IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 00257

BETWEEN	MERLENE THORPE	CLAIMANT
A N D	UNITED ESTATES LIMITED	DEFENDANT

Claimant not appearing or being represented.

Mr. Christopher Kelman instructed by Messrs. Myers Fletcher and Gordon for the Defendant.

PRACTICE AND PROCEDURE - APPLICATION TO SET ASIDE DEFAULT JUDGMENT –JUDGMENT ENTERED AFTER DEFENCE FILED OUT OF TIME – WHETHER JUDGMENT IRREGULAR

Heard: 12th & 20th June, 2006

BROOKS, J.

United Estates Ltd. has good reason to apply to set aside a default judgment entered against it in this claim. It however wants more; it wants the court to find that the default judgment was irregularly entered, and it wants a wasted costs order against the Attorneys-at-Law acting for the Claimant Miss Merlene Thorpe. It seeks these remedies despite the fact that it filed its defence out of time.

Background

Miss Thorpe was employed to pick oranges at a citrus grove in Bog Walk in the parish of Saint Catherine. She alleges that she was in the course of carrying out her duties, when a limb of an orange tree hit her on the eye.

She says that as a result she has lost sight in that eye. She alleges that United Estates was her employer at the time, and that it was that company's negligence which caused her misfortune. She has filed this claim against it to recover compensation for her injuries. United Estates, for its part, seeks to defend the claim on the basis that it was not Ms. Thorpe's employer and owed her no duty of care.

The chronology of events relevant to this application is as follows.

1. 16-2-2005 – Claim Form and Particulars of Claim served on United Estates.
2. 7-3-2005 – Acknowledgement of Service of Claim Form filed
3. 7-3-2005 – Dyoll Insurance Company Ltd, (insurer for United Estates, and which instructed Attorneys-at-Law for it), placed under the control of a Temporary Manager.
4. 20-6-2005 – United Estates retained new Attorneys-at-Law; Messrs Myers Fletcher and Gordon (MFG).
5. 21-6-2005 – Notice of Change of Attorney filed by MFG.
6. 22-6-2005 – MFG wrote to Ms. Thorpe's Attorneys-at-Law, Messrs Kinghorn and Kinghorn, (Kh & Kh) requesting further time in which to file a defence.

7. 29-6-2005 – Kh & Kh wrote to MFG refusing to accede to the request.

8. 5-7-2005 – MFG wrote to Kh & Kh sending, by fax, a copy of the proposed defence and indicating an intention to file it that day.

9. 6-7-2005 – Document entitled "Defence" filed.

10. 12-7-2005 – Request for Judgment in Default of Defence filed

11. 17-8-2005 – Judgment in Default of Defence entered.

12. 14-12-2005 – Judgment in Default of Defence served on United Estates, and notice of Assessment of Damages served on MFG.

13. 28-12-2005 – Application to set aside Default Judgment filed.

Have the requirements of Rule 13.3 been satisfied?

The question at this stage is whether that chronology would have demonstrated that the three requirements of Rule 13.3 (1) of the Civil Procedure Rules 2002 (CPR) have been satisfied. That rule allows the court to exercise a discretion whether or not to set aside the default judgment and to give leave to defendant/applicants to defend actions. It says as follows:

> "13.3 (1) 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 has been entered;

> (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
> (c) has a real prospect of successfully defending the claim." (Emphasis supplied)

It is now well established that the court has no discretion to set aside the default judgment unless the defendant meets all aspects of the triple test laid down by rule 13.3 (1). See *Caribbean Depot Ltd. v. International Seasoning & Spice Ltd.* SCCA 48/2004 (delivered 7th June 2004).

The evidence to be considered comes from Mr. David McConnell, the Manager for United Estates, in an affidavit sworn to on 22nd December 2005 and filed in support of the application. For the first limb of the rule, Mr. McConnell does not depose as to the reason for the fourteen day delay in filing this application to set aside the Default Judgment. It is noted however that the application was filed during the court's Christmas break. I am prepared to find that although there was that lapse after the discovery of the entry of the default judgment, the intervening Christmas holiday made the application one which was filed as soon as was "reasonably practicable".

