[2018] JMSC Civ. 129

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 04357

BETWEEN	**MICHAEL BOYD**	**CLAIMANT/RESPONDENT**
AND	**CITRUS GROWERS ASSOCIATION LIMITED**	**1st DEFENDANT/APPLICANT**
AND	**THE JAMAICA CITRUS GROWERS LIMITED**	**2nd DEFENDANT**

IN CHAMBERS

Mr. Christopher Henry instructed by Samuda & Johnson for the Claimant/Respondent

Ms. Carol Davis for the 1st Defendant/Applicant

Heard: May 24 & September 18, 2018

Civil Practice and Procedure - Notice of application to set aside default judgment- Civil Procedure Rules, 2002, Rules 13. 2 and 13.3

PALMER HAMILTON, J.

The Background

[1] The Applicant has sought to move this Court on its Amended Application for Court Orders to grant the following orders: -

> *"1. That the Default Judgment entered on the 14th day of October 2009 against the 1st Defendant be set aside pursuant to Part 13. 2 of the CPR;*

2. *In the alternative, that the Default Judgment entered on the 14th day of October 2009 against the 1st Defendant be set aside pursuant to Part 13.3 of the CPR;*

3. *That the Provisional Charging Order made on the 8th day of April 2015 and Final Charging Order made on the 15th day of July 2015 against the lands owned by the 1st Defendant to be set aside;*

4. *That all Orders made pursuant to the Default Judgment obtained against the 1st Defendant be set aside;*

5. *That the Applicant be permitted to file and serve a Defence within 21 days of the Order on this application."*

[2] The stated grounds on which the Applicant seeks to obtain the orders are: -

"1. That the Claim Form and Particulars of Claim herein were allegedly served by Registered Post on the 1st Defendant on Citrus Growers Association Limited, Bog Walk, Bog Walk P.O. St Catherine in circumstances where the Registered Office of the 1st Defendant is Bog Walk, St Catherine and the said registered letter allegedly serving the Claim Form and Particulars were not received by the 1st Defendant;

2. *That the Registered letter allegedly serving the 1st Defendant with the Claim and Particulars of Claim herein was not brought to the attention of the 1st Defendant who was unaware of the Claim made by the Claimant herein;*

3. *The 1st Defendant applied to set aside the Judgment made against it as soon as reasonably practical having become aware of the Claim;*

4. *That the 1st Defendant has a good Defence to the Claim made against it;*

5. *That the application for charging order was made after a period of 6 years had expired from the date of the of the default judgment and no leave to enforce the judgment was obtained."*

[3] The gravamen of the Applicant's contention is that the Default Judgment and consequential Orders made were irregularly entered as it was never served with the Claim Form and Particulars of Claim herein. Furthermore, the Applicant submitted that the Respondent was never employed to it and that they have a good Defence to the Claim. Mr. Percival Miller, Technical Director of the Applicant and Mr. Paul C. Miller, former Chairman of the Defendants both deposed Affidavits in support of the Application herein. Learned Counsel for the Applicant relied on the case of **June Chung v Shanique Cunningham** [2017] JMCA Civ 22 in support of her submissions.

[4] The Respondent in his initiating documents sought to recover damages for breach of contract and wrongful dismissal against the Defendants herein for unpaid salary as well as cash allowances and was granted Judgment on the 14th day of July 2009 in default of their failure to file an Acknowledgment of Service and Defence. The Respondent in an effort to enforce this judgment applied for a Provisional Charging Order and subsequently secured a Final Charging Order on the 15th day of July 2015 against the lands owned by the Defendants.

[5] The Respondent further submitted that the Applicant was properly served and notified of the matter herein and did not apply to set aside the Judgment as soon as reasonably practicable, as they were aware from as long ago as the 4th day of November 2009 of the Default Judgment. The Respondent maintained that the Applicant does not have a good Defence to the Claim.

[6] I have considered the submissions of both Learned Counsel and I am I grateful for their invaluable assistance in the instant case.

