IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2002/M225

BETWEEN	SYDNEY MALCOLM	PLAINTIFF
AND	METROPOLITAN MANAGEMENT TRANSPORT HOLDINGS LIMITED	1st DEFENDANT
AND	GLENFORD DICKSON	2nd DEFENDANT

Mr. Christopher Samuda instructed by Piper & Samuda for the Applicants.

Miss Alicia Thomas and Miss Christine Hudson instructed by K. Churchill Neita & Co. for the Respondent.

Heard: 21st May 2003

Mangatal,J.(Ag)

1. The application before me is by way of Notice dated 22nd April 2003, seeking the following orders:

    1. The Interlocutory Judgment entered herein against the Defendants and all subsequent proceedings be set aside; and
    2. For Leave to be granted to the Defendants to file and deliver their Defence within 14 days.

2. The grounds stated as the basis for the orders are as follows:

(i) The Defendants have a good Defence upon the merits of the Plaintiff's claim and have a real prospect of successfully defending the claim;

(ii) There has been no delay in law in applying to set aside the Default Judgment and filing a Defence or any inordinate delay therefore which has been prejudicial to the Plaintiff and inexcusable; and

(iii) In the interest of justice and public policy leave should be granted to the Defendants to defend the claim.

3. The Application was supported by 3 Affidavits, viz. the Affidavit of Glenford Dickson the Supplemental Affidavit of Glenford Dickson and the Affidavit of Dawn Roberts, sworn to on the 22nd April, 6th May, and 24th April 2003 respectively.

4. The Plaintiff's claim is in respect of personal injuries arising out of an accident on the 1st October 2001, which he alleges was caused by the negligence of the Second Defendant, servant or agent of the owner of motor vehicle registration number PA 0205.

5. The Defence that is being raised by the Defendants is either that the collision was caused by an inevitable accident in that on the day in question, while the Second Defendant was lawfully driving, he was attacked frontally by several men, and in the peril and ordeal thereby created, he took evasive action by reversing. However, notwithstanding all reasonable care and skill, in the dilemna created the Second Defendant was unable to avoid the accident. In the alternative, the Defendants

allege that the collision was caused or contributed to by the driver of the other vehicle in which the Plaintiff was traveling.

6. Counsel for the Respondent Miss Thomas opposed the application on the basis that the requirements of the Civil Procedure Code 2002, in particular Part 13.3 have not been satisfied. She submitted firstly that no good explanation for the failure to file a Defence has been provided. Secondly, although she accepted that the Court ought not to embark on a trial of the issues, the Court ought nevertheless to look at the proposed Defence. She submitted that a Defence with a good prospect of success is different from a Defence on the merits or an arguable defence.

7. Counsel referred to Butterworths Motor Claims Cases, 10th Edition, page 41 and to Charlesworth and Percy, 8th edition, paragraph 3-115 as to the meaning of inevitable accident. It was submitted that the Affidavit evidence of the Defendants did not disclose that other courses available could not have been utilized, which Counsel submitted is necessary for the defence of inevitable accident to be successfully raised

8. The terms of Rule 13.3 so far as relevant are as follows:

> ...the court may set aside a judgment entered under Part 12 only if the Defendant applies to the Court as soon as reasonably practicable after finding out that judgment had been entered;
>
> (i) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and has a real prospect of successfully defending the claim.

9. It is clear that under the new rules, the test for setting aside a default judgment has been put on the same sort of footing as summary judgment except that where one is seeking to set aside a default judgment one must show that one has a real prospect of successfully defending the claim whereas when a claimant is seeking to enter summary judgment against a Defendant it must be shown that the Defendant has no real prospect of successfully defending the claim or issue.

10. I will deal with subparagraph (c) first. The Civil Court Service 2002, which deals with the English rule which is identical to our Rule 13.3(c),at p.507, states:

" a real prospect of successfully defending the claim"... mirrors the provisions in relation to resisting applications for summary judgment... which are based on the decision in Alpine Bulk Transport Co. Inc.v. Saudi Eagle Shipping[1986] 2 Lloyds Rep. 221. The rule requires a case to be better than merely arguable before a default judgment can be set aside. A person who holds a regular default judgment has something of value and to avoid injustice he should not be deprived of it without good reason- International Finance Corporation v. Utexafrica Spr[2001]CLC 1361."

11. Whilst it is clear that the test to be applied by the Court in deciding whether to allow a Defendant in to defend is a higher test than a merely arguable defence, I accept Mr. Samuda's submission that the general principles set out in the well-known case of Evans v. Bartlam[1937] 2 All E.R. 646 at 650 continue to hold true:

The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

12. As Sir Roger Omrod is quoted as saying in Day v. RAC Ltd. [1999] 1 All E. R 1007, at 1013, the rule is not really a rule of law, but of common sense.

