IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2005/HCV2562

BETWEEN	HENRY HARRIS	CLAIMANT/RESPONDENT
A N D	MARIO FYFFE	DEFENDANT/APPLICANT
A N D	MARIE LOPEZ-GORDON	DEFENDANT/APPLICANT

Mrs. Suzette Campbell instructed by Campbell & Campbell for Defendant/Applicants.

Mr. Richard Reitzin instructed by Reitzin & Hernandez for Claimant/Respondent.

Application to set aside default judgment and for judgment on admission to be entered instead – whether rule 13.3 of the CPR allows such an application

Heard: 21st June, and 30th July, 2007

Coram: Brooks, J.

The Defendants Mr. Mario Fyffe and Mrs. Marie Lopez-Gordon have made an unusual application. They seek to have set aside, a judgment which was entered against them in default of defence. They however do not wish to contest the issue of liability as do most applicants in that position. They wish instead, to have a judgment on admission entered in favour of the Claimant Mr. Henry Harris, and to be allowed to file a defence contesting the quantum of damages to be awarded to him.

Mr. Reitzin, representing Mr. Harris, vigorously opposes the application. He asserts that there is no real prospect of defending the claim

and therefore the court has no jurisdiction to set aside the default judgment. It is therefore necessary to:

a. identify what are the practical differences between the two types of judgment, and,

b. decide whether Mr. Fyffe and Mrs. Lopez-Gordon have satisfied the requirements of the Civil Procedure Rules 2002 (CPR), concerning setting aside judgments entered in default, bearing in mind the context in which they wish to do so.

The Facts

Mr. Harris' claim arises out of injuries he sustained in a motor vehicle collision which occurred on December 1, 1996. The Claim Form and Particulars of Claim were filed in court on August 30, 2005. Mr. Fyffe and Mrs. Lopez-Gordon acknowledged service of the documents through their attorneys at law. The form used for the acknowledgment indicated that they intended to defend the claim and that they did not admit either the whole or any part of the claim.

The acknowledgement of service was filed on November 3, 2005; outside of the time prescribed in the rules. The stage was therefore set for a defence to be filed, but that did not occur, and on November 8, 2005 Mr. Harris' attorneys at law filed a request for judgment in default of defence.

On December 16, 2005 a document entitled "Defence of the Defendants" was filed, but it was clearly out of time, and did not have the prior approval of either Mr. Harris' attorneys or the court. The judgment was entered on March 6, 2006, with the assessment hearing set for July 12, 2006. The assessment was not heard on that date, although counsel for both sides were present. The case was next set for the hearing of the assessment of damages on January 18, 2007. Two days before the assessment hearing, the present application was filed.

The Law

The distinction between default judgments and judgments on admission

The case of *Rexford Blagrove v Metropolitan Management Transport Holdings Ltd. and Lloyd Hutchinson* SCCA 111/2005 (delivered 10/1/2006) is a watershed case in terms of the procedure to be adopted at hearings for assessment of damages. This unreported decision has caused the modification of the procedure which was followed in a number of cases of assessment of damages. Smith, J.A. in *Blagrove*, provides guidance as to the rights of a defendant at the assessment hearing, following the advent of the CPR. The essence of the decision is that a Defendant, who is served with a Claim Form and Particulars of Claim, has three courses open to him. Each option has its own ramifications at the assessment hearing.

The first option the Defendant has is to allow a judgment in default to be entered. In those circumstances his right of audience at assessment is severely restricted. The restrictions are set out in rule 12.13. The right to address the issue of quantum of damages is not included among them.

The second option is to admit the claim made against him. That is done when acknowledging service of the Claim Form, or even subsequently, by letter or notice (r. 14.1 (2)). Having taken this course, a Defendant is entitled to cross-examine the Claimant and/or his witnesses and make submissions on the issue of quantum. He is however, not entitled to adduce evidence (r. 16.3 (6)). Where the Defendant adopts this course, the Claimant ought properly to enter a judgment on admission and not a judgment in default (r. 14.4 (1)). If the Claimant (nonetheless) proceeds by way of default judgment, the court may allow the defendant to exercise his rights under this option as if the Claimant had secured judgment on admission.

The Defendant's third option is to, not only acknowledge service, but also to file a defence setting out the facts which he seeks to prove concerning the quantum of damages With this option the defendant is entitled to adduce evidence on the issue of the quantum of damages. He would also be entitled to cross examine the Claimant and his witnesses and address the court in respect of those issues, incorporating such facts as he

hopes would have been proved by the evidence which he has adduced (r. 10.2 (4) and 16.3 (6)).