Issues

[7] The issues shaped from the Application are as follows: -

a) Whether service of the Claim Form and Particulars of Claim were effected within Part 5 of the Civil Procedure Rules, 2002 as amended (hereinafter referred to as “the CPR”)?

b) Whether the Default Judgment was irregularly obtained?

c) Whether the Applicant applied to the Court as soon as reasonably practicable after finding out that Judgment was entered against it?

d) Whether the Applicant has given a good explanation for failure to file an Acknowledgment of Service or Defence?

e) Whether the Applicant has a real prospect of successfully defending the Claim?

f) Whether there will be any prejudice suffered by the Respondent if the Default Judgment and consequential Orders were set aside?

g) Whether the Provisional Charging Order and the Final Charging Order should be set aside?

[8] In treating with the respective issues, for the sake of convenience, I will deal with issues B and E together.

Whether service of the Claim Form and Particulars of Claim were effected within Part 5 of the Civil Procedure Rules, 2002 as amended (hereinafter referred to as "the CPR")?

[9] The Applicant proffered that it is entitled to have the Default Judgment and subsequent Orders pursuant to the Judgment set aside by virtue of rules 13.2 and 13.3 of the CPR. It indicated that the Claim Form and Particulars of Claim were never received. Mr. Percival Miller in his evidence indicated that he went to the Post Office on a one-off visit on or around Monday the 24th day of July 2017. He was given a registered slip for a certain item which turned out to be a Notice of Application for Court Orders and that is when the Claim against the Applicant came to their attention.

[10] Learned Counsel for the Applicant contends that the Claim Form and Particulars of Claim were served at Bog Walk, Bog Walk P.O., St Catherine when the Registered address of the Applicant is in fact Bog Walk, St Catherine. The *"P.O."* in the registered address was wrongly included and she relied on the company details generated by the Companies Office of Jamaica to support this point. The Affidavit evidence of Mr. Percival Miller also disclosed that the Applicant had a special post office number, that is P.O. Box 80, and that there was often confusion at the Post Office between the 1st and 2nd Defendants as they have a difficulty in distinguishing the two (2) companies.

[11] The Respondent avers that the initiating documents were properly served in accordance with rule 5.7 of the CPR. Further, the fact that the letters were not returned by the Post Office from a lack of collection is conclusive evidence that the documents were received and collected by the Applicant. The Respondent also submits that the Default Judgment was personally served at the office of the Applicant by a Mr. Sergeant Phillip, and a Ms. Melrose Atkinson, the Company Secretary, collected same.

Law and Analysis

[12] The Honourable Mr. Justice Bertram Morrison at paragraph 33 of the case of **James Hogan v Renee Lattibudaire and Al-Tec Inc Limited** [2015] JMSC Civ. 85 stated: -

> *"…at the very outset that there can be no doubt that the paramount consideration when once civil proceedings (within the meaning of the CPR) has been commenced by one litigant against another, is that, the former is obliged to bring to that other's attention the fact of that proceedings."*

[13] Part 5 of the CPR sets out the procedure to be followed in serving court proceedings. In particular, rule 5.7 deals with service on a Limited Company and states as follows: -

> *"Service on a Limited Company may be effected –*
>
> *a)* *by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;*
>
> *b)* by leaving the claim form at the registered office of the company;
>
> *c)* by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company;
>
> *d)* by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or
>
> *e)* in any other way allowed by an enactment."

[14] Section 387 of The **Companies Act** conforms with rule 5.7 of the CPR and states that: -

> *"A document may be served on a company by leaving it at or sending it by post to the registered office of the company".*

[15] Also, rule 5.11 (1) of the CPR stipulates that service by registered post is proved by an affidavit of service by the person responsible for posting the claim form to the person to be served and rule 5.11 (2) states that the affidavit must exhibit a copy of the claim form and state the date and time of posting and the address to which it was sent.

[16] In relation to service of the Default judgment and consequential Orders rule 6.1 (1) mandates that: -

> *"Any judgment or order which requires service must be served by the party obtaining that judgment or order unless the court orders otherwise".*

[17] The documents must be delivered, posted or sent by courier delivery to a party at any address for service within the jurisdiction given by that party. Rule 6.6 of the CPR deals with the deemed date of service and service by registered post is deemed to be served twenty-one (21) days after the date indicated on the Post Office Receipt for Registered Post. Service by leaving documents at a permitted address is deemed served the business day after leaving the same document.

