[2015] JMSC Civ 48

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 03117

BETWEEN	**MORANDA CLARKE**	**CLAIMANT**
AND	**DION MARIE GODSON**	**1ST DEFENDANT**
AND	**DONALD RANGER**	**2ND DEFENDANT**

Ms. Channa Ormsby instructed by Campbell & Campbell for the applicant

Mr. Paul Edwards instructed by Bignal Law for the claimant/respondent

Heard: 23rd and 24th February 2015 and 20th March 2015

Substituted service – Application to set aside substituted service by Insurer – Insurer saying they are unable to contact insured – Default judgment – Application to set aside default judgment – Test to be applied for setting aside default judgment – Extension of time to file defence.

Bertram-Linton
Master-in-Chambers

[1] The Claimant Moranda Clarke was a passenger in a public passenger vehicle PP264V which collided with the motor car 8201 FS owned by both the 1st defendant Dion Godson and the 2nd defendant Donald Ranger. The 2nd defendant was driving at the time of the collision.

[2] Miss Clarke filed her claim on 22nd May 2013 but was unsuccessful in serving the documents. Thereafter a successful application was made to serve their insurance company Advantage General Insurance Company Limited.

Interlocutory Judgment in default was subsequently entered and the matter slated to proceed to Assessment of Damages.

[3] Advantage General now applies to be heard in the claim and by their Amended Notice of Application filed on 29th October 2014 requests inter alia.

"(1) That permission be granted to the applicant to be heard in the claim.

(2) That there be an extension of time for filing of the Notice of Application for Court Orders and Affidavit in Support and that the documents be allowed to stand.

(3) That the Order for substituted service made herein on the 11th December 2013 to effect substituted service of Claim on Advantage General Insurance Company Limited in lieu of personal service of the personal service on the 2nd Defendant be set aside.

(4) That service of the Claim Form and Particulars of Claim pursuant to the order for substituted service in respect of the 2nd Defendant be set aside.

(5) That all proceedings flowing from the service of the documents to be set aside.

(6) That the default judgment entered in Binder 761 Folio 454 be set aside.

(7) That the Acknowledgment of Service filed on behalf of the 1st Defendant be permitted to stand.

*(8) That there be an extension of time within which the **1st defendant*** (type amended on 23rd February 2015) is to file a defence to the claim within 14 days of the hearing of the application herein.

(9) …

(10) …"

The Application is supported by two (2) affidavits that of the 1st defendant Dian Godson and Ruthann Morrison Legal Officer at Advantage General both filed on 3rd November 2014.

The Case for the 1st Defendant

[4] Miss Ormsby sought to move the court in respect of the 1st defendant for the default judgment to be set aside and extension of time to file a defence. In her Affidavit the 1st defendant asserts that the 2nd defendant who was a joint owner of the vehicle and her former spouse had gone to visit relatives and only informed her that he met into an accident. It was when the Investigator sent by the insurance company came to her home in August 2014 that she became aware of the suit. She had moved from her previous address and had not informed her insurance company of the new one.

[5] She said Mr. Ranger had been about his own business when the accident occurred and she should not be held liable for it. They ended their relationship sometime after the accident. He left Jamaica in January 2012 and she has not seen or heard from him since.

An Acknowledgement of Service was filed on her behalf on 4th November 2014 and this was as a result of contact being made by the attorneys now representing her.

Submissions for 1st defendant

[6] Ms. Ormsby says Ms. Godson's defence deserves to be heard since she was a co-owner of the vehicle and not to be held liable for the other co-owner's independent actions. There would be no issue she contends as to vicarious liability. When she was informed of the claim she contacted her insurers and thereafter made every effort to co-operate and involve herself in the defence of the action which she now feels has a real prospect of success. The default judgment had been served on the 8th September 2014 which meant there was a delay of about one (1) month and twenty (20) days to when the Amended Notice requesting the setting aside of the default judgment was filed.

[7] She concedes that the Acknowledgment of Service was filed after the Application but asked the court to view this as non-compliance with a formality that should not prove fatal. She asserts that what was important was that the deficiency has been corrected and the 1st defendant's application should be given standing by the court which has the discretion under Rule 26.1 to abridge the time.

[8] Mr. Edwards says in opposition to the 1st defendant's application that she has come with her application after an unreasonably lengthy period of time. Even if she only became aware of the suit in August 2014, the first hint that she had a defence only came in October 2014 a good two (2) months after. Her insurance company's actions must be attributed to her, they knew that they had problems contacting their insured from as far back as January 2013 when other claimants had filed their actions.