In respect of the second limb, I find that United Estates has demonstrated that it has a good explanation for its failure to file the defence in time. Mr. McConnell deposed that it was by letter dated 17th June 2005 that United Estates' insurance brokers advised it that the retainer of its previous Attorneys-at-Law had been terminated by the Temporary Manager

for Dyoll Insurance. The intervention of the Temporary Manager can be inferred as being the reason for the previous Attorneys-at-Law not preparing a defence as they ought to have done. This omission would not have been the fault of United Estates.

Finally, United Estates would have a real prospect of succeeding on the Defence which it alleges that it has, if evidence in support, to the requisite standard, were placed before a judge at trial.

I find therefore that United Estates would have satisfied the triple test set out by rule 13.3(1).

Does Rule 13.2 apply?

Despite the situation where the court would grant an order in favour of United Estates pursuant to Rule 13.3, Mr. Kelman for United Estates asserts, that United Estates is entitled to an order pursuant to Rule 13.2 of the CPR. The relevant part of the latter rule states:

> **13.2. Cases where court must set aside default judgment**
> 13.2. (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because -
>
> (a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;
>
> (b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or
>
> (c) the whole of the claim was satisfied before judgment was entered.

> (2) The court may set aside judgment under this rule on or without an application. (Emphasis supplied)

Mr. Kelman's submissions on the point may be summarized thus:

1. The Defence faxed to Kh & Kh on 5th July, 2005, ought to have prevented them from applying for the judgment in default. They therefore acted unreasonably in making the application for the default judgment.

2. The Defence filed on 6th July 2005, although out of time, was not a nullity and the Registrar was wrong to subsequently enter the default judgment. This is because a condition prescribed by Rule 12.5 (d) had not been satisfied.

3. Rule 10.2 (5) which speaks to the penalty to a defendant who has not filed a defence, is subject to Rule 12.5.

4. The Default judgment was wrongly entered and so United Estates is entitled *ex debito justitiae* to have it set aside.

In support of his submission, Mr. Kelman relied heavily on the case of *Benros Company Ltd. and anor. v. Workers Savings and Loan Bank and ors.* (1997) 34 J.L.R. 92. It is important to note that that case was decided according to the provisions of the Judicature (Civil Procedure Code) Act, and not the CPR. In *Benros* P.T. Harrison J. (as he then was) in addressing the issue of judgments in default said that a defence filed out of time is not a

nullity, and that the Registrar was obliged to accept it. The learned judge cited, as authority for the principle, the case of *Gill v. Woodfin* (1884) 25 Ch. Div. 707. In *Gill v. Woodfin*, the Earl of Selbourne, L.C. said (at p.709):

> "...unfortunately...the Plaintiff...took (the order) as in default of defence, thinking that as the defence was put in after the proper time he was entitled to treat it as a nullity. That was a mistake. There is nothing in the orders to the effect that a statement of defence which is put in after the time has expired may be treated as a nullity."

Cotton L.J, also expressed himself thus (also at p. 709):

> "The order in form was in my opinion wrong; the Plaintiff had no right to take such a judgment when the defence had been delivered."

Indeed, under the regime of the Civil Procedure Code, it was the usual practice of the Registrar of this court, not to enter a default judgment once a defence had been filed, whether out of time or not. The Registrar would in the normal course, inform the Plaintiff of the existence of the defence. The situation which resulted was that the suit was stymied. The Plaintiff was prevented from entering a judgment; despite the fact that it was the Defendant who was in default, and who in the normal course of a suit would have been required to apply for leave to file a defence out of time. Many Defendants benefited from the delay and there was usually no anxiety to regularize the situation. That was before the advent of the CPR.

In order to assess Mr. Kelman's submission, in the context of the CPR, it is necessary to ascertain what Rules 10.2 and 12.5 of the CPR state.

> **10.2. The defendant - filing defence and the consequences of not doing so**
> 10.2. (1) A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5)....
>
> (5) Where a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered against that defendant if Part 12 allows it.

(Rule 10.3(1) specifies that the "general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form".)