[18] The Respondent provided an Affidavit of Service filed on the 17th day of February 2009 that was executed in accordance with rule 5.11 (1). The deponent, Mr. Carlton Blye, disclosed that the documents were sent by registered post on the 7th day of October 2008 to the registered office of the Applicant and exhibited the registered slip numbered 071652 as evidence of same.

[19] Regarding the service of the Default Judgment, the said Mr. Carlton Blye swore to an Affidavit of Service filed on the 4th day of July 2014 that indicated that an attested copy of the Default Judgment dated the 17th day of February 2009 was served by registered post on the 5th day of November 2009 and exhibited registered slip numbered 1075833 as proof of service. Learned Counsel for the Respondent also submitted that a letter dated the 4th day of November 2009 demanding the judgment sum was personally served on the 6th day of November

2009 at the office of the Applicant by one Sergeant Phillip of the Bog Walk Police Station where one Ms. Melrose Atkinson, the company secretary collected same.

[20] In my judgment, given the evidence before me, service of the Claim Form, Particulars of Claim and the Default Judgment was properly effected on the Applicant within the ambits of the CPR. Whilst the Applicant contends that the inclusion of the *"P.O."* in the registered address was wrong and that it affected the delivery of the documents to their registered address, respectfully I must disagree with this submission mainly because there is evidence before the Court that subsequent documents herein were received by the Applicant at the same Post Office bearing the address of Bog Walk, Bog Walk P.O., St Catherine.

[21] Further, there is no evidence to suggest that the same documents were ever returned to the Respondent for lack of collection, as is the customary practice of the Post Office when a document is not collected by the intended recipient. An inference can be drawn that the address of the Applicant is Bog Walk, Bog Walk P.O., St Catherine. It is also useful to note that the letter head exhibited to the Respondent's Affidavit in response to the Application cites the Applicant's address as P.O. Box 80, Bog Walk P.O., St Catherine, Jamaica W.I.

[22] The Applicant contends that there was often confusion at the Post Office between the 1st and 2nd Defendants as they have a difficulty in distinguishing the two (2) companies. It may be that an intermediary party, the Post Office, affected in some way or the other the Applicant's receipt of the documents. However, this does not negate the deemed date of service of the documents by registered post, particularly when the Respondent's service of the documents was otherwise regular.

[23] In my view, this is an example of the hazards of service by registered post but the Respondent having done all that is necessary to properly effect service by this method cannot be punished for the inefficiencies of the intermediary party.

Whether the Default Judgment was irregularly obtained and whether the Applicant has a real prospect of successfully defending the Claim?

[24] Having found that service of the Claim Form and Particulars of Claim are in order, it is consequent that I find that the Judgment was regularly obtained and properly entered.

[25] The Applicant has applied for the Default Judgment to be set aside in the alternative pursuant to rule 13.3(1) of the CPR. The test embodied in this part of the CPR is whether the Defendant, that is the Applicant in this instance, has a real prospect of successfully defending the Claim. It therefore follows that in order to set aside the regularly obtained Judgment the Applicant must persuade the Court with evidence that he can successfully defend the Claim, that there is good explanation for the failure to file a response to the Claim and that the Application to set aside the Judgment was made as soon as reasonably practicable after finding out that Judgment has been entered.

[26] In examining the nature of the Defence, it is trite law that the Defence must be more than arguable and have a real rather than fanciful prospect of success. Sir Roger Ormrod in the case of **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc.** [1986] 2 Lloyd's Rep 221 stated that *"the 'arguable' defence must carry some degree of conviction."*

[27] The substantive Claim before the Court concerns recovery of damages for breach of contract and wrongful dismissal against the Defendants. The Applicant attached a draft Defence to the Affidavit of merit deposed to by Mr. Paul C. Miller in support of the Application to set aside the Default Judgment. The nature of the Defence is that the Applicant had no contract of employment with the Respondent and did not act on behalf of the 2nd Defendant, which is an independent company. The draft Defence declares that the Respondent was employed to Caribbean Preserving Company, an associated but separate legal entity from the Applicant. The Applicant further proposed in its draft Defence that the 2nd Defendant assumed the

Respondent's contract of employment and it is the 2nd Defendant that terminated the Respondent's contract of employment.

