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Judgment Book

In the Supreme Court of Judicature of Jamaica

In the Civil Division

Claim NO. HCV02371/2007

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| Between | Winston Hunter | 1st Claimant |
| And | Johanna Hunter | 2nd Claimant |
| And | Benjamin Hunter | Defendant/Applicant |

Ms. Kayann Balli instructed by
Lightbourne and Hamilton for the Defendant/Applicant.

Mr. Maurice Manning instructed by
Nunes, Scholefield, DeLeon & Co. for the Claimants/Respondents.

Heard: 3rd & 20th November, 2009

*Default judgment – Application to set aside whether the CPR has two distinct rubric for setting aside – whether permission required to file acknowledgement of service out of time – whether an irregularly obtained default judgment can be varied – R. 13.2 and R.13.3.*

*Where an acknowledgement of service is filed before the request for judgment in default to be entered, though filed outside of time allowed by the general rule, any default judgment so entered will be irregular and must be set aside. Furthermore, the court is not competent to vary that judgment to make it read in default of the filing of a defence even where no defence has been filed.*

*Coram: Evan Brown, J (Ag.)*

1. The Claimant commenced proceedings on the 7th June, 2007, with the filing of both thee Claim Form and the Particulars of Claim to recover damages arising out of an incident which occurred on the 15th September, 2006. Both documents were served on the Defendant on the 7th July, 2007, one month hence. The defendant

filed in the registry an acknowledgement of Service on the 9th August, 2007.

2. On the 19th December, 2007, the Claimants filed a Request for Default Judgment to be entered against the Defendant in default of acknowledgement of service. The Claimants certified:

   a. The time for the 1st Defendant to file an Acknowledgement of Service pursuant to CPR Part 9 Rule 3(1) has expired;

   b. That no Acknowledgement of Service nor Defence to the Claim or any part of it has been filed;

   c. That the 1st Defendant has not paid any monies in settlement of the claim or any part of it;

   d. That the said claim is for an unspecified amount and the Claimants are in a position to prove the amount of damages.

   Accordingly, on the same date, interlocutory judgment in default of the filing of an Acknowledgement of Service was entered against the Defendant.

3. Learned Counsel for the Defendant/Applicant submitted, inter alia, that the judgment entered in default was premature, that is, irregular and ought to be set aside. With equal force but considerably less brevity, learned counsel for the Claimants/Respondents opposed the application.

4. His opening salvo was directed at the conspicuous absence of the judgment's irregularity from the grounds. He next submitted that if the court was persuaded by the Defendant/Applicant's argument concerning the Acknowledgment of Service, the court should act under R.13.3 to vary the default judgment since the Defendant sat on the suit. By vary, Counsel elaborated, the court could substitute 'a Defence' for 'Acknowledgement of Service.' With all due deference to learned counsel for the Claimants, his several other submissions do not fall for consideration since the court is of the view that the success or failure of the application is pivoted on whether the judgment was irregularly obtained.

5. The CPR contemplates two distinct ways in which a default judgment may be set aside. Each exists in its own sphere and is not the alternative of the other. Neither is there any hybridized zone. In short the application is made either as of right or an appeal to the court's discretionary power. In the case of the former, the application to set aside is considered under R.13.3. In the latter, the court exercises its jurisdiction under R. 13.2. If the point needed any emphasis, the heading of the respective sections of the CPR amply provides this. R.13.2 is headed "cases where court must set aside default judgment." On the other hand, R.13.3 is headed "cases where court may set aside or vary default judgment."

6. Whether the application is set aside depends on the Defendant's antecedent conduct vis-à-vis the CPR. R.9.2(1)(a) mandates a Defendant who desires to dispute a claim to file an acknowledgement of service in the appropriate form at the registry out of which the claim form was issued. Thereafter the Defendant must send a copy of the acknowledgement of service to either the Claimant or the Claimant's Attorney-at-law. R.9.2(2) prescribes filing of the acknowledgement of service by handing it in at the registry, posting, or faxing it to the registry.

7. A Defendant is relieved from the task of filing an acknowledgement of service if he has filed and served on the Claimant or the Claimant's counsel a defence: R.9.2(5). This rule stipulates the period for this as that 'specified in rule 9.3.' However, R.9.3 does not address the period for filing a defence. Hence, it seems the printer's devil was at work and it is R.10(3) that is meant. Outside of the purview of R.9.2(5), the acknowledgement of service must be filed. The general rule is that it must be filed within 14 days of the service of the claim form: R.9.3(1). Nevertheless, "a defendant may file an acknowledgment of service at anytime before a request for default judgment", by virtue of R.9.3(4). And that acknowledgement of service is of no effect until its receipt at the registry: R.9.2(4).

