness, at paragraph 2 of the order, the master was live to the basis on which the leave was sought to set aside the default judgment namely, inadvertence. He indicated that counsel at the hearing sought to expand on this assertion. It is not entirely clear the method that was utilized to bring additional evidence to the master's attention during the hearing of the application.
- [19] I underscore that at the beginning of paragraph 3 of the order, the learned master indicated that Yates Construction's evidence "is that it did nothing about the email until March 27, 2014 when Ms. Yates received a call from insurers for the applicant". Counsel submits that the oversight in reading the email or addressing it was "human error" or "fallibility" which ought to be excused. I disagree. Interestingly, learned counsel Mr. Neale, advocating on behalf of Yates Construction's seeks to persuade the Court that the master was of the view that the inadvertence was not as a consequence of human error or fallibility. It is clear the master indicated his disagreement such that the "human error" or "fallibility" could amount to a good explanation. It is clear to me that the master indicated his disagreement with the "human error" of fallibility" should be a basis upon which he should have exercised his discretion to set aside the default judgment.

Ground 1

The learned master failed to properly exercise his discretion in the matter since he erroneously held that mere inadvertence in this case human error in overlooking email correspondence could not be a good reason for the failure to file a defence in a timely manner and as such form a proper basis for the exercise of the court's discretion under CPR 13.3

- [20] In relation to the matter of "human error" or the "fallibility" in the grounds of appeal what Yates Construction did is to conflate the observation with the comment that the master made that Yates Construction is a corporate entity which ought to conduct its affairs with more diligence and scrupulous regard to serious matters especially litigation. There is no such basis for Yates Construction to complain that the master concluded it was not a human error but rather that Yates Construction did not conduct its affairs with due diligence. The basis of the application remained inadvertence. The master was there opining about the

quality of conduct that is required in relation to litigation and was thereby rejecting the suggestion that mere inadvertence can provide a good explanation as required by CPR 13.

Ground 2

The learned master failed to properly exercise his discretion in the matter since he erroneously held that the test under CPR 13.3 demanded some sort of balancing exercise specifically whether a vigilant Claimant should be made to bear the consequences of the inattention of the Defendant as distinct from whether the inattention of the Defendant provided a sufficiently good reason for the failure to file a Defence

- [21] With no disrespect intended to Yates Construction, there is no basis for its complaint that the learned master utilized some sort of balancing exercise as Yates Construction contends; this was not borne out by the learned master's order. There was nothing to indicate that the master undertook any balancing exercise. This ground of appeal has no merit and is therefore dismissed.

Ground 3

The learned master failed to properly exercise his discretion in the matter since he erroneously concluded that the inadvertent failure of an officer of the claimant to read a letter forwarded via email was not reflective of a human error but evidence that the claimant did not conduct its business affairs with due diligence and scrupulous regard for serious matters especially litigation matters

- [22] Yates Construction complains that the learned master acted outwith his discretion when he held that "administrative in souciance" for more than six (6) weeks was the reason for its failure to file the defence as opposed to a simple human error in overlooking an email correspondence.
- [23] There is no doubt that all of the utterances that were made by the master were in relation to the inadvertence that was proffered as a good explanation. This much is clear from the reading of the entire third paragraph of the order. To fortify this view, it must be underscored that the master indicated that "[a] corporate entity or even individuals, ought to have arrangements in place for more careful conduct of

their affairs". It is clear that the master was there underscoring the legal principle that mere inadvertence cannot amount to a good explanation. It must be made clear that it is not open to an appellate court to dictate to a court of first instance any specific wording that must be used in rendering its judgment or for that matter making an order. Neither is it part of our function to piece apart or conflate the words of the judicial officer in order to impugn it.

[24] With no disrespect intended, much of Yates Construction's complaint on this ground amounts to much ado about nothing. Its submissions highlight the fact that, in contradiction to what is alleged, the learned master did not make most of the findings that were erroneously attributed to him. To the contrary, most of the matters which formed the grounds of appeal are the comments on the evidence that was before him. The fact that perhaps he may have been more elaborate in his utterances than may have been necessary is not a basis upon which an appellate court can interfere.

[25] An appellate court should be very slow to dissect an order of court in the way that Yates Construction is contending since to do so may unnecessary lead to an unfair impugning or invalidation of a just or fair disposition of a claim or order, even if the judicial officer over spoke.

[26] Accordingly, this ground of appeal fails. There is no doubt that all of the matters to which the master referred in paragraph 3 of the order are underpinned by the generic concept of mere inadvertence.

[27] Next, learned counsel Mr. Neale argued that the master took into account irrelevant factors and contends that the master sought to introduce matters apart from the business practice of Yates Construction even though there was no evidentiary basis for this. This criticism of the learned master is not made out based upon his observation; he was clearly speaking about the six (6) weeks delay and not about any general practice of Yates Construction.

[28] Based on the evidence that was placed before the master, it cannot be said that in exercising his discretion he acted improperly. There is therefore no basis upon which this Court can properly interfere with the exercise of the discretion more so to even impugn it.

[29] In my view, too much is being made of some of the utterances of the learned master. This does not negate the fact that it may be more desirable if more restraint is shown in the comments that are proffered during the rendering of a judgment. However, it is not part of an appellate court's function to muzzle judicial officers at first instance. By way of comment, it is regrettable that Yates Construction in its notice of appeal has sought to attribute several findings of fact to the master that are not borne out by the master's order. It must be remembered that the main basis upon which Yates Construction sought to have the default judgment set aside was that of the inadvertence. The master remained live to this throughout the rendering of his order.

Ground 4

The learned master failed to properly exercise his discretion in the matter since he erroneously concluded without basis that "administrative insouciance" for more than six (6) weeks was the reason for the claimant's failure to not file a defence in the matter as opposed to a simple human error in overlooking an email correspondence in circumstances where several emails would be sent to Yates Construction on a daily basis and the overlooking of a particular email correspondence would usually not be brought the intention of the officer of the claimant unless a reminder or a request for a response was sent by the sender which did not happen in this particular case

[30] This ground of appeal and the submissions that were made in support of it only need to be stated so as to be rejected. In a word, they are of no moment and this needs no further elucidation. This ground of appeal also fails.

Conclusion

[31] In view of the foregoing, it should be very clear that there is absolutely no reason to interfere with a careful detailed and just order of the learned master in the

proper exercise of his discretion. Accordingly, the appeal is dismissed. There is no order as to costs since Mr. Quammie did not participate in the appeal.

Louise Esther Blenman
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal