IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2005 HCV 2297

IN CHAMBERS

BETWEEN	DAVE BLAIR	CLAIMANT
AND	HUGH C. HYMAN & Co. (A Firm)	1ST DEFENDANT
AND	HUGH C. HYMAN	2ND DEFENDANT

Mr. Kevin Williams and Miss Yualande Christopher instructed by Grant, Stewart Phillips and Co. for Claimant.

Miss Carol Davis for Defendants.

Practice and Procedure – Application to set aside default judgment – Delay in filing Defence – Whether Defence has any real prospect of success – Rule 13.3 of the CPR - Limitation period in Tort

6th and 16th May 2008

BROOKS, J.

On 19th December 1991 Mr. Dave Blair suffered burns and other injuries in an incident while at work. He blamed Alumina Partners of Jamaica (Alpart) for the incident. He retained the law firm of Hugh C. Hyman & Co. and its principal Mr. Hugh C. Hyman to act for him in securing compensation for his suffering. I shall refer to the lawyers collectively, as "Hyman". Mr. Blair asserts that because of Hyman's failure to serve a Writ of Summons on Alpart within the limitation period, he was forced to compromise his claim against Alpart. The result, he says, is that he

recovered only a portion of what he would have recovered in a suit. He has therefore filed this claim against Hyman for damages for negligence.

Hyman failed to file either an acknowledgment of service or statement of defence within the stipulated time. A judgment in default of defence was eventually entered against them. Hyman have now filed this application to set aside the default judgment. Mr. Williams for Mr. Blair resists the application on the basis that Hyman have no real prospect of successfully defending the claim.

The question for the court to resolve is whether Hyman have satisfied the requirements of rule 13.3 of the Civil Procedure Rules 2002 (CPR), concerning setting aside judgments entered in default.

Chronology of the Events

1. 19/12/91 – Mr. Blair injured.
2. October 1995 - Mr. Blair retained Hyman
3. 27/12/96 – Writ of Summons in Suit C.L. 1996/B414 filed
4. 24/12/98 – *Ex Parte* summons to extend the validity of the Writ filed
5. 11/1/99 – Order made extending the validity of the Writ of Summons for 30 days from 11/1/99
6. 10/2/99 – Statement of Claim filed
7. 10/2/99 – Writ of Summons and Statement of Claim mailed to Alpart by registered post

8. 26/3/99 – Alpart filed a conditional appearance and a motion applying to set aside the renewal of the Writ of Summons and the service of the Writ

9. January 2004 – Mr. Blair retained Messrs. Grant Stewart Phillips and Co. (GSP), attorneys-at-law

10. 9/8/05 – Claim form and Particulars of claim filed against Hyman

11. 23/8/05 – Hyman served with Claim form and Particulars of Claim

12. 4/10/05 – Acknowledgement of Service filed

13. 26/9/05 – Request for default judgment (re acknowledgement) filed

14. 30/12/05 – Application to extend time to file defence filed

15. 29/11/06 – Request for default judgment (re defence) filed

16. 23/3/07 – Judgment in default of defence entered

17. 31/7/07 – GSP advise Hyman that claim against Alpart settled

18. 19/12/07 – First appointment for hearing of application to extend time

Rule 13.3

In order to succeed in this application Hyman have to show that they have satisfied the requirements of rule 13.3.

The rule states as follows:

"(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered;

(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.
(Rule 26.1 (3) enables the court to attach conditions to any order)"

The present formulation has been in effect since September of 2006. It is less stringent than the previous version and allows the court to consider the Overriding Objective in arriving at its decision. It is now closer to rule 13.3 of the Civil Procedure Rules in England. Although paragraph (2) of the rule speaks to considering the timing of the application and the reason for the failure to file the defence in time, Mr. Williams has indicated that he takes no issue with those aspects of Hyman's application. I shall therefore accept the application as having satisfied those elements of the rule. I therefore turn to the aspect of Hyman's prospects of success in defending the claim. In doing so I do not think that I contravene the principles set out in *Villa Mora Cottages and anor. v Shtern* SCCA 49/2006, cited by Miss Davis on behalf of Hyman. That case concerned observing the requirements of rule 26.8 is not relevant to the issue of the prospects of success of Hyman's defence.

