

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008/HCV03080

BETWEEN	RIVERWALK LIMITED	1 ST CLAIMANT
AND	BIKE MOUNTAIN WATERFALLS TOURS LTD	2 ND CLAIMANT
AND	JAMAICA TOURIST BOARD	1 ST DEFENDANT
AND	TOURISM PRODUCT DEVELOPMENT COMPANY LIMITED	2 ND DEFENDANT
AND	THE ATTORNEY GENERAL	3 RD DEFENDANT

N. Jones for the Claimants

D. Kitson and S. Ridsen-Foster instructed by Grant Stewart Phillips & Company for the Defendants

Heard: November 16, 23, December 13, 2010 and July 29, 2011

Application to set aside Judgment in Default of Defence

Lawrence-Beswick J

1. The claimants filed suit against the defendants and the defendants did not file defences within the prescribed time. Judgment in default of defence was thus entered against Jamaica Tourist Board (JTB) and Tourism Product Development Company Limited (TPDCo).

2. This is an application to set aside that judgment. The defendants' preliminary submission was that the judgment was irregular because the defendants were Crown servants and/or agents and that leave should have been first obtained to enter judgment against them.

3. In a written judgment, this court dismissed the preliminary submission. This substantive application to set aside the judgment is now based on the submission that the proposed defence is meritorious.

4. The Civil Procedure Rules 2002 (CPR) provide that the court may set aside a judgment entered in default of defence if the defendant has a real prospect of successfully defending the claim.¹

5. In deciding whether or not to exercise its discretion the court must consider whether the defendant has:

- a. applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
- b. given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.²

I consider first, these factors.

6. **Was the application filed "as soon as was reasonably practicable after finding out that judgment had been entered?"**

The suit was filed on June 11, 2008. Default Judgment was entered some four months later on October 13, 2008. The judgment was served on both defendants on April 30, 2009. The defendants filed an application to set aside the judgment on June 17, 2009, about six (6) weeks after the service.

¹ Rule 13.3 (1)

² Rule 13.3 (2)

7. During these six weeks, JTB and TPDCo contacted the Attorney General's Chambers, only to be met with several reasons why the Chambers had failed to file the defences within the prescribed time. Not surprisingly, new attorneys-at-law were retained and thereafter would have had to be briefed in order to advise properly. However, the file was not readily available.

8. The evidence is that the file could not be located at the Attorney General's Chambers. Efforts to reconstruct it by reference to the file at the Supreme Court also proved futile because that file could also not be located. Eventually, recourse had to be had to the kindness of attorneys-at-law for the claimants who allowed the defendants' attorneys-at-law access to their files.

9. I accept this evidence as being true on a balance of probabilities and therefore find that in these circumstances, the period of six weeks which passed before the application to set aside judgment was filed, was as soon as was reasonably practicable after JTB and TPDCo found out that judgment had been entered.

Short of indulging in a physical search themselves for the file at the court and/or the Attorney General's Chambers, it appears to me that JTB and TPDCo had done all they could do to seek to continue their case.

The Attorney General's Chambers must accept responsibility for the inability to locate its file in its Chambers. However, it cannot be held responsible for the file not being available at the Supreme Court, which delayed the time in which the application could be filed.

10. **Was there a good explanation for the failure to file a defence?**

One explanation for the failure of the Attorney General's Chambers to file a defence is that senior staff were leaving the Attorney General's Chambers and that there was insufficient staff to prepare the defences in the prescribed time.

The Attorney General's Chambers state that they were unaware of their initial failure to file defences because the officer who was responsible for the case had left the Chambers.

11. However, it is the evidence of Mr. John Lynch, Chairman of the JTB that both JTB and TPDCo had written to the Attorney General's Chambers with instructions to prepare their defence. They followed up with repeated correspondence and a request for a status report as to the progress of the matter. They did not realize that the Attorney General had not followed their directions until they were served with the judgment. The evidence is that the JTB and TPDCo have always been ready, willing and able to defend the claim.

12. The JTB and TPDCo therefore submit that the failure to file the defence was not of their doing, but rather, they had done all that they could have done. It was the failure of their attorneys-at-law to promptly represent them that resulted in judgments being entered against them, the defendants.

13. The explanation of the Attorney General's Chambers for having failed to file a defence is not good. If the Attorney General's Department were representing the defendants, they had a duty to access competent attorneys-at-law, whether within or without the department, to file the defence. If they were unable so to do or anticipated that they could not, they ought to have informed their clients of their failure or anticipated failure.

14. However, it is my view that clients who have reason to believe that they are being represented by the Attorney General's Chambers, may reasonably presume that their matters are being dealt with in a responsible manner. I cannot fault them for that. The Attorney General's Chambers come under the aegis of the State, have a complement of attorneys-at-law and presumably have access to the vast resources of the State.

