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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2001/R 034

BETWEEN	JAMES ROBERTSON	CLAIMANT
AND	MAXINE HENRY-WILSON	FIRST DEFENDANT
AND	CVM TELEVISION LIMITED	SECOND DEFENDANT

Miss Andrea Walters instructed by Palmer and Walters for the claimant

Miss Camaleta Brown instructed by Vaccianna and Whittingham for the first defendant

Mr. Garth McBean instructed by Garth McBean and Company for the second defendant

November 9 and November 11, 2004

Sykes J (Ag)

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT OF DEFENCE

1. Mrs. Maxine Henry-Wilson has applied to set aside a judgment in default of defence. She applied on the ground that she has a good defence. This ground by itself is not enough. It is only one of three hurdles that must be cleared before the possibility of the exercise of the discretion conferred by rule 13.3 can arise. What are the circumstances that led to judgment being entered against her?

2. The claimant, Mr. James Robertson, issued a writ with a statement of claim on March 5, 2001. He alleged that Mrs. Maxine Henry-Wilson, the first defendant, issued a press release, on or about January 28, 2001. This release, he alleged, was broadcast by CVM Television Limited, the second defendant. The release is alleged to have contained these words

> *The National Executive Council of the People's National Party, has condemned JLP Caretaker for West St. Thomas, and prominent member of his party (sic) G2K Youth Leaders Group, Senator James Robertson for using violent and intimidatory tactics to try to prevent the PNP from holding a meeting in Yallahs today (Sunday 28, 2001).*
>
> *JLP supporters led by Mr. Robertson, blocked sections of the road leading to Yallahs, just prior to the convening of the PNP meeting...*

3. The statement of claim has other quotations, allegedly from the press release which have not been included here. What has been said suffices to give the tenor of the press release. Mrs. Henry-Wilson entered an appearance on March 19, 2001. She did not and has not filed a defence. Mr. Robertson entered judgment against her.

4. CVM Television Limited filed a defence on April 4, 2001. The defence also stated that an apology to Mr. Roberson had been aired.

5. This application first came before Hibbert J on October 6, 2004 and was adjourned to November 9, 2004. Between these dates, Mr. Michael

Vaccianna from the firm of Vaccianna and Whittingham, the firm representing Mrs. Henry-Wilson, filed an affidavit to buttress the application. He says that despite his request to the broadcaster for a copy of the tape recording and the transcript he only got the transcript of the programme in October 2003. He is still awaiting a copy of the tape recording of the broadcast. Mrs. Henry-Wilson filed an affidavit as well. To put it mildly, Mrs. Henry-Wilson's affidavit did not address paragraphs (a) and (b) of rule 13.3. Mr. Vaccianna's affidavit has not added any significant new information. His affidavit covers much the same ground as Mrs. Henry-Wilson's.

6. Rule 13.3 states

> *Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12* ***only if*** *the defendant –*
>
> *(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;*
>
> *(b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and*
>
> *(c) has a real prospect of successfully defending the claim.* (my emphasis)

7. These three paragraphs must be read conjunctively. They are not disjunctive. Meeting just one could not be sufficient. The applicant could not succeed if, for example, she were to apply as soon as reasonably practicable after finding out that judgment had been entered without also showing that she had a real prospect of

successfully defending the claim. It would not make sense to provide a good explanation for the failure to file a defence without also showing that there is a real prospect of success. This must be so because the purpose of applying to set aside any judgment is to defend against the claim.

8. The framers of the rules have decided that it is not simply a matter of having a real prospect of successfully defending the claim but the applicant should indicate why the delay occurred. In addition, they have decided that the applicant should apply as soon as is reasonably practicable after knowing that judgment has been entered. The reasons are not hard to find. The claimant who has abided by the rules and has secured his default judgment, in accordance with the law, should not be lightly deprived of it. Unless conditions are imposed, the system would be open to wanton abuse. Thus, a claimant who dutifully follows the rules would be condemned to a two and one half to three year wait to get another opportunity to secure judgment in his favour. This is now the approximate time that matters are being set for trial after the first case management conference. In fact, the more days a matter needs for trial the further away the date of trial. Is an award of costs, by itself, really an appropriate remedy in this kind of situation? I do not see how simply condemning the defendant in cost is sufficient. Both parties need to know the outcome of litigation as soon as possible. Litigation at the best of times is stressful which is not reduced by increasing the anxiety caused by undue delay in resolving the matter. Rule 13.3 has raised the bar for the tardy defendant. It is not that the rule is harsh. It gives greater recognition of the right of

claimant to secure his judgment at the earliest possible time with consequential reduction of costs. The tardy defendant is not shut out but he must act quickly once he knows of the judgment. What is unjust about requiring such a person to provide some explanation for the delay? What is unreasonable about allowing a claimant who has abided by the rules of court to enforce his judgment against a person who (a) knows of the action and (b) knows of the judgment and does nothing about either? Why should a tardy defendant, after being given every opportunity to defend himself, be allowed to turn up more than one year after judgment has been entered to attempt to set it aside? It is not the rule that has created the problem for tardy defendants here, but rather their conduct. They have it within their power to act and failed so to do.