There have been a number of cases decided since the inception of the CPR in both Jamaica and England which have contemplated the issue raised by the phrase "a real prospect of successfully defending the claim" as it used in the rule. Arising from those decisions, the learned editors of *Civil Procedure* 2003 (The White Book) have, at paragraph 13.3.1, opined:

> "The phrase...reflects the test for summary judgment...It is not enough to show an "arguable" defence..."

At paragraph 24.2.3 the learned editors expand on the subject:

> "...it is sufficient for the (defendant) to show some "prospect", *i.e.* some chance of success. That prospect must be real, *i.e.* the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word "real" means that the (defendant) has to have a case which is better than merely arguable...The (defendant) is not required to show that his case will probably succeed at trial."

I accept that as a working definition of the phrase.

In our jurisdiction, Mangatal, J. (Ag.) (as she then was), considered the meaning of the phrase in *Sydney Malcolm v Metropolitan Management Transport Holdings Limited and Glenford Dickson* Suit No. C.L. 2002/M225 (delivered 21/5/2003). The learned judge approved a similar definition to that which has been set out above.

Although rule 13.3 has been modified since *Sydney Malcolm*, the change has not affected this requirement for defendants, making an application of this nature, to show "a real prospect of successfully defending the claim". In exercising the discretion given to it, the court must consider the evidence provided in support of the application. It must satisfy itself that what has been raised by way of that evidence is the essence of a realistic and not a fanciful, defence. In doing so the court should not undertake a "mini-trial" of the case. Refusals should only be in clear cases of either law or fact. (See *Swain v Hillman* [2001] 1 All ER 91 at page 95 b). This does not preclude the court from conducting an enquiry in appropriate cases, if it will result in the saving of time and costs.

In *ED & F Man Liquid Products Ltd. v Patel and anor.* TLR April 17, 2003 at page 224, [2003] EWCA Civ 472 (delivered 4/4/2003) Lord Justice Potter, in referring to rules 13.3 and 24.2 (the latter dealing with applications for summary judgment) stated, at paragraph 10 of the judgment:

> "It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* ... However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. **In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.** If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable..." (Emphasis supplied)

In the instant case there are very few issues of fact joined between the parties. It seems to me that the issue of liability turns on questions of law, which may conveniently be dealt with at this stage. These questions, as I perceive the matter, are:

a. whether the limitation period had expired as against Alpart;

b. whether the validity of the writ of summons was properly extended;

c. whether the writ of summons was served before the expiry of its extended life;

d. whether Alpart was entitled to have the service of the writ struck out

e. what was Mr. Blair's position as against Alpart

It is necessary that I make reference to the order extending the validity of the writ of summons. I am not, however, required to make any order which affects that ruling and I may properly express an opinion about it.

Whether the limitation period had run as against Alpart

The accepted period for the limitation of actions in tort, which is the basis for the claim against Alpart, is six years. In *Melbourne v Wan* (1985) 22 J.L.R. 131 at page 135 F Rowe, P. stated:

> "The Jamaican courts have over the years treated actions for negligence as actions upon the case to which the six year period of limitation applies....As the law now stands there is for Jamaica a rigid rule that actions for negligence must be brought within a period of six years from the time the cause of action arose **and any failure so to do will render the action statute barred.**" (Emphasis supplied)

The limitation period for Mr. Blair's action against Alpart would therefore have expired on 18th December 1997. The writ of summons against Alpart was therefore filed within the limitation period.

Whether the validity of the writ of summons was properly extended

Section 30 of the Judicature (Civil Procedure Code) Law (CPC) provided that a writ of summons was valid for service for no more than twelve months, in the first instance. The section allowed for a renewal of the writ, upon application, for a further period of six months. Service after the twelve months without an order for renewal was an irregularity, though the writ was not a nullity. An unconditional appearance after such service would cure the irregularity. An application to renew the writ should be made before the expiry of the twelve month period, but an application could

be properly made to enlarge time. In *Sheldon v Brown Bayley's Steel Works Ltd and anor.* [1953] 2 Q.B. 393 at page 398 Lord Singleton stated in respect of the equivalent of section 30:

> "It has been held over a long period of years that this rule enables the court to renew a writ even though application is not made until after the expiration of 12 months laid down under Ord. 8 r. 1. **The court will not normally exercise its discretion in favour of the renewal of a writ after the period of service has expired if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has occurred.** (Emphasis supplied)

Based on these provisions the writ against Alpart would have expired on 26th December 1997. The application to extend its validity was filed on 24th December 1998; just under a year after it had already expired, and just over a year after the limitation period had already run.