13. I accept Lord Justice Ward's analysis in the Day case where he indicates that there are differences in language in the various cases, which ought really to be viewed as the emphasis in a particular case on the particular facts of that particular case. I also adopt Justice Ward's comment that an arguable case must carry some degree of conviction but that judges should be wary of trying issues of fact on Affidavit yet untested. To do so is to usurp the function of the trial judge. In addition, I accept Justice Ward's reasoning that a real prospect of succeeding ought not to be elevated into a "real likelihood' of the Defendant succeeding.

14. As was the case under the old rules as to summary judgment, and the present rules relating to summary judgment, it will be inappropriate to find that there is no real prospect of success where there are vital disputes as to facts to be resolved.

15. I found the case of Swain v. Hillman T.L.R., Nov 4 1999, p. 745 helpful. The case was concerned with a summary judgment application under the 1998 English rules in relation to a personal injury action.. However, I found the analysis useful in deciding how to treat with our rule's "real prospect of successfully defending the claim".

16. In that case, the English Court of Appeal held that a matter could be summarily disposed of where it did not have a realistic, as opposed to a fanciful, prospect of

success. In deciding whether to exercise such a power, a judge should not conduct a mini-trial of issues which should be investigated at trial.

17. The excerpts from the practice at paras. 584 and 585 of the Civil Procedure Rules 1998 cited by Mr. Samuda are also useful in demonstrating how the Court is to deal with the issue of a real prospect of successfully defending a claim, and how that issue interacts with the overriding objective of dealing with cases justly.

18. Turning now to look at the instant case, in my view what has been set out in paragraphs 3-7 of Mr Dixon's First Affidavit, and in particular para. 3 of his Second Affidavit, i.e. that the persons who attacked him, left him no other course of action but to reverse, are sufficient to raise a defence of inevitable accident which has real prospects of succeeding. In this regard, the instant case is distinguishable from both the Saudi Eagle and the International Finance cases cited by Miss Thomas, in both of which the Affidavit evidence to place the matters (of contract and estoppel as opposed to road traffic negligence) in dispute, were found wanting. Miss Thomas is correct that the test will be the same whether the matter is a contract matter or some other area of law or whether the matter is a running down matter. However, to raise the bar, so to speak, which suggests a real prospect of successful defence in a running down matter or in any matter tending to involve substantial factual dispute on a relatively simple issue, may well be easier than in other matters requiring a more intricate factual substratum. It is important to recognize that the correct application of the test does not involve an analysis at this stage of whether the Defendant has a real likelihood, as opposed to a real and not fanciful prospect of succeeding. That is why one does not at this stage examine the Affidavits and

opposing factual disputes to assess what the likely outcome will be. Indeed, what may appear to be a weak case, will still be a case with a real prospect of success, where the issues are joined in reality. The weakest case on paper may be bolstered by powerful credibility when the witnesses give their evidence, or in contrast, the strongest case may be completely eradicated by powerful cross-examination. What the Court must satisfy itself of is that what is raised by way of evidence at the hearing of the application is the gravamen of a real, and not fanciful, defence. While I think that the point concerning the necessary allegations to be alleged in the Affidavit evidence with regard to the defence of inevitable accident was well-articulated by Miss Thomas, I think that those matters are matters of detailed evidence to be fully ventilated at trial. Indeed, the statement of Lord Greene from Browne v. De Luxe Car Services[1941] k.b.549,552 supports my analysis. He said:

I do not feel myself assisted by considering the meaning of the phrase "inevitable accident" . I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence?".

19. I also take the view that the alternative defence raised, i.e. negligence on the part of the other driver raises a defence which is not fanciful and which is capable of being, and should be investigated at trial.

20. Finally, I turn to consider the question of delay. Dawn Roberts and Mr. Dickson account for what had happened to the matter prior to the entry of default judgment, which essentially seems to be that the matter was put in the hands of the brokers, but there was no communication forthcoming from them. The period of delay

between the entry of the default judgment and the filing of the application to set aside is less than 2 months, which I do not consider inordinate and which do not cause excessive prejudice to the Plaintiff. The case of McDonald v. Thorn T.L.R., Oct. 15 1999, 691, demonstrates that the question of delay, and whether reasons are or are not given is but another factor to be put in the scale when the Court considers how best to exercise its discretion.

21. In my view the overriding objective of doing justice between the parties will best be fulfilled by setting aside the default judgment on condition that the Defendants file and serve their Defence within 7 days of the date hereof. The costs thrown away, and the cost of this application to the Plaintiff, to be paid within 30 days of the date of agreement, taxation or other mode of ascertainment.

a. In accordance with Rule 13.6(1) I intend to now treat this hearing as a case management conference. Based upon the fact that both parties have advised that the Plaintiff is an old man and the allegations of injury set out in this Statement of Claim are serious, it would be just to deal with this matter now and to treat it with some urgency