[2014] JMSC CIV 233

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2011 HCV 07856**

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|---|---|---|
| **BETWEEN** | **SEYMOUR FERGUSON** | **CLAIMANT** |
| **AND** | **AMECO CARIBBEAN INC.** | **1ST DEFENDANT** |
| | **KEEBLE DIXON** | **2ND DEFENDANT** |

**Civil Practice – Application to set judgment aside – Burden on Applicant — Information necessary to assess whether application made as soon as "reasonably practicable" and whether explanation is a "good" one- Observations on administrative error as a reason.**

Appearances: Jason Jones instructed by Nigel Jones & Co. for the Claimant

Franklyn Halliburton instructed by Hart Muirhead & Fatta for the 1st Defendant

Heard: 6th November 2014 and 13th November 2014.

**CORAM: BATTS J**

**[1]** This judgment was orally delivered on the 13th November 2014.

**[2]** By Notice of Application filed on the 6th October 2014 the 1st Defendant seeks to have a judgment in default set aside and time extended for the filing of its Acknowledgement of Service and Defence. The Notice states the grounds for the application rather concisely:

*" a) At the time when request for judgment was filed the First Defendant had not been served with a copy of the Particulars of Claim which had been duly filed.*

*b) The 1st Defendant has a real prospect of successfully defending the Claim.*

*c) There is a good reason why the acknowledgement and defence were not filed and this was due to unintentional administrative error.*

*d) The application was made as soon as it was reasonably practicable to do so after the legal vacation when the 1st Defendant became aware that the Claimant requested a default judgment."*

The Application is supported by an affidavit of Novelette Appleby an administrative assistant employed to the 1st Defendant.

**[3]** The Claimant opposes the application on the following grounds:

a) The Rules do not require that Particulars of Claim be sealed.

b) There has been no real Defence demonstrated because the alleged lease has not been exhibited.

c) The reason for delay advanced is by law not a good one and must not be accepted by this Court.

d) The court is not in a position to excuse delay or decide if the application is as soon as reasonably practicable because there is no evidence as to the relevant time period. It was the duty of the 1st Defendant to provide this information.

**[4]** In considering this matter I bear in mind that a party is not to be driven from the seat of judgment without an opportunity to be heard save and except where to do so would result in an injustice. This fundamental precept of natural justice,

recognised in the constitutional right to a fair hearing, is expressed in ***Evans v Bartlam [1937] 2 All ER 646.*** It remains good law.

**[5]** The Civil Procedure Rules are to be regarded in that light even as the Court seeks to enhance its efficiency and penalise delinquency. The Rules and in particular Order 13.3 state:

> *"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 Defence as the case may be."*

**[6]** In this matter the 1st Defendant urges that the Default Judgment was irregularly entered and should be set aside as a matter of right. This is because the Particulars of Claim served upon them had not been issued by the Court. I asked counsel to point me to the Rule which required that such a document be sealed. He said there was no such rule, however his contention was that the Particulars of Claim served had not been filed. I asked how did he know that. He said the document served did not have the normal stamp demonstrating it was a true copy of the one filed. Counsel was unable to point to a rule making it mandatory for a document served to have such a stamp.

**[7]** I agree with the submissions of counsel for the Claimant that the Rules require only that the originating process i.e. the claim be sealed. Furthermore service of Claim and Particulars were proved by an affidavit of service filed in support of the

Default judgment. Additionally by affidavit of Jason Jones filed on the 29th October 2014, a letter from the Claimant's former attorney-at-law affirms that a true copy of the Particulars of Claim filed in the Supreme Court was the one served on the 1st Defendant. I should add that perusal of the Court's file shows clearly that the Particulars of Claim were indeed filed on the 15th December 2011.

**[8]** I therefore find that there has been no irregularity. The 1st Defendant was duly served with a Claim and Particulars of Claim. In any event I would have in the circumstances adopted the approach of my sister McDonald J in ***Hennie v Ja. Pre-Mix [2014] JMSC Civ 50*** Unreported judgment delivered on the 11th April 2014 (a case helpfully cited by Mr. Jones),that " technical" errors should not be allowed to defeat the substance of a claim. In that case a Defence was filed but bore an incorrect suit number. The Claimant , being well aware a Defence was filed, was not allowed to maintain a judgment in Default entered in such circumstances. In this case even if there was a breach of the Rule (expressed or implied) I would have found the breach to be lacking in substance. The judgment is therefore regularly entered and will not be set aside as of right.