[9] Having found her in August 2014 and served with the default judgment in 8th September 2014 it was unreasonable that they waited until 29th October to represent her position through the Amendment to the application

Mr. Edwards submits as well that rule 11.16(2) has been breached since this application to set aside the substituted is outside the requisite fourteen (14) days from the date of service of the order. The default judgment was served on 8th September 2014 so the defendant had until 23rd September 2014 to approach the court.

[10] The Rule says of an application to set aside or vary order made on application made without notice. Rule 11.16

> *"(1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.*
> *(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.*
> *(3) An order made on an application for which notice was not given must contain a statement telling the respondent of the right to make an application under this rule."*

[11] He disagrees with Ms. Ormsby that just as in ***Austin v Public Service Commission & AG*** 2013 JMSC Civ 26 where Managatal J, found rule 11.16(3) to be directory rather than mandatory, rule 11.16 (2) was to be interpreted as mandatory and in keeping with the general thrust of the rules to observe and enforce timelines for the efficient conduct of litigation.

Analysis of 1st defendant case

[12] The court must of necessity deal with this issue first since it hinges on whether this application can move forward at all.

[13] In the **Austin** case as cited above, the reasoning concerned rule 11.16(3) and whether this was applicable to a matter which was pursuant to part 56 of the Civil Procedure Rules. Even though finding that the rule was not applicable in Administrative Law proceedings Managatal J, went on to examine the meaning of *"must"* in Rule 11.16(2) and 11.16(3) at paragraph 17 of that judgment. She was careful to separate the various contexts in which the word had been seen, as either a mandatory requirement or a permissive/directory one.

[14] She concluded that in the case of Rule 11.16(3) the language was such that

> *"It does not speak of the judge directing or being mandated to direct anything at all. Rather it states that the order "must contain a statement telling the respondent of the right…" to challenge the order made ex parte (my emphasis). This language does not correspond to that used in respect of orders required to be made by the judge. The notice or statement, whilst important, is therefore a procedural formality. It does not go to the substance of the order itself. Consequently where it is absent, it is not a defect which will render the order void. Rule 11.16(3) is in my judgment directed at the formal order and not the adjudicating decision in the substantive order."*

and later at paragraph 27 she concludes

> *"In my judgment, the situation regarding Rule 11.16(3) is analogous to one where an injunction was ordered requiring a party to do a particular act within a specified time but the formal order did not contain the penal notice. The fact that the penal notice was not contained in the order does not mean that the substantive of the order would be invalid."*

Based on the reasoning in relation to Rule 11.16(3) Mangatal J, cannot be faulted for coming to the conclusion outlined. Notable though is that even though the section is headed in relation to both Rule 11.16(2) and 11.16(3) the clarity in reasoning focuses only on Rule 11.16(3).

[15] In my judgment the CPR Rule 11.16(2) is meant to be mandatory and is distinguishable from the one in Rule 11.16(3) as to when the application to set aside or vary an order made on application made without notice is to be made.

This is so because in keeping with the stated thrust of the Civil Procedure Rules a specific time frame is being laid down not as a directory or permissive one as in the case of a notice corollary to the order of the court but as a structure to prevent protracted litigation on an issue – that of the decision to grant an ex parte order.

[16] I am persuaded to this view as time and again the rules have been endorsed as a means of preventing undue delay in the adjudication of matters. The dicta of Sykes J, in ***Carr v Burgess*** and ***James Robinson v Maxine Henry Wilson*** is useful on this point. In the latter decision at paragraph 8 he stated

> *"8. …unless conditions are imposed, the system would be open to wanton abuse …"*

and further on

> *"Litigation at the best of times is stressful which is not reduced by increasing the anxiety caused by undue delay in resolving the matter …"*

As far back as 1995 Wolfe JA (as he then was) in ***Wood v H.G Legions Ltd and Another*** (1995) 48 WIR 240 at 256 and endorsed by Panton JA in the same case said

> *"I make bold to say, plagued as our courts are with inordinate delays, this court must develop a jurisprudence which addresses our peculiar situation."*

Panton JA says in ***Port Services Ltd v Mobay Undersea Towns*** SCCA No 18/2001 (delivered March 11, 2002)

> *"In this country, the behaviour of litigants, and in many cases, their attorneys-at-law in disregarding rules of procedures, has reached what may comfortably be described as epidemic proportions."*

Even though these pronouncements were made within the context of an application to strike out a case because of inordinate delays they are indicative of the sentiments directly predating the implementation of the Civil Procedure Rules of 2002.

[17] When the rules were introduced Cook JA (as he then was) in ***Alcan Jamaica Company v Herbert Johnson & Idel Thompson-Clarke*** SCCA 20 of 2003 (delivered 30th July 2004) at pg 26 said

> *"These rules are the antidote to the epidemic of delay against which Panton JA so rightly inveighed in Wood."*

It is within this context that I say that a mandatory timeline was being dictated under Rule 11.16(2).