It is these differences between default judgment and judgment on admission which have induced Mr. Fyffe and Mrs. Lopez-Gordon to make the present application. They wish to be able to participate in the assessment exercise, to the extent afforded by option three outlined above.

What therefore are the requirements which they have to satisfy in order to secure their objective? Rule 13.3 is the relevant rule to be considered.

Rule 13.3 and the ground for setting aside a default judgment

Rule 13.3 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 provides the court with more flexibility than the previous version and

allows the court to consider the Overriding Objective in arriving at its decision. The rule is now closer to the UK rule 13.3.

There have been a number of cases decided in this era of the CPR 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, defined the phrase as follows:

> "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 respectfully agree with that as a working definition of the phrase. In our jurisdiction, Mangatal, J. (Ag.) (as she then was), carefully considered the meaning of the phrase. This was in the case of *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. Her Ladyship found the case of *Swain v Hillman* [2001] 1 All E.R. 91 helpful in her assessment.

Although rule 13.3 has been modified since that decision, 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 is raised by way of that evidence is the essence of a real and not a fanciful, defence. Does that test however, apply to the case where a defendant does not wish to contest liability? Mr. Reitzin stoutly asserts that it does not. He submitted that Mrs. Campbell representing Mr. Fyffe and Mrs. Lopez-Gordon, has conceded as much in her submissions. Mrs. Campbell stated:

> "In light of the fact that the claimant is suing to recover damages the amount of which has not yet been determined by the court, the Defendants have no way or method of proving that their proposed defence has a reasonable prospect of success."

Mr. Reitzin warned that for the court to find otherwise would be a launch into "judicial activism". Despite Mr. Reitzin's warning, it is my view that there could be cases where a defendant could justify an application to file a defence limited to the quantum of damages. If, for instance, a defendant had medical evidence which contradicted the claimant's doctor's opinion, that would be such a basis. As another example; where he had evidence that the claimant was malingering or his claim for other loss was

false, the defendant could justify an application to file a defence to that effect. In either case, if the evidence was accepted by the court conducting the assessment, it would result in a reduction of the damages. If such a defendant would be able to file such a defence, in time, without leave, as is contemplated by rule 16.3 (6), why would he be automatically prevented, solely on the basis of having been late in filing that defence, from asserting that he had a "real prospect of successfully defending the claim" in respect of the damages to be awarded? I do not find that there is a valid distinction between the two scenarios. In summary therefore, I find that rule 13.3 does allow for a defence to the claimant's claim, solely on the question of the quantum of damages. The present application may therefore be assessed according to the requirements of the rule.

Is there any room for natural justice to be applied in considering applications to set aside?

Mrs. Campbell submitted as an alternative, that natural justice principles, particularly the need to hear both sides, provided a basis for granting the application. Mr. Reitzin asserts that the principle of natural justice relied upon by Mrs. Campbell in her submissions cannot avail a defendant in circumstances such as these. In paragraph 42 Mr. Reitzin submitted:

"...there are several answers to (Mrs. Campbell's proposition-

i) rule 12.13 shows that, contrary to the defendant's submissions, the court has a duty **not** to hear the defendants;

ii) an analysis of the Civil Procedure Rules, 2002 (as amended), employing ordinary canons of construction, demonstrates that no such residual jurisdiction, power or discretion exists in any event;

iii) where, as here, the rules are clear and jussive, no jurisdiction arises from the overriding objective nor otherwise;

iv) our Jamaican rules may be viewed in contradistinction to the English rules where such a residual power is expressly conferred upon the court;

v) this is not a case where the court's inherent jurisdiction to prevent abuse of process or the like is called in aid or can be invoked; and

vi) even if a residual discretion had been expressly conferred upon the court, it could not be used to circumvent the express requirements of rule 13.3."

On the issue of rule 12.13, I find that Mr. Reitzin is not on good ground. The authorities allow for a litigant in default to apply to set aside the order which has caused him to be in that situation. See *Chuck v Cremer* (1846) 1 Coop. T. Cott. 338; 47 E.R. 884 and *Dexter Chin v Money Traders and Investment Ltd.* SCCA 113 of 1997 (delivered 24/3/1998). In any event rule 12.13, clearly allows for an application such as this. It commences with the words "Unless the defendant applies for and obtains an order for the judgment to be set aside...". If therefore, the application made under rule 13.3 is granted, the defendants would be able to participate to the extent permitted by the rules.

