

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 03689/2010

BETWEEN	DANIEL ROBINSON	CLAIMANT
AND	TRADE BOARD LIMITED	1 ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2 ND DEFENDANT

Glenroy Mellish for Claimant

Harrington McDermott instructed by Director of State Proceedings for the 1st and 2nd Defendants

Heard: October 19 and 21, 2011

Setting aside default judgment – permission for proposed defence to stand

Lawrence-Beswick J

1. This matter concerns two applications by the Trade Board - one to set aside a default judgment and the other, an application to permit its defence which was filed out of time to stand.
2. The claimant, Mr. Daniel Robinson, is a Court Bailiff. The first defendant, Trade Board Limited (Trade Board) had obtained a Writ of Seizure and sale against Grains Jamaica Limited and the Attorney General's Chambers as attorneys-at-law for Trade Board, engaged the bailiff to execute it. Trade Board also obtained an order for sale of land of Grains Jamaica Limited.

3. On May 28, 2001, Bailiff Robinson executed the writ and secured the chattels and land which he had seized on behalf of Trade Board. Several expenses were thereby incurred by Mr. Robinson. He sought payment from the Trade Board.

4. The Trade Board did not pay to Mr. Robinson the amounts which he claimed had become due. In July 2010, he sued the Trade Board and the Attorney General for the outstanding amounts. In a letter of February 1, 2007, a member of the Attorney-General's Chambers signing for the Attorney General had stated, "at a convenient time [we will] settle the various costs, fees and expenses owing to [the claimant's bailiff]." The bailiff regarded this as the Attorney General's undertaking.

The money was not paid. In a further attempt to obtain payment, Bailiff Robinson had written to the Attorney General in a letter dated September 4, 2009 including a Bailiff Report which had been previously submitted on May 2, 2008 and which showed the outstanding balance. The monies remained unpaid despite repeated telephone calls and letters.

5. The Attorney General is sued as an officer of the Court, requiring her to "honour the undertaking" she is said to have given.

6. The Director of State Proceedings acknowledged service of the claim form and particulars of claim on both the Trade Board and the Attorney General but filed no defence within the prescribed time. Judgment in Default of Defence was therefore regularly entered against the Trade Board in November 2010 and the claim against the Attorney General was abandoned.

7. In arguing that the judgment should be set aside, Counsel for Trade Board relies on Rule 13 of the Civil Procedure Rules (CPR) 2002.

Rule 13.3(1) CPR 2002 empowers the Court to set aside a default judgment regularly obtained if the defendant has a real prospect of successfully defending the claim.

Rule 13.3(2) further mandates that in making this determination, the Court must consider if the defendant (a) has applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered and (b) has given a good explanation for the failure to file a defence.

8. It is not challenged that the judgment against Trade Board was regular and it is agreed that the application to set aside the judgment was made as soon as was reasonably practicable after the Trade Board found out about the judgment. One of the questions remaining to be determined therefore, is if the Trade Board has given a good explanation for the failure to file a defence.

9. Counsel for the Trade Board argues that it was unable to file a defence because it did not have sufficient instructions and had requested information from Bailiff Robinson which had not been forthcoming in time.

The Trade Board filed a Request for Information from Bailiff Robinson on the same day that it filed the proposed Defence and the application to set aside the judgment.

10. The Request for Information by the Trade Board was exhibited. The questions all seek details of, and surrounding, the Writ of Seizure and Sale, and of copies of correspondence in this matter, between the Attorney General's Chambers and Bailiff Robinson.

However, the Writ was exhibited in the affidavits of Bailiff Robinson filed on March 1 and 31, 2010, in a matter related to this instant matter where the Trade Board

was the appellant and Bailiff Robinson was the applicant /intervener. The Counsel who signed the Draft Defence and the Request for Information was the same counsel who appeared for the Trade Board in that related appellate matter.

11. In addition, the proposed Defence indicates that “due to the claimant’s failure to particularize the Writ of Seizure and Sale” in the Particulars of Claim, the defendants were unable to properly respond to the allegations.

12. Records exhibited show that the Director of State Proceedings had initially represented Bailiff Robinson in the related matter of **Pepper Source v Trade Board and Grains Jamaica Limited** CL 2002/T031, and on May 19 and June 11 2008 filed Bailiff Robinson’s affidavits, on his behalf, based on the existence of the Writ of Seizure and Sale and an acceptance of its attendant circumstances.

