IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.2001/M022

BETWEEN	AUDLEY MATTHEWS	1ST PLAINTIFF
AND	DERRICK MATTHEWS	2ND PLAINTIFF
AND	KENNETH HYMAN	1ST DEFENDANT
AND	THE ADMINISTRATOR GENERAL FOR JAMAICA (Administrator Ad Litem for the estate of Walsh Anderson, deceased).	2ND DEFENDANT

Mr. M. Manning and Miss Catherine Minto instructed by Nunes Scholefield DeLeon and Co., for both Plaintiffs.

Miss Kerry Gay Brown instructed by Livingston Alexander and Levy for 1st Defendant.

Mr. Rudolph Smellie instructed by Daley Thwaites and Co., for 2nd Defendant.

HEARD: 17TH July, 2003

CORAM: D. McINTOSH, J.

On January 28, 1997, the second Plaintiff (hereafter referred to as Claimant, in accordance with the new CPR of 2002) was seriously injured as a result of a collision involving a motor vehicle driven by the second Defendant and owned by the first Defendant.

At the Case Management Conference, the Claimants and both Defendants sought orders. The first Defendant sought to set aside a judgment entered against him on the 11/4/03 and to have time extended to answer to interrogatories while the second Defendant sought an order to set aside the judgment entered against him on the 13th of September, 2002 and an extension of time to file a defence.

The Claimants applied for an order for security for costs.

FIRST DEFENDANT

In support of the application of the first Defendant, it was submitted that Mr. Hyman was presently off the island, that he often travels overseas and that he was overseas on the date that the matter came up for trial against him.

On June 18, 2002, Miss Justice Smith had ordered him to file answers to interrogatories within 14 days. Those 14 days had expired on the 2nd of July, 2002, but it was not until the 2nd of August, 2002 that he purported to file the answers. It is arising from that default that the first Defendant now seeks to have the judgment set aside and to be granted an extension of time to file the interrogatories.

The first Defendant also seeks relief from the "unless order" made by the Court on June 18, 2002, pursuant to Part 26 of the CPR 2002, specifically, Rule 26 .8, which provides relief from sanctions on the basis that the delay in complying with the order of the Court was not intentional.

SECOND DEFENDANT

The Second Defendant relied primarily on the affidavit of Mrs. Loma Brown,

the Administrator General.

It was submitted that the first test to be applied when considering an application to set aside judgment was whether the application was filed in reasonably practicable time. That reasonably practicable time depends on one's notion of what is reasonable, given the particular circumstances.

The affidavit of the Administrator General was to the effect that Mr. Gyles, the former Administrator General, was not aware that the second Defendant needed to file his own defence, being under the impression that the first Defendant's defence would cover the second Defendant.

In addition, he was not accustomed to represent the Administrator General when joined as a Defendant and was not aware of the defence available to the Administrator General, nor did he explore the possibility of any defence.

The Law has not changed and is very clear with limbs of varying importance.

The most important limb is:

a) Whether you have a good defence.

b) The prospect of the defence succeeding. Ultimately, the Plaintiffs must show how it is that the relevant delay and/or default served to prejudice them in relation to the real test – that of – a good defence.

The second Defendant claims to have that good defence - an absolute statutory defence by virtue of section 2 (3) (b) of the Law Reform (Miscellaneous Provisions) Act of 1955.

CLAIMANTS

On behalf of both Claimants it was submitted that in reliance on

Purcell v. F.C.T. (1970) 2 A E R 671 which speaks to consent orders the parties are bound and cannot afterwards excuse themselves for any failure to comply.

The principles in Purcell's case were followed in:

Caribbean General Insurance Company v. Frizzell Insurance Brokers – CA – 28/9/95, and in:

Lawnoss v. Babcock 1998 PZOK – 2, 253.

Further, the affidavit of Mr. Hyman did not set out any particulars as to any inability to comply with the ruling of the Court.

With respect to the second Defendant, leave was sought to appoint the Administrator General as guardian of the estate of Walsh Anderson after the writ was served.

The application was made to the Court and the Administrator General was served with notice. Mr. Gyles then represented the Administrator General and was present when the order was made.

Subsequently, on April 18, 2002, the Administrator General did enter an appearance, but as no defence was filed, Interlocutory judgment was entered against the 2nd Defendant on the 13th September, 2002. Summons to proceed to assessment of damages was thereafter granted on the 22nd of November, 2002, at which hearing Mr. Gyles was present and assessment was then fixed to be heard at trial.

The matter would have been tried against the first Defendant on the 10th of February, 2003 but on that date the second Defendant indicated an intention to seek leave to set aside the interlocutory judgment.

The Court then ordered that the application be filed within 14 days. That application was filed on the 21st of February, 2003.

Part 13.3 of the CPR 2002 governs applications to set aside default judgment.

The judgment was entered in September, 2002 and the application to set it aside was made on the 21st of February, 2003. That the application was not made in reasonably practicable time speaks for itself.

The affidavit of Mrs. Loma Brown does not begin to give a good explanation for the failure to file a defence as required by law.

Paragraph 7 of her affidavit, on which she now relies, speaks about assumptions and ignorance of the Law. The Court should not countenance these as feasible explanations.

The applicant has not complied with the requirements of Part 13.3.

The defence has no real prospect of success. The six months referred to in paragraph 9 of Mrs. Brown's affidavit is from the date of the entry of appearance.

See sec. 2(3) of the Law Reform (Miscellaneous Provisions) Act.

Even if such a defence was available to the Administrator General the requirements of Part a, and b, have not been satisfied and the second Defendant should not be allowed to advance same.

COURT

After considering the relevant arguments, this Court made the following orders:

1. First Defendant's application for order to set aside judgment and to extend time to file defence refused.

2. Second Defendant's application for order to set aside Judgment and to extend time to file defence refused.

3. The first Defendant is ordered to pay to the Claimant the sum of $250,000 for his immediate medical needs within 30 days here of.

4. Cost to the Claimant to be agreed or taxed.

5. Leave to appeal refused.

One cannot over emphasize the importance of applications being filed in reasonably practicable time. Both Defendants have failed in this regard. The purported explanation by Mr.Hyman's attorney for his failure, is at best spurious. To compound matters, he was contemptuous of the Court's "unless orders".

The second Defendant's application depends on the affidavit of Mrs. Loma Brown. That affidavit describes Mr. Gyles as ignorant and incompetent. While she speaks to what Mr. Gyles did or did not do, what he knew, or did not know, there was no affidavit from Mr. Gyles himself.

Further Mr. Gyles was present at the hearing, still representing her and still retained by her department as its attorney. He was the person she succeeded to her present post.

Surely any excuse of ignorance or incompetence should have come from him.

The practice of parties holding the other side in a dispute to ransom by delaying tactics and endless applications should have been put to rest by the new rules. Many persons have suffered because of the strength of their opposition resulting in matters being dragged out over many years ultimately making it impossible for them to be adequately compensated.

The Claimant in this matter is in urgent and dire need of medical assistance and to grant the Defendant's applications where there is no real likelihood that the defences filed will succeed, can only lead to great injustice.