IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L.J. 094/2002

BETWEEN	J WRAY & NEPHEW LIMITED T/as APPLETON ESTATE RUM TOUR	CLAIMANT
AND	SOLO JAMAICA LIMITED	1ST DEFENDANT
AND	FRED SMITH t/as EXCLUSIVE HOLIDAYS	2ND DEFENDANT

Mr. Charles Piper instructed by Piper, Samuda for Claimant/Respondent

Mr. Audel Cunningham and Ms. Sheena Stubbs instructed by Dunn Cox and Orett for 1st Defendant/Applicant.

Heard on 23rd & 24th June and 13th July 2004

STRAW, J. (Ag)

Solo Jamaica Limited, the 1st Defendant has applied to set aside a default judgment entered against them on 29/10/03 and for leave to file defence out of time.

History of Events

The writ of Summons/statement of claim were filed on the 25th November 2002 and acknowledgement of service filed on the 14th February 2003 by Mr. Sean Kinghorn on behalf of the 1st defendant. Subsequently, a second acknowledgment of service was filed by Ms. Lara Dayes of Dunn Cox and Orett on behalf of the 1st defendant on the 4th July 2003.

Default judgment was entered against both defendants on 29th October 2003, notice of which was served on Mr. Sean Kinghorn on the same day. Dunn Cox and Orett filed Notice of Change of Attorney on behalf of the 1st defendant on the 9th June 2004.

Submissions of Counsel

Mr. Cunningham has submitted on behalf of the Applicant that they have satisfied the conditions set out in Rule 13.3 (1) of the CPR 2002 and therefore, the Court should exercise its discretion to set aside the judgment.

Rule 13.3 reads 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 acknowledgment of service or a defence as the case may be; and
>
> (c) has a real prospect of successfully defending the claim.

In relation to rule 13.3 (1) (a) counsel referred to the affidivit of Miss Sheena Stubbs filed on 10th June 2004. Ms. Stubbs depones that in June 2003, the 1st defendant had requested that the firm take over representation from Mr. Kinghorn. As a consequence, a letter dated 25th June 2003 was dispatched to Mr. Kinghorn requesting copies of the court documents. She states that he

replied by letter dated 26th June 2003, but no acknowledgment of service was received in the bundle. As such, an acknowledgement of service was filed by the firm.

Miss Stubbs further depones that she commenced written dialogue with the Claimant's attorney setting out her client's instructions. They were engaged in dialogue right up until 18th May 2004 when the firm received notice of the default judgement under cover of a letter dated 18th May 2004 from the Claimant's attorney.

Mr. Cunningham argued that the application to set aside was filed on the 10th June 2004 which is 'as soon as reasonably practicable' after the 18th May 2004.

I am of the view that this condition has been satisfied.

Condition #2

In relation to the second condition specified at rule 13.3 (1)(b), Mr. Cunningham referred the Court to the affidavit of Miss Stubbs. She depones that the firm had been in dialogue with the Claimant's attorney and had been requesting that they discontinue the action against them. The letters are exhibited with the affidavit. He submitted that the firm had not been inactive and passive in relation to the suit and the court could find this sufficient to conclude that a good explanation has been given for the failure to file a defence.

On the other hand, Mr. Piper for the Claimant has submitted that no good reason has been given for the failure to file a defence. He asked the Court to

consider that an acknowledgement of service was filed in February 2003; that although there was correspondence between both attorneys, there was a letter of demand issued by the claimant and the particulars in the Statement of Claim were clear. There was nothing that should have prevented the Applicant from filing a defence one year ago.

I have perused the letters exchanged between counsel for both parties. The Applicant's attorney is alleging that the suit is really an action between the Claimant and the second defendant and the suit against their client ought to be discontinued. I am of the view that the Applicant's attorney should have acted with more prudence. However, I do accept that they were not inactive in the matter but were attempting to resolve the issues between the parties.

In the light of these circumstances, I am prepared to find that this condition has also been satisfied.

Re: Rule 13.3 (1) (c)

Mr. Cunningham submitted that the Applicant has a real prospect of successfully defending the claim. He referred to the proposed defence and the affidavit of Ms. Stubbs with documentary exhibits attached. He argued that these show that the Claimant had no contract with the 1st Defendant; that it was the second defendant who collected money from the 1st defendant and it was the second defendant who had the responsibility to pay the Claimant for the value of the services offered to the 1st defendant's guests by the Claimant.

Mr. Piper argued that the Applicant has failed to show that there is a real prospect of successfully defending the claim. He submits that the affidavit of Miss Stubbs clearly points to an agency relationship between the 1st and 2nd defendants and it is not a defence to the claim for the 1st Defendant to say they have paid their agents. As the principals, they are responsible to the Claimant. He cited the following authorities:

Dick Bentley Productions v Harold Smith 1965 2 ALL ER pg. 65

J EVANS & SON (PORTSMOUTH) Ltd. V Andrea Merzario Ltd. 1976 2 ALL ER 930.