[28] The Respondent submitted that the Applicant does not have a good Defence to the Claim and that from the inception, he has been employed to the Applicant. Learned Counsel for the Respondent submitted the following: -

> *"1. The Affidavit of Mr. Paul Miller has shown that he was employed to Jamaica Citrus Growers Association with the prerogative of the Board of that said entity to transfer him towards the corporate group.*
>
> *2. In paragraph 12 of his affidavit he admits to being the Chairman of all three entities.*
>
> *3. In the affidavit of the Claimant exhibited is a contract where the same Mr. Miller admits that he employs him to the Jamaica Citrus Growers Association specifically the Caribbean Preserving Company (CPC). This shows that he was hired to the 1st Defendant".*

[29] Learned Counsel for the Respondent submitted that if the abovementioned evidence is not conclusive that the Respondent was employed to the Applicant, the Applicant through hiring him to be the General Manager of Caribbean Preserving Company (hereinafter referred to as "the CPC") is in control of the CPC and the Applicant is acting as its agent.

[30] Learned Counsel cited the case of **Barclays Bank PLC v Clarke et al** Suit No. 517 of 1996, Bahamas SC in support of his contention that the subsidiary is merely the agent for its parent by piercing the corporate veil. This case according to Learned Counsel shows that the question is whether on the factual circumstances a subsidiary company is an agent for its parent. It was held that if the factual circumstances are found, then the Court may pierce the veil and hold the companies to be one. Learned Counsel cited paragraph 48 of the judgment where Dunkley J (ag) stated: -

> *"This flexible approach is desirable so that the Court can deal with the varying circumstances where the Corporate form is used for fraudulent or improper purposes, or as a device to evade contractual or other legal obligation".*

[31] Learned Counsel submitted that the Applicant was using the device of corporate personality to evade its legal obligation to pay the Respondent.

[32] Learned Counsel for the Respondent also cited the case of **Smith, Stone & Knight v Birmingham Corporation** [1939] 4 All ER 116 to answer the question as to whether the subsidiary was carrying on business of itself or its parent could be determined from the factual circumstances. Atkinson J at page 121 of the judgment stated that six factors were to be weighted and these were:

> *"a) were the profits treated as the profits of the company?*
>
> *b) were the persons conducting the business appointed by the parent company?*
>
> *(c) was the company the head and the brain of the trading venture?*
>
> *(d) did the company govern the adventure, decide what should be done and what capital should be embarked on the venture?*
>
> *(e) did the company make the profits by its skill and direction?*
>
> *(f) was the company in effectual and constant control?"*

[33] The Respondent submitted that the Applicant satisfies all six (6) of these situations. The Respondent further proffered that the Applicant paid remuneration to the Respondent based on the employment contract dated the 22nd day of November 2005 and that the group of companies are operating on as a single economic unit. Learned Counsel cited the cases of **Wallersteiner v Moir (No.2)** [1974] 3 All ER 116 and **DHN Food Distributors v Borough of Towel Hamlets** [1976] 1 WLR 852 to support of both submissions.

Law and Analysis

[34] On the matter of whether the Respondent has a real prospect of successfully defending the Claim, it is useful to quote the words of Moore-Bick, J in the case of **International Finance Corporation v Utexara** [2001] CLC 1361. Moore-Bick, J stated that: -

> *"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. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside".*

[35] I find that the Applicant has an arguable case with a good Defence that has a real prospect of success and this provides it with a gateway for the granting of the Application to set aside the regularly obtained Default Judgment. The issues raised in the proposed Defence are such that it cannot be said that the Applicant has an unrealistic prospect of success. It raises questions of fact and law.

[36] The issues raised by the Respondent and the Applicant can only be determined on an analysis of the factual circumstances. As stated earlier, Learned Counsel for the Respondent relied heavily on the cases of **Wallersteiner v Moir (No.2)** (supra) and **DHN Food Distributors v Borough of Towel Hamlets** (supra). In both cases the Court conducted an in-depth analysis of the facts and examined whether to pierce the corporate veil and to determine the issue of a single economic entity.