13. I find on a balance of probabilities that the Director of State Proceedings was aware of the existence of the Writ of Seizure and Sale from at least February 2007 when the letter was written from the Attorney General’s Chambers concerning payment to the bailiff for its execution. That letter was a part of the affidavit of Bailiff Robinson filed and served on the defendants on July 27, 2010. It follows that when the defendants were served with the Fixed Date Claim Form in this matter on July 27, 2010, the Attorney General’s Chambers already had the Writ in its possession or at the very least was well aware of its existence and import.

It also follows that there was no need to request of Mr. Robinson information on its contents and on the attendant circumstances.

14. I therefore cannot accept as true the evidence that the absence of information sought in the Request for Information and the absence of particulars in the claim caused the delay in filing the Defence.

15. In addition, an examination of the exhibited Draft Defence filed on December 13, 2010 on behalf of both the Trade Board and the Attorney General, shows that it is replete with bare denials, as it concerns the Trade Board, a situation which is regarded as being unacceptable by the courts. The Court of Appeal in **Jamaica Beverages Limited v Janet Edwards** [2010] JMCA App 11 opined that in proposing its defence, “[A] defendant in default must ... demonstrate that its defence has a real prospect of success” Brooks J.A. (Ag.) [Emphasis supplied]. par 13. This means that there must be some evidence presented which would show that there is such a prospect. Bare denials do not provide such evidence.

16. I conclude therefore that (a) no good explanation for the failure to file a defence has been given and (b) the Draft Defence filed by Trade Board does not show that the defendant has a real prospect of successfully defending the claim.

17. In an affidavit supporting the applications, the attorney-at-law in the Attorney General’s Chambers states that there is the view that payment of the money due to the Bailiff is not the responsibility of the Trade Board on whose behalf he executed the warrant, but rather, has become the responsibility of Pepper Source, another Creditor of Grains Jamaica Limited.

This assertion, which may have been viewed as unusual, had its foundation in the fact that after the writ had been executed on Grains Jamaica Limited on behalf of the

Trade Board, Pepper Source filed suit against the Trade Board and Grains Jamaica Limited seeking priority of rights to the assets of Grains Jamaica Limited.

18. Pepper Source has subsequently been adjudged to have priority over Trade Board over the assets of Grains Jamaica Limited. Further, it was adjudged in the suit where that priority was declared, that before it obtained its Writ of Seizure, the Trade Board was aware that Pepper Source had already obtained a Writ of Seizure against Jamaica Grains Limited and that its execution had been stayed pending a decision of the Court of Appeal.

19. In any event, regardless of where priorities may lie, it is accepted and observed in **Halsbury's Laws of England** that "the execution creditor is liable to the sheriff [bailiff] for the expenses, and the seizure and mileage, even if the execution results in nothing." 4th edition Vol 17 (1) par 208.

20. Further, although not contained in the Draft Defence, issue has been made as to whether the words alleged to be an undertaking are in fact an undertaking. Assistance in that regard can no doubt be had from Panton P. who delivered the judgment of the Court of Appeal in the related appellate matter of **Daniel Robinson v Trade Board** [2010] JMCA. In referring to the recourse open to the Bailiff, Panton P said, "The applicant... has ... an undertaking from the Attorney Generalin the form of a letter." [Emphasis supplied] par 9.

21. The Court of Appeal in **Delroy Lindsay v Attorney General of Jamaica** SCCA106/99 said "[T]he Attorney General's word is his bond and the Courts of our land will hold him to it. The history of our country has not so far produced any reason for there to be any doubt as to the strength and honour of the Attorney General's word" page 29.

22. The apparent acceptance, whether by undertaking or mere statement, by the Attorney General of the fact that the Trade Board is responsible for the payment to the Bailiff, fortifies my view that the Trade Board has not shown a real prospect of successfully defending the claim.

23 In these circumstances therefore, where

- (a) the judgment against the Trade Board was regularly entered and
- (b) the Trade Board has not demonstrated a real prospect of successfully defending the claim, and
- (c) the Trade Board has not given a good explanation for the failure to file a Defence,

Bailiff Robinson is entitled to the benefit of his judgment and it ought not to be set aside.

It follows that the proposed defence will not be necessary.

24. I therefore refuse both Orders sought – to set aside the default judgment entered against the Trade Board and to allow the Defence filed by the Trade Board to stand.

Notices of Application for Court Order filed March 3 and 11, 2011 refused.

Costs to the claimant to be agreed or taxed.