**[9]** I now turn to consider whether the 1st Defendant has demonstrated that it has a Defence with a real prospect of success.

**[10]** The Claim is in negligence arising from a motor vehicle accident. The Claimant alleges that the 1st Defendant's motor vehicle was being driven by its servant or agent. In her affidavit Ms. Appleby states that the 1st Defendant's core business is the lease of fleets of vehicles for hire and reward. The company's records confirmed that the vehicle was at the material time leased to Caribbean Broilers Limited under the terms of an Agreement dated 8th May 2006 and subsequently amended up to September 2011. The agreement she says provides for Caribbean Broilers to insure the vehicles, indemnify the 1st Defendant and, that Caribbean Broilers has full custody and control of them. The Defence according to Mrs. Appleby is based upon legal advice that the 1st Defendant cannot be liable for alleged negligence of a party who was not its servant or agent using its

vehicle which was leased for hire and reward. A draft Defence is attached to the Affidavit.

**[11]** It is manifest that a Defence with a real prospect of success has been demonstrated. Certainly it is too late in the day to question the legal principles established in ***Launchbury v Morgan [1972] 2 All ER 605*** and applied here in Jamaica in ***Avis Rent-a-car v Maitland (1980) 32 WIR 294.*** To be fair Claimant's counsel did not seek to do that. Rather he urged that the defence could not be demonstrated unless the lease agreement was exhibited. He relied on ***Guardsman Alarms Ltd. v Graymill Engineering Ltd.*** claim No. HCV 1113/2007 unreported judgment delivered 11th November 2009, and in particular Justice Brown's dictum at paragraph 10 of the judgment that:

> *"A real prospect of successfully defending a claim is not demonstrated by vacuous assertions supported by nothing more than the Defendant's oath. Without conducting a mini trial, the proposed defence is doomed to end in ashes without the rejuvenating force of the phoenix. Finding as I have, that the defence is hopelessly unconvincing, that should be dispositive of the matter."*

**[12]** The judge's admirable dictum cannot be divorced from its context. So that, and this is obvious, in many cases oral evidence will suffice in and of itself. Indeed evidence very often is only oral. In the case before me the issue at trial will be whether the driver was the 1st Defendant's servant or agent. This Ms. Appleby has denied. The existence of a lease agreement may be part of the proof of that assertion. However it is not necessary for that purpose. Proof, for example, that the driver was not an employee may suffice. I am not at this stage duty bound to decide whether this is so or not, it is sufficient for me to be satisfied that the Defence raised has a real prospect of succeeding. I hold that it does.

**[13]** The position before me is to be distinguished from that facing the Hon. Mr. Justice Brown. There the claim was for the price of security services rendered.

The purported Defence was that the services had not been rendered properly causing loss. There was no evidence submitted of the alleged burglaries or loss; nor were cheques exhibited proving alleged part payments. In any event as the Judge correctly stated an assertion that "routine random checks" would have averted a burglary with any certainty is an unsound argument. So the Defence itself even accepting its oral proof, was not a good one i.e. the fact a burglary occurred was not sufficient evidence that the contract to provide security services had not been performed.

**[14]** I have spent some time on that aspect because it formed a major part of the Claimant's submissions. I hold however that the Defendant has done enough to establish the intended Defence which has a real prospect of succeeding.

**[15]** The Claimant's more persuasive arguments have to do with the lacunae in the material available for me to assess the delay in filing Acknowledgement and Defence, the prejudice to the Claimant, and, whether the Defendant acted with alacrity when making this application. Again reliance is placed on dictum of Justice Brown in ***Guardsman Alarm Ltd. v Graymill Engineering Ltd.*** (above).

> *"It is the Defendant/Applicants who must place before the Court such material, as will enable the court to say whether they applied as soon as was reasonably practicable after finding out that judgment was entered. This the Claimant/Respondent may seek to rebut but the onus is on the Defendant/Applicant."*

I accept this statement of principle without demur.

**[16]** The affidavit of Miss Appleby states that the Statement of Case was served by registered post under cover of a letter dated 17th January 2012. She indicates that the 1st Defendant has "no record of receiving" the registered letter because it was not recorded properly and was misfiled. The documents were located only after their attorneys confirmed with the Post and Telegraph Department when and who collected the registered letter. She then states that "within two weeks"

of confirming this internal error the 1st Defendant instructed their attorneys as soon as practicable to file the application.