[37] I accept the submissions made by Learned Counsel for the Applicant that there is not enough evidence to conclude whether the Applicant is an agent for the 2nd Defendant and to determine the existence of the six (6) factors listed in the case of **Smith, Stone & Knight v Birmingham Corporation** (supra). These are issues that can only be ventilated and determined at trial. Forming a provisional view of the probable outcome, I find that if the Applicant establishes at trial that it had no contract of employment with the Respondent then the Defence to the Claim will be successful.

Whether the Applicant applied to the Court as soon as reasonably practicable after finding out that Judgment was entered against it?

Law and Analysis

[38] The CPR emphasises the need for litigants to adhere to promptitude so as to avoid delays and resultant injustices. Accounting for time is necessary and in the words of the Honourable Mr. Justice Bryan Sykes (as he then was) at paragraph 24 of

the case of **Sasha Gaye Saunders v Michael Green et al** (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 2868, judgment delivered February 27, 2007 stated: -

> *"…in the absence of some explanation for the failure to file the acknowledgement of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish."*

[39] He further opined that if the delay is quite gross then this should impact negatively on the success in setting aside the judgment.

[40] The evidence of the Applicant is that the Claim herein first came to their attention when Mr. Percy Miller visited the Post Office and received a Notice of Application for Court Orders on the 24th day of July 2017. The Applicant obtained copies of the Claim herein from the Court's office and filed this Application on the 31st day of July 2017.

[41] The Respondent however contends the Applicant did not act within a reasonable time within which to apply for the setting aside of the Default Judgment as soon as reasonably practicable as required by rule 13.3 (1) (a) of the CPR. The Respondent submits that proper service of the Claim Form, Particulars of Claim and the Default Judgment were carried out from 2009 and it flies in the face of the interest of justice for the Applicant to be applying to set aside the Default Judgment after nine (9) years that it was brought to their attention. It would not be fair to the Respondent to now set aside the fruits of his Judgment.

[42] If the Applicant's evidence is accepted, the Application would have been filed within seven (7) days of the Applicant becoming aware of the Claim and subsequent Judgments herein. I find that the Applicant acted with alacrity in that regard. While I accept the Respondent's position that the Application to set the Default Judgment was made nine (9) years after the service of the Claim, the wording of the CPR clearly stipulates that time within the ambit of rule 13.3 (1) (a) is measured from the date the Defendant became aware of the Judgment, not when it is deemed served.

Whether the Applicant has given a good explanation for failure to file an Acknowledgment of Service or Defence?

Law and Analysis

[43] The explanation proffered by a defendant seeking to obtain a regularly entered judgment should be one that will persuade the Court that it ought to be accepted to do justice. The Applicant alleges that the Claim Form and Particulars of Claim were never brought to its attention. Though service was regular because of the method of service, the Applicant averred that they did not receive those documents.

[44] I reiterate the challenge of the inefficiencies within our postal services and say that it is a matter for the Rules Committee to address. Considering the circumstances of the case and the speed with which the Applicant acted in applying to set aside the Judgment after it became aware of same, I find it highly probable that if the Applicant was aware of the Claim herein it would have entered an appearance especially in the light of its proffered Defence to the Claim.

[45] In any event, I take note of the principle approved in the case of **Thorn plc v Macdonald** [1999] CPLR 660 that any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account but is not always a reason to refuse to set aside default judgment.

Will there be any prejudice suffered by the Respondent if the Default Judgment and Consequential Orders were set aside?

Law and Analysis

[46] Whilst the parties did not submit reasons as to the potential prejudice that will be attributed to them, I will consider this issue against the weight of the Defence having a real prospect of success. The prejudice that will be accorded to the Respondent if the Application is granted is that he will be kept out of the fruits of his Judgment and that, in and of itself, is prima facie prejudicial to the Respondent.