> **"12.5. Conditions to be satisfied - judgment for failure to defend**
> 12.5. The registry must enter judgment at the request at the claimant against a defendant for failure to defend if -
> (a)...
> (b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and
>
> (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
>
> (d) that defendant has not -
>
> (i) filed a defence to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2(6));..."

Under the regime of the CPR it is the court which has the responsibility of ensuring that cases are dealt with "expeditiously and fairly". Rule 1.1 of the CPR emphasises that it is the court's duty to further the overriding objective of dealing with cases justly. Rule 25.1 stipulates that the "court must further the overriding objective by actively managing cases".

Under the CPR it is, in my view, untenable that a defendant could be able to cause a hiatus in the proceedings by filing a defence outside of the time stipulated by the rules, and thereafter take no step to regularize his

position. The cumulative effect of his action and omission respectively, would prevent the claimant from entering a default judgment and thereafter compel the claimant to incur costs to apply, perhaps, to strike out a defence which is filed in breach of the rules or make some other application suitable to the particular claim. That situation would be unjust.

In my view United Estates followed that improper and unjust course. It knowingly filed a defence out of time and over five months later had still not made an application for leave to regularize the situation, assuming that the Registrar was precluded from entering a judgment in default.

It is true to say, following the reasoning of The Earle of Selbourne, quoted above, that none of the rules state that a defence filed out of time is a nullity. Similarly, the learned editors of the 2003 edition of *Civil Procedure* at Part 15.4.3 submit that "the onus is on the claimant to act promptly if he wishes to obtain a default judgment". They then go on to say:

> "In practice, if the time for filing a defence has expired but the claimant has taken no step to obtain default judgment and the defendant then files a late defence, the court office will accept the defence, file it and proceed as usual so that the claimant will not now be able to obtain default judgment."

I am not in a position to say what is now the usual practice in our own Registry, but I have seen cases where judgments in default have been entered although late defences were on file. Despite the view expressed in *Civil Procedure* 2003 (cited above) I am more inclined to the view which the

learned editors report as being the opinion of Neuberger J. (in *Coll v. Tattum The Times*, December 3, 2001) in this context. The learned judge is reported to have stated that the "rules were unclear on this point but that the general principle was that a party wishing to do something outside the prescribed time limit ought to obtain the consent of the other parties or the permission of the court". That thinking is more in line with the principle which gave rise to Rule 10.3 (6) which limits the number of agreements between parties for the extension of time to file a defence, and Rule 10.3 (7) which limits the number of days by which extension may be agreed.

I also find support for my position in the case of *Lady Elizabeth Anson (trading as Party Planners) v. Trump* [1998] 3 All E.R. 331 where the court of Appeal in the UK ruled that even though a late defence is not a nullity, it is irregular and as a result, a judgment entered in spite of it, is not an irregular judgment. A defendant is therefore not entitled as of right to have it set aside. The court was considering an appeal, where in coming to his finding, the learned judge at first instance said, in part:

> 'I take the view that the words "if a defendant fails to serve a defence on the plaintiff" must be read as "in accordance with the rules or orders made under the rules" otherwise those rules and any orders would be completely nugatory. If when Master Murray orders a defence to be served within 21 days this simply means that the defendant can serve a defence at any time she likes up to the point in time when, as it were, the rubber stamp is put on the judgment in the Law Courts, then it seems to me that that makes a mockery of r 2(1) and indeed of orders of masters such as Master Murray. In my judgment the correct way to read Ord 19, r 2 is to this effect. Where time has been limited for the service of a defence then the defendant has up to the expiry of that time to serve his or her defence. If the defendant does so within

> that time, then the defendant has complied with the rules or the order. A plaintiff who is foolish enough to sign judgment before the expiry of the time is liable to have that judgment set aside ex debito justitiae because the plaintiff has not waited [until] the time has expired. Once the time has expired, however, it seems to me that the defendant is at risk. If the defendant serves a defence, that defence is not a nullity in the sense that it is completely valueless. It is, however, irregularly served ... once the time has expired, without a defence being served in that time, and the plaintiff thereafter [signs] judgment, that judgment in my judgment is regular but of course is liable to be set aside on application by the defendant.' (Emphasis supplied)

The circumstances were not identical to the instant case, and that case is also prior to the UK CPR, but their Lordships found the cases of *Gill v. Woodfin* (cited above) and *Gibbings v Strong* (1884) 26 Ch D 66 outdated. They viewed them as having been superseded by the terms of a practice direction which required the Plaintiff's solicitors to certify, when entering a judgment in default, that the time for filing a defence had expired and that no defence had been filed ([1979] 2 All E.R. 1062). (A situation not unlike ours where affidavits to that effect are required.) This is in contrast to the situation in the nineteenth century, when is seems a motion for judgment was what was required.