The Rules however also under Rule 26.1(2) correspondingly provides for the extending of the time for such an application in the exercise of the court's discretion and this provides some flexibility to ensure that justice is done.

[18] In ***Hoip Gregory v Vincent Armstrong*** SCCA No 80 of 2006 Application No 81/2006; ***Hoip Gregory v O'Brien Kennedy*** SCCA No 81 of 2006; Application No 165/2006 delivered 23rd August 2012. Brooks JA at para 12 rightly says

> *"… there are circumstances which sometimes arise that require a defaulting applicant to succeed despite his default. In some of those circumstances, practicality demands that successful result."*

This court would add that the over-riding objective is also a factor that would sometimes demand that successful result. This does not mean that the Rule was not mandatory in the first place.

As said in ***Saunder v Green*** **and others** 2005 HCV 2868 the *"risk of injustice to the claimant must be considered because justice cannot be for the defendant alone or for one party."*

[19] In my judgment in the instant case, the over-riding objective would best be served by recognizing that the 1st defendant is indeed in breach of the mandatory rule in Rule 11.16 (2) but the court's discretion is justly exercised in allowing the substantial issues to be considered by enlarging the time to file the application in her favour.

[20] Having exercised my discretion in favour of the application for enlargement of time to facilitate the application before the court and the Acceptance of the Acknowledgment of Service, which lays the foundation for the discretion of the court to be exercised, I now turn to consider whether the judgment should be set aside and the 1st defendant allowed an extension of time to file her defence.

CPR Rule 13.3 permits the 1st defendant to apply and must I consider whether the defendant has a real prospect of successful defending the claim

Rule 13.3

> *"(2) In considering whether to set aside or vary a judgment under this, the court must consider whether the defendant has:*
> *(a) Applied to the court as soon as reasonably practicable after finding out that judgment had been entered*
> *(b) Given a good explanation for the failure to file an acknowledgement of service or a defence as the case may be*

In regard to items (a) and (b) above I am persuaded to the reasoning in the submissions of counsel Mr. Edwards that the 1st defendant's response in both accounts have been inexcusable and left to these considerations alone they should be shut out from the seat of justice.

Should this however conclusively deprive her of the right to be heard on the merits?

[21] Even with the absence of a good explanation for the failure to file an Acknowledgment of Service and a defence within the prescribed time, I am mindful that an important test to be applied is whether the 1st defendant has shown a defence on the merits that has a real prospect of success.

[22] Ms. Godson has proffered as her chief argument that she cannot be held liable for the actions of the 2nd defendant as -:

1) He was a co-owner in his own right and did not need her permission to use the vehicle and
2) At the time of the accident he was not engaged in any business or activity connected to her.

[23] There is no dispute as to the ownership of the car. The critical question here is whether the driver (2nd defendant) when he made the journey on the day of the accident was acting in a way so as to ascribe liability to the 1st defendant.

[24] Our Court of Appeal has long widened the obligation of owners of vehicle in reliance on the privy council decision in ***Clinton Bernard v The Attorney General of Jamaica*** [2004] UK PC 47

[25] As it relates as well to the substantive law on vicarious liability, the owner and driver of vehicles have separate obligation to an effected third party, therefore a claimant can sue and proceed against an owner soley.

There, no doubt are several triable issues which in the interest of justice ought to be ventilated and do have a real prospect of success.

[26] I have also applied my mind to the likelihood of prejudice to the claimant if the default judgment is set aside. Undoubtedly this "*thing of value*" which the claimant holds should not be lightly disturbed. However there is no indication on the record that since judgment was entered on 23rd April 2014 the claimant has been in a position certainly not prior to May 2014 when the insurer first filed its application to proceed any further with the matter.

I am of the view that any prejudice to the claimant can be compensated by an appropriate award of costs.

[27] I have considered the arguments of both counsel on the issue and also am persuaded by the learned authors of **Blackstone's Civil Procedure 2004** at para 1.26 that

> *"The main concept of the over-riding objective is that the primary concern of the courts is to do justice.*
>
> *Shutting a litigant out through some technical breach of the rules will not often be consistent with this because the primary purpose of the civil courts is to decide cases on their merits not reject them for procedural default."*

Accordingly with regard to the 1st defendant I am of the view that the default judgment entered against her should be set aside.

The case for the 2nd defendant

[28] The issue in relation to the 2nd defendant is championed by Advantage General who says that they were informed of several other claimants claiming damages in the same accident. They had a report from the 2nd defendant of the accident.