**[17]** The application was filed on the 6th October 2014. The 1st Defendant has provided no information as to when the oversight was discovered, or as to what brought knowledge of the claim to their attention, or as to when their attorneys were instructed. This court cannot begin to assess whether an explanation for a delay in filing Acknowledgement and Defence is "good" within the meaning of the rules or, whether an application has been made as soon as "reasonably practicable" without such information. It is the duty of the Defendant/Applicant to provide this because the burden lies on the applicant to satisfy the court, moreso where the entire period involved is two years.

**[18]** The rules mandate consideration of both those issues. It would be manifestly unfair to the Claimant were I to set aside the judgment in these circumstances. It may be that the delay is inordinate, it may be that the explanation is a good one and it may be the application was not made as soon as reasonably practicable and so too the converse. However without information as to the period of delay and what is attributable to the attorney or to the client the court cannot assess whether the explanation of "inadvertence and administrative oversight" is a good one.

**[19]** For these reasons therefore the application to set judgment aside is refused.

**[20]** Out of deference to the capable argument strongly urged by the Claimant, that administrative error and inadvertence is not a good explanation, I will say a few words in that regard. The Claimant's counsel asserts that "generally administrative oversights are not sufficient explanation". He relies on ***Teslyn Carter v JUTC Cl. No. 2008 HCV 00555*** unreported judgement of the 9th November 2009, ***Haddad v Silvera SCCA 31/2008*** unreported judgment delivered 31st July 2007 and ***H.B. Ramsay & Associates Ltd. v Ja. Redevelopment Foundation [2013] JMCA Civ 1*** unreported judgment delivered 18th January 2013.

**[21]** In the Teslyn case Master George does say that the reasons given were not good reasons. However, this statement cannot be divorced from the facts found that (a) there was no explanation why the claim was only received on the 10th March 2008 when it was posted on the 31st January 2008 and (b) the JUTC's insurers returned the claim (among others) to them on the 16th April 2008 but they only instructed attorneys in June 2008. It bears noting also that the Master found the proposed defence of little merit and with no reasonable prospect of success. In these circumstances, and given the extent of the delay over several months it is little wonder the court found that the "administrative mishaps, blunders, inefficiency and confusion contributed to by counsel, the Defendant's insurers and the Defendants" not to be a good explanation.

**[22]** In the ***Haddad*** case the decision was not as Claimant's counsel submitted that administrative error is not a good explanation. The decision was that the absence of an explanation for a failure to act promptly was decisive, as per Smith JA:

> *"The reasons proferred for the delay were that (i) the parties were having discussions with a view to settling the matter and (ii) the attorney-at-law who had conduct of the matter had left the firm. There was no affidavit from the attorney, who had left, as to the reason for non-compliance on his part."*
>
> The Court of Appeal in those circumstances declined to extend time for the filing of the record of appeal..

**[23]** In the H.B. Ramsay's case the court stated:

> *"Mr. Ramsay's affidavit does not give any explanation for the failure. His evidence that his attorneys-at-law have told him that the default was by way of inadvertence is inadequate. Mrs. Minott-Phillips Q.C. on behalf of the respondents submitted that the term "inadvertence" was a conclusion to be drawn from an explanation*

*and was not itself an explanation. I agree with the submission." Per Brooks JA.*

**[24]** The learned judge did go on to say that at best the attorneys explanation would have been "oversight." He then said,

*"Based on the situation described above and the expected action that it demanded, I would describe such oversight as inexcusable and consequently rejected that explanation as being a good one."*

What were the circumstances? Briefly in that case an order was made and breached. An unless order was then made extending the time for compliance. The applicant says he had paid the required sum to his attorneys two days before the extended deadline. The sanction applied immediately and yet attorneys took one month before applying for relief. It is in those circumstances where there was an exaggerated lack of urgency notwithstanding repeated breaches of the court's orders, one of which was an unless order, that the court said inadvertence was not a good explanation. The case to my mind is easily distinguished.

**[25]** In the final analysis however I have no evidence before me on which to begin to assess the delay its consequences or the reasonableness of the explanation. The application as I have said is dismissed with costs to the Claimant.

David Batts
Puisne Judge
November 13, 2014