Their Lordships in the *Lady Anson* case concluded at p. 336:

> "Consequently the judge was correct when he said, in effect, that the reference to a defence under Ord 19, r 2(1) must mean a regular defence and cannot include an irregular defence."

Perhaps it is a practice direction which is required to provide the necessary guidance, but I am not prepared to say that the Registrar was

wrong in entering the default judgment. In my opinion therefore, rule 13.2 does not apply in this case.

Application for a Wasted Costs Order

Mr. Kelman brought to the court's attention the fact that this is the fourth attempt to have the default judgment set aside. The three previous occasions were thwarted by the absence of the court's file or some similar occurrence having nothing to do with any fault of either party. He complained that the need for the application could have been avoided if Kh & Kh had consented to extend the time to file the defence. Mr. Kelman submitted that that refusal was an unreasonable position, as was the filing of the default judgment. He referred to Rule 64.13 and the definition of "Wasted Costs" which included costs incurred as a result of any "unreasonable" act or omission of any attorney-at-law. Based on that rule Mr. Kelman has applied for a "Wasted Costs Order". He cited the case of *Gregory v. Gregory* HCV 1930 of 2003 (delivered 23/7/2004) in support of the application. In that case Sykes J. emphasized that the true purpose of a Wasted Costs Order, is to punish an "offending practitioner for a failure to fulfil his duty to the court" (per Lord Hope of Craighead in *Harley v. McDonald* [2001] 2 AC 678 at p. 703B para. 49).

Although I find the stance of Kh & Kh unusual, I am not prepared to find, bearing in mind my finding on the issue of the application to set aside, that they acted unreasonably. They had indicated to MFG that they intended to proceed to judgment on behalf of their client. There was no subsequent indication to the contrary, and yet MFG did not then, file the necessary application to apply for leave to file the defence out of time. United Estates must bear the burden of its failure to make the application on a timely basis.

Conclusion

I find that the fact that United Estates placed a late defence on the court's file did not prevent the Registrar from subsequently entering a judgment in default of defence, pursuant to Rule 12.5. The judgment was therefore not irregular and Rule 13.2 did not apply to this application to set it aside. United Estates' application fell within the ambit of Rule 13.3 (1). I find that it has satisfied the triple-test imposed by the latter rule, and that the court should exercise its discretion to set aside the default judgment. Miss Thorpe is however, entitled to have the costs thrown away, paid to her.

Since I find that the judgment was not irregular, I am not prepared to find that the action of Miss Thorpe's Attorneys-at-Law were unreasonable. Mr. Kelman's application for a Wasted Costs Order must therefore be refused.

In light of the absence of Miss Thorpe and her Attorneys-at-Law from the hearing, and in light of the limited time made available for the hearing, it was not practicable to hold a Case Management Conference as is normally required by Rule 13.6 (1). The Case Management Conference must therefore be held at another time.

The order on the Notice of Application for Court Orders dated 28th December, 2005 is therefore:

1. The Default Judgment filed herein on the 12th July, 2005 be and is hereby set aside.

2. The time for filing the Defence herein is hereby extended to allow for the Defence filed on 6th July, 2005 to stand as properly filed.

3. The Registrar is hereby instructed to fix a date for the Case Management Conference in accordance with Rule 13.6 (2).

4. The application for a Wasted Costs Order is refused.

5. Costs of the application and costs thrown away to the Claimant to be taxed if not agreed.

6. The Defendant's Attorneys-at-Law are to prepare, file and serve the formal order hereof on or before the 30th June, 2006.