IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO 2004 HCV 02594

IN CHAMBERS

BETWEEN	CHARELA INN LIMITED	CLAIMANT
AND	UNITED CHURCH CORPORATION	DEFENDANT/ ANCILLARY CLAIMANT
AND	CHARELA INN LIMITED	1ST ANCILLARY DEFENDANT
AND	PETER JUNOR	2ND ANCILLARY DEFENDANT
AND	PETER JUNOR (Executor of the estate of Leila Louise Junor)	3RD ANCILLARY DEFENDANT
AND	NEVILLE KEITH JUNOR	4TH ANCILLARY DEFENDANT

Ms Carol Davis for the 2nd, 3rd and 4th Ancillary Defendants.

Mr John Givans instructed by Janet Mignott for the Defendant/Ancillary Claimant.

Civil Procedure – Costs – Default costs certificate – Application to set aside – Registrar signing default costs certificate after the filing of the points of dispute – No evidence of service of the points of dispute – Whether receiving party entitled to default costs certificate - CPR rr. 65.20 and 65.22

30 June and 8 July 2011

BROOKS J

On 5 March 2010 this court handed down judgment against United Church Corporation in favour of Charela Inn Limited, Mr Peter Junor, Mr Peter Junor as executor of the estate of Leila Louise Junor deceased and Mr Neville Keith Junor. The court also ordered United Church to pay costs to Charela Inn and the Junors. United Church having failed to file points of dispute in respect of a bill of costs filed by the Junors, the registrar

of this court issued a default costs certificate in favour of the Junors. The certificate was in the sum of $2,342,248.11.

United Church now applies to set aside the default costs certificate. The basis on which the application is made is that the failure to file the points of dispute, within the time specified by the rules, was due to the illness of the attorney-at-law representing United Church. The Junors submit that the default costs certificate was properly issued and therefore this court has no authority to set it aside.

The issues to be decided are:

a. whether the Junors were entitled to a default costs certificate;

b. if they were, whether the court has any authority to set it aside, and

c. if the court has that authority what principles guide its decision.

The chronology

A chronology of the relevant developments is important to this assessment. It will assist in determining whether the default costs certificate was properly issued.

a. 15 November 2010 - The bill of costs was filed and served;

b. 16 December 2010 – The default costs certificate and affidavit in support is filed;

c. 17 December 2010 – The points of dispute, an application for extension of time to file points of dispute and an affidavit in support is filed;

d. 4 January 2011 – A supplemental affidavit in support of the application for the extension of time is filed;

e. 17 January 2011 – The default costs certificate is signed by the registrar

f. 4 February 2011 – The present application to set aside the default costs certificate is filed.

The application which was filed on 17 December 2010 was not served as, to date, no date has been set for it to be heard. It is superseded by the present application. There is no evidence as to the date of service of the points of dispute, but if it was served, such service was effected after the registrar had signed the default costs certificate.

In her affidavit, filed in support of the present application, Ms Janet Mignott deposed that the reason for failing to file the points of dispute on time was that she was ill for some time before the Junors' bill of costs were served. She said that although she recovered from her illness before the date of service, her absence from work had created such a backlog of work that she was not able to meet the deadline for filing the points of dispute.

The submissions

Counsel appearing for United Church, Mr Givans, submitted that the situation described by Ms Mignott and the fact that the points of dispute demonstrate that the amount stipulated by the default costs certificate was manifestly excessive, are good reasons for the default costs certificate to be set aside. He relied upon, for guidance, the provisions of rule 47.12 of the English Civil Procedure Rules and the practice direction in force in that country in respect of that rule.

In response, Ms Davis for the Junors submitted that as United Church was not alleging that the default costs certificate was improperly issued, the certificate cannot properly be set aside. In addition, learned counsel submitted that as the period, for which Miss Mignott was ill, predated the service of the bill of costs, Ms Mignott had the opportunity to contact opposing counsel but failed so to do. Ms Davis submitted that rule 47.12 of the English Civil Procedure Rules was very different from the relevant rules in

the Civil Procedure Rules 2000 of Jamaica (the CPR) and was not, therefore, of any assistance on the issue.

The analysis

I reluctantly find that I must agree with Ms Davis' submission that the Junors were entitled to the issue of the default costs certificate. However, I find that the court does have a discretion to set aside a properly issued default costs certificate. My reasons for so finding, turn on rules 65.20 (6) and 65.22 of the CPR. It should be noted, for the purposes of this analysis, that United Church is the paying party and the Junors are the receiving parties.

Rule 65.20 sets out the procedure for serving points of dispute in respect of a bill of costs. Paragraph 3 of that rule requires that the paying party files and serves its points of dispute within 28 days of being served with the bill of costs. A sanction is stipulated to punish paying parties who fail to obey that rule. The sanction is that the paying party in default is precluded, unless permitted by the registrar, from participating in the taxation proceedings.