Baker v Bowketts Cakes Ltd. [1966] 1 W.L.R. 861 was a case with very similar circumstances to the instant case. In that case, however, the defendant applied to the judge who had extended the life of the writ, to set aside his own order. The learned judge acceded to the application and reversed the order for the extension. The Court of Appeal ruled that the reversal was correct. Courts, it held, should become stricter with granting extensions as the time for the expiry of the limitation period draws nearer. In Mr. Blair's case it had long passed by the time the application was made.

In *Muir v Morris* (1979) 16 J.L.R. 398 our Court of Appeal ruled that a renewal of the writ ought not to be granted if it would deprive the defendant of a defence provided by the Limitation of Actions Act. The headnote states, in part:

> "(i) S. 676 of the Judicature (Civil Procedure) Law gives the court the power to enlarge time in instances where an application for the renewal of a writ is made after the expiration of the time allowed, being one year. In such an instance, the court must be satisfied that there were exceptional circumstances that caused the delay in the service of the writ upon the defendant. **Further, the court should never exercise its discretion in favour of the plaintiff where to do so would prejudice the defendant.** In the instant case, the plaintiff has failed to show good cause as to the reason for the delay in the service of the writ upon the defendant. (ii) Additionally, **the period of limitation having expired, to grant an enlargement of time to the plaintiff would mean depriving the defendant of his defence under the Statute of Limitation.**" (Emphasis supplied)

In my view, based on the quote from Lord Singleton above, and the decision in *Muir v Morris*, the writ should not have been renewed at that stage. The Court of Appeal would, I think, have ruled against Mr. Blair, as it did against Mr. Morris, in *Muir v Morris*. I however accept that it is a matter for the court's discretion, and so I move to the next question.

Whether the writ of summons was served before the expiry of its extended life

If it were accepted that the writ was properly renewed, that renewal would have been valid to 10th February, 1999. It would therefore have had to have been served on Alpart on or before the 10th. It was not. It was posted on the 10th but not deemed served until two days thereafter.

Section 370 of the 1967 Companies Act, which was applicable in 1999, provided for the service of documents on a company by post. Section 52 of the Interpretation Act stipulates that service by post, unless the contrary is proved, shall be deemed "to have been effected at the time at which the letter would be delivered in the ordinary course of post".

There is uncontradicted evidence that the Postmaster General, by letter of 20th May 1999 stated that the ordinary course of post for the letter that Hyman posted to Alpart was seventy-two hours. In fact the letter was delivered to Alpart's bearer on the 12th February, 1999. This would have been within the time allowed for the ordinary course of postal business, but clearly outside of the time of the extended validity of the writ and outside of the limitation period. It may possibly be argued that this is an issue which should be placed in evidence before a trial judge, but in my view, any submission that the writ would be deemed served on the 10th February would be untenable. The claim should not be sent to occupy the trial resources of this court for that reason.

Whether Alpart was entitled to have the service of the writ struck out

Alpart, therefore, had three bases on which to apply to have the action against it struck out; the limitation period had run, the writ had been improperly renewed and the renewed writ had expired by the time it was served. It is not clear why Alpart's motion to set aside the renewal order and the service was not heard despite the passage of several years, but it is my view that it ought to have succeeded and the arguments to have been used then would be successful if this matter were to be tried in open court.

It is true that the expiry of the limitation period is not, by itself, a bar to an action in tort, as it is for a defendant to plead the Statute if he is so minded. Where, however, it appears on the face of the claimant's pleadings

that the limitation period had, run the defendant may succeed in an application to have the action struck out, as being an abuse of the process of the court. See *Richies v DPP* [1973] 2 All E.R. 935 and *Lloyd v The Jamaica Defence Board and others* (1981) 18 J.L.R. 223. In *Lloyd,* our Court of Appeal upheld the decision of a trial judge (Rowe, J. as he then was) to strike out the statement of claim. Zacca, J.A. (as he then was) said at page 226 I, in reference to the relevant limitation period:

> "The writ being filed on November 29, 1978, the respondents are entitled to the protection of the Act. The defendants made it quite clear that if the action proceeded they would be relying on the protection of the Act. **It is, therefore, open to the trial judge to strike out the statement of claim as disclosing no reasonable cause of action, *Richies v Director of Public Prosecutions*...**" (Emphasis supplied)

In the case against it, Alpart clearly had in mind the fact that the limitation period had expired. It referred to that fact at paragraph 9 of the affidavit of Janet Elaine Morgan, sworn to on 28th March 1999 and filed in support of the motion to set aside the renewal of the writ.

