SUPREME COURT LIBRARY
KINGSTON
JAMAICA
Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 02126 OF 2004

BETWEEN	**ISHMAEL ROBINSON**	**CLAIMANT**
AND	**CLARENDON PARISH COUNCIL**	**FIRST DEFENDANT**
AND	**CITIBANK N.A.**	**SECOND DEFENDANT**

IN CHAMBERS

Claimant absent and not represented

Miss Suzette Wolfe instructed by Crafton Miller and Company for the first defendant

Mr. Jerome Spencer instructed by Myers, Fletcher and Gordon for the second defendant

SEPTEMBER 28, 30 AND OCTOBER 4, 2005

APPLICATION TO SET ASIDE JUDGMENT

SYKES J

1. This is yet another of those very familiar applications to set aside a regularly obtained judgment in default of acknowledgment of service. The application is made solely under rule 13.3(1) of the Civil Procedure Rules (CPR) 2002.

2. I am not aware of any judgment from the Full Court of the Court of Appeal on this rule but there is a not too well known decision of Smith J.A.

of the Court of Appeal dealing with the point. It is the case of ***Caribbean Depot Ltd v International Seasoning & Spice Ltd*** SCCA 48/2004 (delivered June 7, 2004). This was a procedural appeal heard in Chambers. It was an appeal from a decision of D. McIntosh J who had set aside a judgment obtained in default of acknowledgment of service. It was accepted that the defendant had applied for the setting aside as soon as was reasonably practicable after finding out that default judgment had been entered. This meant that paragraph (a) of rule 13.3(1) was satisfied. The remaining issue was whether the other two paragraphs were satisfied. Smith J.A. said at paragraph 13 of his judgment

> *If the answer to* ***either*** *of these [i.e. para (b) and(c) of 13.3(1)] is in the negative, the judge would be obliged to dismiss the application to set aside.* ***Only if the answers to both are in the affirmative, would the court have a discretion to exercise any power under Rule 13.2*** (my emphasis).

3. According to Smith J.A. since the learned judge had indeed found that there was no explanation for the delay and no merit shown, there was no power to set aside the judgment. The necessary conclusion from this analysis of Smith J.A. is that all three paragraphs of rule 13.3(1) must be satisfied. Implied in Smith J.A's reasoning is that a reason for the failure to file an acknowledgment of service must be given. A reason must be given before a court can consider whether the reason is good. A fortiori if no reason is given then clearly the application must fail.

4. The policy derived from a textual analysis rule 13.3 (1) is that judgments regularly obtained should not be lightly set aside. The rule says that if rule 13.2 does not apply then the court may set aside the judgment ***only if*** the conditions set out in paragraphs (a), (b) and (c) are met. It is only

when those conditions are met then the discretionary power given to the court properly arises.

5. It is to be noted that the Rules Committee in Jamaica who undoubtedly knew of the corresponding English provisions made a deliberate policy decision not to give the judge in Jamaica an unfettered discretion as currently enjoyed by his English counterpart. The judge in England may set aside the judgment in default of appearance if (a) the defence has a real prospect of success **or** (b) there is some other good reason. The reason given is one of the factors the English judge takes into consideration. This is in contrast to Jamaica where there are gatekeepers of the judge's discretion. The gatekeepers are the three paragraphs of rule 13.3(1).

6. These rules, of which rule 13.3(1) is a part, are the product of extensive discussions and deliberations that ran over several years. So extensive were the discussions that some members of the profession thought they would never be implemented. It could not be suggested that those who sat on the Rules Committee were unaware of the fact that judgment in default of acknowledgement of service meant that there was no trial on the merits. Equally, they could not be unaware of the judicial pronouncements on the desirability of disposing of cases after a trial where possible. It is inconceivable that anyone could suggest that a committee made up of distinguished lawyers and judges had forgotten the principles of ***Evans v Bartlam*** [1937] A.C. 473. I would suggest that they would be aware of the lax attitude of some litigants to court procedures. They would have known of the high cost imposed on claimants who would be delayed by years from securing judgment in their favour if a default