Paragraph 5 of rule 65.20 states that a receiving party may file a request for the registrar to issue a default costs certificate, if the 28-day period mentioned above has expired and no points of dispute have been served on it. On the request for the default costs certificate having been filed, paragraph 6 of rule 65.20 becomes applicable. It states:

> "If any party (including the paying party) **serves** points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate." (Emphasis supplied)

I am prepared, for these purposes, to find that “issue” in the context of this rule, means “signed by the registrar”. The term is not specifically defined in the CPR and it would unnecessarily complicate proceedings such as these, to find that “issue” means “delivered to the receiving party”.

There is, however, a more curious issue to be resolved. Paragraph 5 speaks to the paying party **serving** the points of dispute before the issue of the default costs certificate. That, in my view, is a cumbersome requirement. It seems to me that it would be the **filing** of the document which would alert the registrar to the existence of the points of dispute. Service is effected on the paying party, while filing, as defined in rule 3.7(1), is delivery, by one means or other, to the registry.

The service of the points of dispute is not an action which could be relied upon to guide the registrar; there is no requirement in the rules for the receiving party, upon being served with the points of dispute, to then notify the registrar of the service. Even if there were such a requirement, it would be a most cumbersome and inconvenient procedure. It is my view, that it is the filing of the points of dispute which should restrain the registrar. It would then be for the registrar to decide whether permission would be granted to the paying party to participate in the taxation hearing which would follow in accordance with rule 65.23.

Despite that reasoning, however, I find that the rule is clear; it requires **service** of the points of dispute in order to restrain the registrar from issuing the default costs certificate. It is not permissible, in my view, to find that “serves”, as used in rule 65.20 (6), means “files”. The rule should be reviewed by the rules committee to determine whether its effect is reasonable.

In the instant case, although it is accepted that the points of dispute were filed almost a month before the default costs certificate was signed by the registrar, there is no indication that it was served before that signing. Consequently, the Junors were entitled to the certificate and there was no indication that the registrar ought not to have signed it.

I shall now consider whether the default costs certificate may be set aside in accordance with rule 65.22. That rule states:

> "(1) The paying party may apply to set aside the default costs certificate.
>
> (2) **The registrar must set aside a default costs certificate if the receiving party was not entitled to it**." (Emphasis supplied)

I divert briefly to state that I find, that if the registrar is permitted to set aside the default costs certificate, the court or a judge would also be empowered to take that step. Support for this finding is to be found at rule 2.5 (1) of the CPR, which provides:

> "Except where any enactment, rule or practice direction provides otherwise the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by –
> (a) a single judge of the court;
> (b) a master; or
> (c) a registrar."

Even if I am wrong in that interpretation of that rule, I find that the court's power to set aside the default costs certificate would fall within the court's inherent power to control its process. I therefore find that I have the authority to set aside the default costs certificate, or, at least direct the registrar so to do, if the application ought to succeed.

In returning to the task at hand, it is my view that Rule 65.22 does not stipulate any qualification to allow the paying party to request that the default costs certificate be set aside. Paragraph 1 is broad in its import. Paragraph 2 stipulates a mandate for the

registrar but, in my view, does not otherwise prevent the registrar from setting aside a certificate. It does not say, “but not otherwise”.

I am fortified in this view by the fact that by rule 65.20 (4) the registrar may permit a paying party who does not file points of dispute in time, to participate in the taxation proceedings. Such proceedings could only be a taxation hearing, which would follow from points of dispute being in place.

I, therefore, find that the registrar has the discretion to set aside a default costs certificate even if the receiving party was not found to be not entitled to it. The court may also exercise that discretion. Rule 47.12 of the English Civil Procedure Rules speaks to setting aside the default costs certificate, “if it appears to the court that there is some good reason why detailed assessment proceedings should continue”. Although there is no such provision in the CPR, it is my view that, in our jurisdiction, a default costs certificate may be set aside for “good reason”.

In applying that finding to the instant case, although illness is a factor to which this court usually gives a lenient approach, I agree with Ms Davis that illness does not arise in this scenario. Ms Mignott, having received the bill of costs at an awkward time, but not while she was ill, should have communicated with the attorney-at-law for the receiving party and asked for an indulgence, which, in the normal course of practice, I am sure would have been granted. She did not. I do not think that the reason advanced for the failure is a good reason.

Before concluding this judgment, I should say that the 28 days stipulated in rule 65.20 (3) does not constitute an irreversible bar to the paying party. Paragraph 4 of the

rule contemplates a party filing its points of dispute late and provides a sanction, which sanction the registrar is at liberty to lift.

Conclusion

Based on the above, I find that the Junors were entitled to the issue of the default costs certificate. This is because United Church failed to serve its points of dispute to the bill of costs before the registrar issued the default costs certificate. United Church may, if it provides a good reason for the court to do so, secure an order for the default costs certificate set aside pursuant to rule 65.22 of the CPR. It has, however, not supplied a good reason to support this application. The application must therefore be refused and the applicant must pay the costs of same.

Ordered that:

1. The application to set aside the default costs certificate dated 17 January 2011 is refused;

2. Costs to the 2nd, 3rd, and 4th ancillary defendants to be taxed if not agreed.