15. It follows therefore that the Attorney General's Chambers have failed to provide a good explanation for the failure to file a defence but I accept that the litigants themselves have provided a good explanation for their own failure having fully instructed the Attorney General's Chambers, following up with repeated correspondence.

16. I turn now to consider whether each defendant has a real prospect of successfully defending the claim. The claim against the defendants, in substance, is that their actions in allowing Mayfield Falls to be licensed to operate as a tourist attraction in competition with the claimants, JTB and TPDCo resulted in damage and loss to the claimants, Riverwalk Limited and Bike Mountain Waterfalls Tours Limited (Riverwalk).

The Background

17. A brief history of the circumstances which gave birth to this suit is helpful. Mayfield Falls and Mineral Springs opened in 1995 and were licensed by the JTB from 2000 until 2006 to operate as a tourism enterprise. The property was on leased land adjoining the Mayfield River in Hanover.

18. Meanwhile in 1999, an attraction opened on the other side of the river. Bike Mountain Waterfalls Tours acquired control of that attraction which the JTB licensed in 1999 as a tourism enterprise. The license eventually expired and in 2002 Riverwalk

Limited was incorporated and operated that attraction. The JTB licensed it from 2002 to 2009.

19. The attractions were separated by a river and in fact, shared the river. They targeted the same tourism market. The hostilities that festered between the staffs of the two entities were, in the particular circumstances, almost inevitable. Mayfield and Riverwalk damaged each other's business by their bitter and acrimonious competition which included their staff being violent to each other.

20. The TPDCo arranged mediation sessions between the parties which resulted in the resolution of some of the issues. However, one of the fundamental problems remained – the river. Both parties conducted tours of the river with walks into the adjoining land where the river did not permit walking. The parties each claimed exclusive right to particular parcels of the land adjoining the river.

21. In the face of this acrimonious environment, it is no wonder that the businesses suffered. Riverwalk laid the blame for that at the feet of JTB and TPDCo claiming that had they carefully examined the applications for the licences granted, they should not have granted a licence to Mayfield.

22. Riverwalk claims that JTB and TPDCo breached a contract and/or their statutory duty and/or were negligent in licensing Mayfair to operate on premises adjoining theirs, resulting in losses to Riverwalk.

23. **Real prospect of successful defence**

The JTB is a statutory board. It bears the responsibility of issuing licences for tourism enterprises in accordance with the Tourist Board Act.

24. Where a tourism enterprise operates contrary to the Tourist Board Act it is the Resident Magistrate who is empowered to convict such an operator in court.³

25. The JTB exhibits a draft defence supported by affidavit evidence of Mr. John Lynch, stating that their responsibility concerning licensing is specified by the requirements of the law. The draft defence indicates that the licences were not contracts but were revocable permission in accordance with the Tourist Board Act, which also allows them to grant licences to competitors and does not give a warranty not to licence competing attractions.

26. The proposed defence also indicates that the Tourist Board Act, under which the licences are granted, does not require the JTB to issue exclusive licences. Further, it adds, that in any event, an exclusive licence restricting competition would be contrary to the Fair Competition Act.

27. Riverwalk contends further that the operators of Mayfield Falls have trespassed on their property primarily because JTB and TPDCo failed to take care when they granted licences to Mayfield to operate a similar attraction adjoining Riverwalk. That contention is met by the proposed defence that Mayfield was openly operating there from 1995, before Riverwalk began operations, and their operations could be easily seen by Riverwalk before it started business.

28. The proposed defence further asserts that there was no breach of duty and that in fact the Tourist Board Act under which the licences were granted does not place any duty of care on the JTB or TPDCo. Consequently, negligence would not arise.

³ s.24 (4) Tourist Board Act

29. TPDCo argues that far from damaging Riverwalk, it contributed to the welfare of both Riverwalk and Mayfield, by the arrangement for mediation to pacify an explosive situation. Further, it has no control over the licences issued, that being totally within the purview of the JTB.

30. **Setting aside**

One of the general principles which continues to guide the court despite changes in procedure, is to be found in **Evans v Bartlam**⁴ where it was observed that “unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow the rules of procedure.”

31. At the same time, it is not to be denied that “a person who holds a regular default judgment has something of value and to avoid injustice, he should not be deprived of it without good reason.”⁵

32. It is my view that the defendants have a real prospect of successfully defending the claim. The defence reveals important legal issues and affidavit evidence supports these contentions.

33. Further, the circumstances of the case are such that the court should exercise its discretion to set aside the judgment entered in default of defence. There is good reason for setting aside the default judgment in these particular circumstances.

⁴ [1937] 2 All ER 646 at 650

⁵ **Intl Finance Corporation v Utefrica Spr** [2001] CLC 1361

34. The Order therefore is judgment entered herein is set aside and the JTB and TPDCo have leave to file their defence out of time within 14 days of this Order. Costs of this matter and costs thrown away to the claimants to be agreed or taxed.