On the question of the court's discretion or residual jurisdiction, the first principle which governs that matter is that this court has an inherent

jurisdiction to control its process. Secondly, the CPR provides that the court must seek to give effect to the Overriding Objective when interpreting its rules or exercising any power thereunder. For completeness I should repeat that the Overriding Objective is for the court to deal with cases justly. It is clear that in neither case the court is entitled to exercise a discretion where the CPR stipulates that it has no discretion. (See *Totty v Snowden* [2001] 4 All E. R. 577) At paragraph, 34 the court said, concerning the rule setting out the Overriding Objective:

> "Rule 1.2 requires the court to have regard to the overriding objective in interpreting the rules. Where there are clear express words, as pointed out by Peter Gibson LJ in Vinos' case, the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case'. Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective."

I agree with Mr. Reitzin that the terms of rule 13.3 are sufficiently precise to prevent the court's use of the Overriding Objective in assessing applications of this nature. I repeat, for convenience, rule 13.3 (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."

It is fair, I find, to read rule 13.3 (1) as if it allowed the discretion of the court to be exercised **only** if the defendant satisfied this condition. The UK equivalent of this rule provides a wider scope to the court in that jurisdiction. Those courts may also set aside a default judgment if some other good reason exists for such an action. That formulation, unlike ours,

allows for the consideration of the Overriding Objective. I now turn to the present application.

Analysis of the instant case

In her commendably succinct submissions, Mrs. Campbell cited *Swain v Hillman,* mentioned above. She sought to distinguish the instant case from the circumstances in *Swain* on the basis that liability is not in dispute. Mrs. Campbell went on to say:

> "The substantive issue for the court to determine at assessment is the quantum of damages to be recovered, which will be based on the nature, type and extent of injuries suffered by the claimant and awards made for similar injuries in previous cases. In light of the fact that the claimant is suing to recover damages the amount of which has not yet been determined by the court, the Defendants have no way or method of proving that their proposed defence has a 'real prospect of success'."

From my analysis above, it would be clear that I disagree in principle with Mrs. Campbell's conclusion. That default judgment has a value, and Mr. Harris should not be deprived of it without good reason. (*Per* Moore-Bick, J. in *International Finance Corporation v Utexafrican* SRPL [2001] L.T.L., May 16). In my view, the onus is on Mr. Fyffe and Mrs. Lopez-Gordon to provide evidence which would satisfy the court that it should deprive Mr. Harris of his default judgment. That evidence must show that they have a real prospect of successfully defending the claim on the question of quantum of damages. I now assess whether that has been done in the context of the three levels of participation in the assessment exercise, as

outlined by the rules and explained in the *Blagrove* case mentioned above. I shall start with the highest level.

Should a defence be permitted to be filed?

I find that no good reason has been provided to allow a defence to be filed. The affidavit in support of the present application, at best, speaks to a hope that the involvement of defence counsel would result in a lessening of the damages. Mrs. Julia Roache in that affidavit, at paragraph 19, said:

> "That I verily believe this (barring of the defendants from participating in the assessment) would be prejudicial to the Defendants as the court would be proceeding on evidence which was unchallenged an untested by cross examination and would be presented with submissions on damages geared toward recovering the maximum amount. I verily believe barring the Defendant (sic) from the assessment would likely render any judgment unbalanced and unfair."

No indication is given in the affidavit that Mr. Fyffe and Mrs. Lopez-Gordon will seek to adduce evidence concerning the issue of damages.

In the proposed defence, exhibited to Ms. Roache's affidavit, there is no assertion which contradicts Mr. Harris' averments in his Particulars of Claim, in so far as damages are concerned. What the proposed defence states on this point is:

> "5. The Defendants admit such of the injuries as are contained in the medical report of Dr. Edgar A. Abbott Consultant Orthopaedic Surgeon dated January 10, 2005 and Dr. W. Palmer Chief Orthopaedic Resident, University Hospital of the West Indies dated the 10th August 2005. The Defendants however reserve the right to require the said doctors to appear for cross examination on their reports or to put questions in writing to the said doctors pursuant to rule 32.8 (1) of the Civil Procedure Rules 2002."

> "6. No admission is made to the particulars of special damages and loss of earnings pleaded as the Defendants do not know whether the matters alleged are true."

I believe that those statements in the affidavit and the defence, respectively, demonstrate that the aim is to cross examine Mr. Harris and/or his witnesses and **hope** that something will turn up. It smacks of "surmise and Micawberism". That, with respect, is not a proper basis on which to allow a defence to be filed in this case. No "real prospect of successfully defending the claim" has been disclosed. To allow a defence, as the one proposed, to be filed, would also contravene the spirit of rule 16.3 (6) which speaks to the defendant filing "a defence setting out the facts the defendant seeks to prove". Mr. Fyffe and Mrs. Lopez-Gordon cannot therefore be allowed this highest level of participation in the assessment exercise.

Should a simple judgment on admissions be substituted for the default judgment?