8. The brief chronology of events makes it manifest that the acknowledgement of service was not filed within the time allowed under the general rule, that is , within 14 days of the service of the claim form. Still, that does not *ipso facto* put the defendant across the Rubicon with a burnt boat. Though he stands in peril of judgment being entered, the CPR offers him the security of a fig leaf. That he adorned himself with when he filed his acknowledgement of service on the 9th August, 2007, some four months before the Claimants' request for judgment in default to be entered on 19th December, 2007. Rule 9.3(4) is that fig leaf.

9. The English and Jamaican positions are imbued with dissimilarity. In ***Coll v. Tattum (2001) The Times***, 3 December, 2001, Neuberger J. held that, although the CPR are silent on the point, a Defendant who wishes to acknowledge service or defence after these time limits have expired but before judgment in default is entered needs either the other side's consent or the court's permission. Under the Jamaican CPR 10.2(5), (6) and (7), the parties may twice agree to extend time for the filing of a defence, to a maximum of 56 days. Additionally, R.10.3(9) allows for application to be made for the requisite order.

10. When it comes to the acknowledgement of service however, there is no lacuna in the Jamaican CPR. The intention of the drafters is transparently clear. The defendant may file at any time as long as no

request for judgment in default has been filed. Indeed, the presumption *expressio unius est exclusio alterius* may well apply. The framers specifically mentioned extension of time in relation to the filing of a defence but, it appears, have deliberately left it out in their treatment of the acknowledgment of service. In any event, there seems to be no want of clarity in the formulation of R.9.3(4).

11. So then, the acknowledgement of service was filed according to the dictates of the CPR. Since that is the conclusion, what then is the fate of the judgment entered? Rule 13.2(1) commands, so far as is relevant:

> 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 acknowledgement of service, any of the conditions in rule 12.4 was not satisfied.

12. The pertinent section of R.12.4 reads:

> b). the period for filing an acknowledgement of service under R9.3. has expired;
>
> c). that defendant has not filed—
> 1). An acknowledgement of service.

It will be noticed that the above is recited in the certificate of the request for judgment in default. Rule 9.3 lays down the general obligation of 14 days after the date of service of the Claim form.

And, as was said above, the defendant was in disobedience in this regard.

13. That notwithstanding, the Claimants were in obvious error when they certified that as a matter of fact an acknowledgement of service had not been filed. It appears that the combined effect of R12.4(c) and R9.3(4) is to infuse R9.3(1) with colourable redundancy. That is, a Claimant cannot rely on the lapse of 14 days simpliciter, he must assert the fact of non-filing but the time for filing is extended indefinitely, conterminous with the request for judgment in default. Neither party is constrained by these rules to prosecute the claim with expedition consonant with the overriding objectives.

14. Be that as it may, it ought not to be an Utopian expectation for the Claimant to be able to certify the fact of the Defendant's default without resort to a search an exercise neither required nor provided for by the CPR 2002. Rule 9.2(10 requires not only the filing of the acknowledgement of service but also that a copy be sent to either the Claimant or his Attorney-at-law. The CPR are deafeningly silent on the manner of proof that the copy was sent and appropriate sanctions for the failure so to do. It surely was not intended for defendants to wait until the ninth hour then, like Nicodemus, file the acknowledgement of service then like Zaccheus recline on a suitable

limb of the sycamore tree to see what the Claimant will do next. In the instant case, it is not apparent that the Claimant received the requisite notification. Indeed, it was not until 4th December, 2007 that the Defendant 1st filed a notice of application for court orders seeking inter alia, to set aside the default judgment.

15. Whether or not a copy of the acknowledgement of service was sent to the Claimants or their Attorneys-at-law, this application has to be determined under R13.2 and not R.13.3. Can the court therefore accede to the request of counsel for the Claimants/Respondents and vary the default judgment in the terms suggested? This submission struck the court as being extemporary and remains unsupported by authority. It is patently clear that the court has no power to do anything but set aside a default judgment irregularly obtained. To countenance this submission would be to purport to exercise a discretion given only under R.13.3. That would result in the forbidden hybridization of the rules and a canter down a path of error, the defendant is entitled *ex debite justitiae* to have this demonstrably irregularly obtained default judgment set aside: ***Anlaby v. Praetorious (1880) 20 QBD 764.***

16. I therefore make the following orders:

(1). Interlocutory judgment entered on the 19th December, 2007 set aside.

(2). Leave be granted to the defendant to file his Defence within seven (7) days of the date hereof.

(3). The Attorney-General be made an Ancillary Defendant.

(4). Defendant granted permission to file and serve Ancillary Claim Form and Ancillary Particulars of Claim on the Ancillary Defendant within thirty (30) days of the date hereof.

(5). Claim to proceed to Case Management Conference.

(6). Costs to be costs in the claim.