[47] The Default Judgment is something of value and the Respondent should not be deprived of it without good cause. However, there would be greater prejudice afforded to the Applicant if the Judgment was not set aside as the Applicant would be shut out of the process without being given the chance to have its Claim ventilated. In light of the overriding objective it would be an injustice to allow the Judgment to stand where the Applicant has a real prospect of demonstrating that it is not a proper party before the Court. In the circumstances, I find that the interest of justice will require that the Default Judgment be set aside in order to enable the merits of the Defence to be determined.

Whether the Provisional Charging Order and the Final Charging Order should be set aside?

Law and Analysis

[48] Part 48 of the CPR makes provision for charging orders. Rule 48.1 (1) begins by saying that this part deals with the enforcement of a judgment debt by charging 'land, stock (including stock held in court) and other personal property.' Rule 48.1 (2) states that stock 'includes shares, securities and dividends arising therefrom.'

[49] Learned Counsel for the Applicant submitted that in the event the Default Judgment herein was set aside, it would only be fair to proceed to set aside all Orders that were made for the enforcement. In particular, in so far as there was an Order for sale of the lands of the Applicant, such an order would be set aside because pursuant to rule 46. 2 of the CPR, permission is required for the issue of a writ of execution of six (6) years after the date of Judgment. Learned Counsel submitted that an Order for sale of land is a writ of execution, and it was applied for after six (6) years after the date of the Default Judgment.

[50] Learned Counsel for the Respondent submitted that there is no time limit in which to apply for a Charging Order that would require the Respondent to seek the leave of the Court on such an application.

[51] In the case of **Jennifer Messado & Co. v North American Holdings Co. Ltd**. [2014] JMSC Civ.101 the Honourable Mr. Justice Brown in considering the nature of a charging order at paragraph 57 stated that: -

> *"A Charging Order is granted by the court to secure payment of money pursuant to a judgment or order. Although the charging order has been described as a form of compulsory mortgage, it differs from a mortgage. The differences are, it passes no property (notionally or actually) to the judgment creditor, no right of possession or foreclosure but only a right of realisation by the judicial procedure created under rule 48.11. The charging order is therefore a security for a judgment debt and is imposed on property in which the judgment debtor is beneficially entitled."*

[52] In my view a charging order is not a writ of execution as defined in rule 46.1 of the CPR which includes an order for the seizure and sale or an order for sale of land. Therefore, the Honourable Ms. Justice Ingrid Mangatal at paragraphs 27-28 of the case of **Air Jamaica Limited v Stuart's Travel Service Limited and others** (unreported), Supreme Court, Jamaica, Claim Number 1998/A-018, judgment delivered February 24, 2011 stated as follows: -

> *"…that since the definition of "writ of execution" in Rule 46.1 of the CPR does not include charging orders, then the six year period after which permission must be sought to issue a writ of execution spelt out in Rule 46.2, does not apply to charging orders. There is also is no such six year period referred to in Part 48 of the CPR which deals with charging order.*
>
> *I also agree with Mr. Graham that a charging order in relation to land does not necessarily or inexorably lead to an application for an order for sale of land, which order is included in the definition of a writ of execution. A charging order is a separate proceeding and/or alternatively, it has its own utility, as a form of execution not covered under the definition of writ of execution."*

[53] I therefore adopt this ruling, however, considering the nature of Charging Orders, I find that consequent upon the setting aside of the Default Judgment it would be resultant to proceed to set aside said Order that was made for the enforcement of the Default Judgment.

Disposition and Orders

[54] It is hereby ordered: -

1. That the Default Judgment entered on the 14th day of October 2009 against the 1st Defendant/Applicant is set aside pursuant to rule 13.3 of the CPR;

2. That the Provisional Charging Order made on the 8th day of April 2015 and Final Charging Order made on the 15th day of July 2015 against the lands owned by the 1st Defendant/Applicant are set aside;

3. The 1st Defendant/Applicant is allowed 14 days from the date of this order to file its Defence to the Claim;

4. Case Management Conference is set for the 7th February 2019 at 3:30pm for half an hour;

5. No Order as to costs for this Application;

6. Parties are referred to Mediation to be completed within 90 days of the date of this order;

7. 1st Defendant's/Applicant's Attorney-at-Law to prepare, file and serve Orders made herein.