GARNAC GRAIN CO. V HMF FAURE et al 1967 2 ALL ER pg. 353

Secondly, Mr. Piper also submitted that paragraph 2 of the proposed defence does not form the basis of any evidence of fact before the Court as it has not been sworn to by anyone representing the 1st Defendant. He cited the case of **Ramkissoon v Olds Discount Co. (TCC) Ltd. Vol 4 Wir (06/24/2004)**

In that case an application to set aside a regularly obtained judgment was refused because there was no affidavit of merit before the judge. In his affidavit, the solicitor did not purport to testify to the facts set out in the defence nor did he claim to have personal knowledge of the matters put forward to excuse the failure to deliver the defence.

The Court of Appeal upheld the decision of the judge and held that the solicitor's affidavit did not amount to an affidavit stating facts showing a substantial ground of defence and as the facts related in the statement of defence were not sworn to by anyone, there was no affidavit of merit.

REASONS FOR JUDGEMENT

I will first consider whether the affidavit of Miss Stubbs is sufficient to constitute an affidavit stating facts showing a substantial ground of defence as the proposed defence is unsigned by anyone representing the 1st Defendant.

In paragraph 2 of her affidavit filed on 10th June 2003, Miss Stubbs states as follows:

> "I am the Attorney-at-Law having conduct of the matter herein, having taken over conduct from Mrs. Lara Dayes who is not longer with this firm, and I am duly authorized to swear to this affidavit and do so from facts within my own knowledge excepted where stated by me to the contrary."

A deponent to an affidavit should swear to things which he knows and can prove of his own knowledge.

Miss Stubbs depones to communication made by Mrs. Lara Dayes to the attorney who first entered an appearance on behalf of the Applicant, Mr. Sean Kinghorn and with the Claimant's attorney. She took over conduct of the matter in or about February 2004 from Ms. Dayes. The documents exhibited with the affidavit include a letter from Clayton Morgan and Company on behalf of the 2nd Defendant dated 13th December 2002 enquiring whether the claimant would be prepared to accept payment of the debt in installments.

There is also a letter written by the Claimant to the 1st defendant complaining that the second defendant had fallen behind in their payments.

There is another letter dated 27th February 2000 from the claimant to the 1st defendant setting out the balance due from Exclusive Holidays, the 2nd defendant and request that Solo make arrangements to pay them directly.

Finally, there is a letter dated 19th June 2003 to Miss Dayes at Dunn Cox & Orett where it is admitted that the dispute is between the claimant and the 2nd Defendant. This letter is signed by Mr. Fred Smith, who represents the second defendant.

It is clear that these documents were submitted to the attorneys by their client, the applicant. These documents substantially reflect the proposed defence of their client.

The CPR 2002 requires that I be satisfied that the Applicant has a real prospect of successfully defending the claim.

The overriding objectives of these rules are that the Court is enabled to deal with the cases justly. (Rule 1.1 (1) Rule 1.2 reads as follows:

1. 2 The Court must seek to give effect to the overriding objective when it -

(a) exercises any discretion given to it by the Rules; or

(b) interprets any rule.

There are no affidavits signed by any representatives of the 1st Defendant. But, having regard to the particular circumstances of this case, I am of the view that the affidavit of Miss Stubbs including the attached exhibits, sets out the facts on which the proposed defence is made.

In relation to whether or not the Defendant has a real prospect of successfully defending the claim, I am guided by the words of **Lord Woolfe MR in Swain vs Hillman (2001) 1 ALL ER 91 at pg. 92 viz**:

> "The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success..... they direct the court

to the need to see whether there is a "realistic" as opposed to "fanciful" prospect of success."

The defence sought to be argued must have some degree of conviction. *(per Lord Justice Potter in EDF Man Liquid Products Ltd v Patel and ANR A3/2002/1450 delivered on 4th March 2003 at par. 8)*

The Court is not to engage in a mini trial in considering whether there is a real prospect of success *(per Lord Woolf MR in Swain v Hillman ibid)* However, the court can subject statements made by a party to some analysis to determine if there is real substance to factual assertions made *(per Lord Justice Potter in EDF Man et al at par. 10).*

In the instance case, the letters of the claimant and the 2nd defendant exhibited in the affidavit of Miss Stubbs which forms the matrix of the defence, do demonstrate some degree of conviction.

I am of the view, therefore, that the applicant has satisfied the court of the third condition listed at rule 13.3 (1)(c) of the CPR 2002.

Notice of Application for Court Orders filed on 10th June 2004 is granted as follows:

(i) Default Judgment dated October 29, 2003 is set aside as against the 1st defendant.

(ii) Leave to file defence on behalf of the 1st defendant within 14 days of the date herein.

(iii) Costs of the application and costs thrown away to the Claimant/Respondent

(iv) Leave to appeal granted.