judgment was set aside. The Committee would have been aware of those defendants who sat back and allowed a claimant to expend time, money, energy and great intellectual labours to put his case together, secure not only judgment but also an assessment of damages. These defendants simply turned up often times as late as execution to say, "Oh judge, I have a good defence on the merits so you must hear me." The sad thing about all this is that no one could properly test whether the proferred defence had any merit. All the defendants had to do under the old rules was simply deny the claimant's case. All these and other ills prompted the call for a change of procedure. In many cases, it is simply impossible to say whether a defence has any real prospect of success. Unsurprisingly, the Rules Committee sought to have some other criteria that was susceptible to some degree of objectivity. These were (a) the application has to made as soon as reasonably practicable after finding out that judgment had been entered and (b) a good reason had to be given. The third hurdle is not hard to satisfy. It simply requires words on a paper. When the applicant comes under rule 13.3(1) he has to file an affidavit. He may be cross examined. Costs are no longer the great cure all in a system that still takes more than two years between filing of claim and trial. The Rules Committee fashioned rule 13.3(1) to reflect our reality and made a deliberate and calculated policy choice to make it difficult for a properly obtained default judgment to be set aside. So to make an appeal to the effect of a default judgment without a trial is beside the point.

7. The Committee decided not to confer on the judges an unconditional discretion. The evils it spawned with consequential delays were too much to bear. I make this almost banal observations to say that the rule has

already determined where the balance lies and that is decidedly in favour of the person who has properly secured the judgment. It is not that the rule is defective as some have said; it simply strikes a different balance. I daresay that the defendant who acts with the requisite promptitude will hardly be caught out by the rule. Some have said that the failure to give any reason for the delay is not a knockout punch. I agree. It is not a knockout; it is fatal. ***Evans v Bartlam*** [1937] A.C. 473 and its progeny are, happily and thankfully, now confined to history

8. I now turn to an analysis of the evidence put before me. The claim was filed on September 1, 2004 and served on Citibank N.A. (Citibank) on September 20, 2004, at 12:30pm by Mr. Junior Rowe who swore an affidavit to that effect. Mr. Rowe handed the document to Miss Pamela Simpson who admitted service by signing a document known as particulars of service. The defendant did not file any acknowledgment of service. On November 16, 2005, the claimant entered judgment in default of acknowledgement of service.

9. Mrs. Maureen Hayden-Cater, on behalf of the Citibank, acknowledged that the claim was served on either September 20 or 21, 2004. The document was eventually given to an employee with instructions to send it to the attorneys of the bank, Myers, Fletcher and Gordon. This was not done. Mrs. Hayden-Clarke states that the employee told her that she (employee) did not "read the documents, did not fully appreciate their urgency and inadvertently omitted to send them to external legal counsel as she was instructed to do". The end result being that Citibank's counsel did not get the documents.

10. On the face of it, the claimant has done what he was required by law to do. Citibank had proper notice of the claim. It had more than ample time to contact its attorneys. The frank admission that the officer who was charged with the responsibility of contacting the attorney did not do so is to be commended but I do not see how the failure to read the document with consequential failure to appreciate their significance can amount to a good explanation. I conclude that the reason advanced is not a good reason. The other affidavits in the case were aimed at demonstrating that there is a reasonable prospect of successfully defending the claim and that the application was made within a reasonable time. These two matters do not arise for any consideration because I have concluded that the explanation given is very, very poor indeed.

11. Before closing I refer to the submission that the court should take into account that a corporate body only acts through human agents and that in this case the default was not that of the directing mind of the company and so that default should not be attributed to Citibank. If more were needed to bring the claim to the attention of the "directing mind" then no doubt the rules and relevant legislation would have said so. The fact that the internal mechanism of the bank failed cannot, without more, be a good reason since obviously every omission by a corporate body to contact its lawyers in time can almost be invariably be attributed to internal failures. To take the argument to the absurd, the submission would mean that a corporate entity would nearly always succeed in an application such as this. This would undermine the policy of the rule as outlined already. The application is dismissed.