To allow Mr. Fyffe and Mrs. Lopez-Gordon to have a 'mere' judgment on admission, entered against them still requires them to clear the hurdle that it would allow a "real prospect of successfully defending the claim". The default judgment would still have to be set aside as a pre-requisite to that step. Again, I am of the view that the contents of the affidavit, the terms of the defence and the thrust of Mrs. Campbell's submissions, at best, amount to a hope that the ability of counsel for the

defence, exhibited either in cross-examination or submissions to the court, will somehow result in a reduction in the quantum of damages awarded.

The assertion that a claimant's attorney will make submissions geared to securing the maximum award, bears the inherent assertion that the tribunal hearing the assessment will not apply the principles of law regarding evidence and awards of damages, so as to achieve a fair award. This spurious speculation is not a basis for setting aside a default judgment. Mr. Fyffe and Mrs. Lopez-Gordon in order to succeed at this level must show that there is some defect in Mr. Harris' claim which would only be revealed through their participation in the assessment exercise. Nothing along that line has been asserted. No "real prospect of successfully defending the claim", even at this level, has been revealed.

Is a variation of the default judgment allowed?

The failure to succeed at the two levels examined above, leaves Mr. Fyffe and Mrs. Lopez-Gordon at their present status. In my view, they are not entitled, as an alternative, to have the default judgment varied, so as to allow them to actively participate in the assessment exercise. This is because rule 13.3 (3) only allows variation if the circumstances allow for the default judgment to be set aside. The paragraph states it plainly:

> (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

If the power to vary were an unfettered alternative to the power to set aside, the paragraph would not have been expressed in those terms. I find that the proper interpretation of the paragraph is that where, on applying the rule to a particular situation, the court finds that the defendant has a real prospect of success, the court may, for whatever sufficient reason, vary the default judgment instead of setting it aside.

The present application must therefore fail.

Should judgment on admissions have been entered by the Claimant?

I should not dispose of this application without addressing an issue which featured heavily in the submissions. Mrs. Campbell opined that Mr. Harris ought properly to have requested judgment on admissions in any event, because his attorneys were aware that Mr. Fyffe and Mrs. Lopez-Gordon were not contesting liability. This, counsel suggested, was made clear by letters passing between the attorneys for the respective sides.

Mr. Reitzin insisted that the correspondence, being sent under the cover of being "without prejudice", was inadmissible. Interesting arguments were made on each side concerning viewing the "without prejudice" correspondence. In my view, I need not tarry on this point. I shall only say here, that the case of *Western Broadcasting Services Ltd. v Edward Seaga* SCCA 68 of 2003 (delivered 20/12/2003) is authority for the court viewing

the subject correspondence to determine whether a settlement was concluded.

The fact is that the request for judgment was filed after the acknowledgment of service was filed. The latter document did not admit liability. It indicated that the claim would be contested. In my view, the "without prejudice" correspondence which followed, having not concluded in a settlement (and there is no assertion to the contrary) was not sufficient to have Mr. Harris withdraw his request and replace it with a request for judgment on admission. Neither can the correspondence be treated as an admission which would allow the court to view the default judgment as having been improperly requested. In my view the defendants were preserving their options by so couching their letters.

Conclusion

A fair reading of rule 13.3 of the CPR requires a defendant to show that he has a "real prospect of successfully defending the claim", in order to have a default judgment set aside or even varied. No other basis is allowed by the rules and even the court's "power to revoke the expression of its coercive power where (a default judgment) has been obtained", as mentioned in *Evans v Bartlam* [1937] 2 All E.R. 646 at p. 650, must be exercised in the context of the rule.

The rule does apply in cases where the defendant does not seek to contest liability but wishes only to contest the quantum of the award. He must however provide evidence which demonstrates that he has "a real prospect of successfully defending the claim", in so far as he has some chance of significantly reducing the likely level of the award of damages. He may do so, either by showing that he has evidence which contradicts the claimant's factual assertions, or by showing that there is some defect in the claimant's assertions in his pleadings or otherwise, which the defendant's active involvement in the assessment exercise, can fully reveal.

In this case Mr. Fyffe and Mrs. Lopez-Gordon satisfied neither of those requirements. At best, they expressed a hope that their involvement, through cross examination or submissions by their counsel, would result in a reduction of the quantum of the likely award. That hope is no more than fanciful and is insufficient to set aside Mr. Harris' default judgment.

A date has already been set for the hearing of the assessment and so I need not make any orders in that regard.

The orders therefore are as follows:

1. Application to set aside the default judgment is refused.
2. Costs to the claimant in the sum of $16,000.00 which costs are to be paid before any other application may be made by the defendants.