[29] A letter was sent to him in about January 2013 at the address shown in their records which was returned in March 2013. They contend that based on their futile attempts to locate the 2nd defendant and the information that he had migrated without them being aware of how to contact him, they had fulfilled their obligation and the order for substituted service on them should be set aside.

[30] Their contention as represented by Ms. Ormsby is that all reasonable attempts have been made to locate Mr. Ranger and these having failed they should not be called upon to honor the terms of the substituted service and it should be set aside.

[31] Ms. Ormsby relied on the affidavit of Ruth-Ann Morrison which sought to outline their position and in particular at para 9 at seg. There, they complain as well that the notice applicable to Rule 11.16(3) had not been served on them. This court has already discussed that issue in detail and so will go on to their substantive request which is that in keeping with the requirements of the law enunciated in ***Insurance Company of the West Indies v Shelton Allen (Administrator of the Estate of Harland Allen)*** [2011] JMCA Civ 33**,** that once reasonable to contact the defendant failed the order should not stand.

[32] Ms. Ormsby submits as well that the Court of Appeal in ***British Caribbean Insurance Company Ltd v Barrett & others*** is instructive on the issue. This case once again highlights that it is in the discretion of the tribunal to determine in each set of circumstances what is reasonable.

[33] The issue before me then is, what were these efforts, and can they be deemed reasonable such that Advantage General should be relieved of the responsibility under the order.

The nature of the efforts made

[34] Miss Morrison says in her affidavit that from as far back as January 2013 they attempted to locate the defendants in relation to other claimants in the other matters. They employed investigators, who after locating the 1st defendant at an address not previously known to them, reported that it was their information that the 2nd defendant had migrated. The 1st defendant also contributed the same information.

Thereafter there seems to have been nothing done to follow up on that information.

[35] I am inclined to agree with submissions made by Counsel Mr. Edwards that in this matter Priority Investigation Services Limited may well have done an affidavit outlining the steps they took in their investigations and the testing of the source of their information.

[36] Having visited the address on file and not locating any of the defendants in the first instance they seem to have had additional information and followed other modes of enquiring as the 1st defendant was located and no information given as to how this was done.

[37] What is reasonable must be looked at, as in my judgment the court must not fall into the trap of expecting necessarily the steps of enquiry to be so onerous that it becomes unrealistic for the insurance company to achieve.

[38] I note that once the information was received that the 2nd defendant was abroad nothing further seems to have been done.

To my mind the affidavit of Miss Morrison falls short in several aspects.

(a) It is clear on the affidavit evidence before this court that Mr. Ranger had relatives in Spanish Town who Miss Godson says he was visiting at the time of the accident, no account is given as to whether these persons were contacted in an

attempt to ascertain their knowledge as to his whereabouts or to bring the matter to his attention. This to my mind would have been a reasonable step to take.

(b) Was a general advertisement done whether locally or abroad by the several means available to indicate to the 2nd defendant or anyone knowing him that attempts were being made to contact him?

[39] To my mind these are reasonable steps utilized on a daily basis and endorsed by our very rules to bring claims to the attention of proposed litigants.

I say this as it is well noted in the **BCIC** case that the Court of Appeal declined to venture into what would constitute *"reasonable efforts by an insurer to contact its insured".*
(Phillips JA a para 25)

[40] I feel no such reticence though since my examination of the nature of these matters on which this case turns would suggest that if the claimant has already been unsuccessful in serving the 2nd defendant at the given address the insurer by virtue of the relationship and obligation under their contract should not be absolved if no additional step is taken.

Certainly if this was done Miss Ruth-Ann Morrison's affidavit does not disclose it.

[41] I am therefore dissatisfied with the efforts disclosed by Advantage General and do not think that in the circumstances the order for substituted service should be disturbed.

[42] I therefore make the following orders in keeping with the amended application filed 29th October 2014.

1. Permission is granted for the Applicant to be heard.
2. Extension of time for filing of the Notice of Application for court orders is granted and the documents are allowed to stand as filed.
3. In relation to the 1st defendant, default judgment entered on the 9th July 2014 is set aside.

4. The Acknowledgment of Service filed on behalf of the 1st defendant is permitted to stand as filed.
5. Extension of fourteen (14) days within which the 1st defendant is permitted to file her defence is granted and takes effect from the date of this order.
6. Application to set aside Service of the Claim Form and Particulars pursuant to the Order for substituted service in respect of the 2nd defendant on Advantage General is refused.
7. Costs are awarded to the claimant for this application and for costs thrown away to be agreed or taxed.
8. The applicant is to file and serve the formal order.
9. Leave to appeal is requested by the applicant and granted.