What was Mr. Blair's position as against Alpart

Based on the answers to the questions analysed above, it is my view that Mr. Blair's claim against Alpart was doomed. He salvaged an agreement for an *ex gratia* payment, but he had no viable claim in law or equity. This was as a direct result of Hyman's failures in acting for him.

Does Hyman's defence have a real prospect of success?

In his affidavit filed on 30th December 2005, in support of the application to set aside the default judgment, Mr. Hugh Hyman does not

seek to advance any basis for his statement in paragraph 14 thereof, that "the Defendants strongly deny that they were negligent in the handling of the 1996 suit, as alleged by the Claimant and denies the Claimant's allegation [of negligence]". He did say that his counsel had advised him that Hyman had a good and arguable defence and a real prospect of successfully defending the Claim, but nothing objective was placed before the court.

The draft defence which was exhibited to his affidavit was very little more than a bare denial of the crucial issues. It contained an assertion that Mr. Blair's Particulars of Claim did not disclose a cause of action but that assertion is patently flawed. The Particulars of Claim allege negligence and details the alleged particulars of Hyman's negligence in handling Mr. Blair's claim against Alpart.

In a later affidavit (filed April 30, 2008, Mr. Hyman at paragraph 5 attempted to hint, (the word "assert" would have been an overstatement) that the writ of summons was served on Alpart on 26th December, 1997. That intimation must be rejected out of hand. Hyman clearly did not believe it to have been served or they would not have applied for the renewal of the writ in December of 1998.

Assessment of Damages

There is one other aspect to be considered in respect of Hyman's position. It is whether Mr. Blair, having compromised with Alpart, his claim against it, has received full compensation for his loss. If he has not, has he

nonetheless hopelessly prejudiced any claim that he had against Hyman? Miss Davis argued that that was "not merely a question relating to assessment" of damages, but was "a question of liability as to whether there was any loss held to be attributable to the negligence of the defendant, if proved". I confess that I cannot appreciate the distinction which Miss Davis seeks to draw. The process of assessment of damages is to quantify the loss which is attributable to the defendant's wrong. In my view if Mr. Blair seeks to have his loss assessed then he will have the burden of proving his loss and how it has been affected, if at all, by the compromise.

The case of *Patricia Dixon v Clement Jones Solicitors (A Firm)* [2004] EWCA Civ 1005 is authority for saying that Mr. Blair, in having his case so handled, has lost something of value. He deserves to have that loss quantified and have set-off against it, the amount received in the settlement.

The unfortunate result of the default judgment is that Hyman will not be permitted to actively participate in the proceedings for the assessment of damages. Rule 12.13 prevents his participation, except to a very limited degree. See *Rexford Blagrove v Metropolitan Management Transport Holdings Ltd. and Lloyd Hutchinson* SCCA 111/2005 (delivered 10/1/2006).

It is without any pleasure that I remind claimants and their attorneys-at-law of the words of Lord Denning M.R. in *Baker v Bowketts Cakes Ltd.*, cited above, that claimants who delay until the very last minute, have only

themselves to thank if they are not given further time to serve their claim. "If it is his solicitors' fault, he can blame them."(Page 866 B)

Conclusion

Hyman have failed to show that they have a real prospect of success if they should be allowed to proceed to trial in this matter. There are very few facts in dispute concerning the issue of liability. The issues involved are all issues of law and an examination of those issues demonstrates that Hyman were negligent in their handling of Mr. Blair's case. It would not be in the best interest of the parties or the best use of the court's limited resources to have allowed this matter to proceed to trial, though the issues of law have required some close consideration. Hyman have no defence to Mr. Blair's claim. The application must be refused.

I, therefore, make the following orders:

1. Application to set aside default judgment and for extension of time to file and serve defence out of time is refused.
2. The Claimant is at liberty to apply for his damages to be assessed.
3. Costs of this application to the Claimant to be taxed if not agreed.