9. The Rules Committee has deliberately avoided the more flexible approach under the Civil Procedure Rules in the United Kingdom. It may be that the Rules Committee were influenced by dictum from Wolfe JA (as he was then) in ***Wood v H. G. Liquors Ltd and Another*** (1995) 48 WIR 240, 256

> *All the cases relied on by counsel for the appellant are cases decided by the House of Lords and the Court of Appeal in England. Those cases were decided to meet the English situation.* ***I make bold to say, plagued as our courts are with inordinate delays, this court must develop a jurisprudence which addresses our peculiar situation****.* (my emphasis)

10. To the same effect Panton JA said in ***Port Services Limited v MoBay Undersea Tours Limited and Fireman's Fund Insurance Company*** SCCA No. 18/2001 (delivered March 11, 2002) at page 9

> *In this country, the behaviour of litigants, and, in many cases, their attorneys-at-laws (sic) in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions.*

11. These two passages were used in the context of applications to strike out an action for inordinate delay but they express judicial concern from the Court of Appeal in 1995 and 2002 about delay, disregard for rules and the need for special measures for Jamaica.

12. Cooke J.A in ***Alcan Jamaica Company v Herbert Johnson & Idel Thompson Clarke*** SCCA 20 of 2003 (delivered July 30, 2004) at page 26

> *These rules [speaking of the new rules] are the antidote to the epidemic of delay against which Panton J.A. so rightly inveighed in Wood.*

13. Rule 13.3 seems to be one part of the antidote. It is designed to hasten the steps of defendants. The rule is enabling claimants who have obtained a default judgment, in accordance with the rules, to keep the benefit of their labour. The rule is fashioned to meet the need of Jamaican circumstances. Claimants should not be deprived of their right to enforce the judgment without good reason being shown. Given the comments by the Court of Appeal, rule 13.3 is a salutary one. This is especially so when litigants are now receiving dates in 2007 for trial

of cases. One's ability to litigate effectively might be hampered by delay.

14. Since Mrs. Henry-Wilson is not saying that she did not know that judgment had been entered against her. I take it that she knew about it. This means that rule 13.3(1) (a) has not been satisfied. She says that she was waiting on the transcript and tape recording of the broadcast. The transcript did not come to hand until 2003. However, in my view this is not a good explanation because Mr. Robertson's case against her is grounded in the allegation that she published or caused to be published a press release that was broadcast by CVM Television Limited. She ought to know whether she published or caused to be published the press release referred to by Mr. Robertson. She ought to know whether she produced any press release around the time alleged. This being so, she could have addressed those allegations in her defence. Therefore, she could have said, "I did not produce any press release", if that was the case. She could have said that the press release did not contain the words used in the broadcast. She could have filed her defence and sought permission to amend her defence, if necessary, after receiving the tape and transcript. She has not addressed why she was unable to respond to the allegations before she got the transcript of the tape. Mr. Robertson goes further by alleging that she published or caused to be published the press release to all major media houses in Jamaica including the second defendant. The allegations against her were very clear and specific.

15. This is not the type of case where it is alleged that the defamer spoke the offending words over the airwaves. In such circumstances there may be a good argument for saying that a tape and/or a transcript may help the defendant in recalling what exactly was said

and so prepare his defence. In this case, the source of the defamatory words, namely, the press release, was alleged to be either published by Mrs. Henry-Wilson or she caused it to be published. I do not see why she needed a transcript and/or the tape. She is not being accused of speaking. She is being accused of doing, viz, circulating or causing to be circulated written material. Surely she must know whether she did this or whether the release contained the allegedly defamatory words.

16. She, unfortunately, has not addressed any of these issues in her affidavits. I therefore conclude that she has failed to clear the first two hurdles in rule 13.3. There is no need to consider the real prospect of success.

17. In the event that I am in error in interpreting the rule in the way that I have and that the paragraphs are simply matters to be taken into account in the exercise of the discretion this is not a case in which the discretion should be exercised to set aside a judgment properly obtained. The delay in the application is inordinate and the reasons offered are not reasonable.

Conclusion

18. The application to set aside the judgment in default of defence is dismissed with costs to the claimant. Costs to the second defendant in the sum of $8,000 including GCT.