[2021] **JMSC CIV. 82**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV04199

BETWEEN	**NATHANIEL BENNETT**	**CLAIMANT**
AND	**SUNSHORE JAMAICA SHIPPING**	**1ST DEFENDANT**
AND	**ALTHEA WHYTE T/A COMBINED FREIGHT FORWARDERS**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Ravil Golding instructed by Lyn-Cook Golding Attorneys-at-Law for the Claimant

Miss Petrina Williams instructed by Zavia Mayne & Company, Attorneys-at-Law for the 2nd Defendant.

22nd February and 9th March 2021

Civil Procedure Rules (CPR) 39.6 - Application to set aside order made in the absence of a Defendant after trial; what is a reasonable explanation for the Defendant's absence at trial, whether reasonable steps taken by Counsel to notify the Defendant of the trial date.

MASTER ORR, (AG)

[1] On October 16, 2018, judgement was entered against the Defendants after a trial in their absence in the sum of CAD$21,194.00 with interest at 3% from June 22, 2006 to October 16, 2018. Miss Althea Whyte the 2nd Defendant has now applied to set aside this order which was made in her absence.

[2] CPR 39.5 authorises a Judge to enter judgment against a Defendant in absentia. The section provides:

> *"Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules-*
>
> *(a) if no party appears at the trial the judge may strike out the claim and any counterclaim; or*
>
> *(b) if one or more, but not all parties appear the judge may proceed in the absence of the parties who do not appear."*

[3] CPR 39.6 gives the absent party an opportunity to explain to the court why he/she did not attend the trial. It also gives the party whether Claimant or Defendant in whose favour the judgment was given, the chance to protect this judgment and of not having to prove his case all over again albeit that it is not a judgment on the merits.

[4] CPR 39.6 is most relevant to this application – it provides as follows:

> *(i) A party who was not present at a trial which judgment was given or an order made in its absence may apply to set aside that judgment or order.*
>
> *(ii) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.*
>
> *(iii) The application to set aside the judgment or order must be supported by evidence on affidavit showing*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other judgment or order might have been given or made.*

[5] The consistent use of the word "must" throughout CPR 39.6 informs us that all three requirements must be satisfied. Unlike an application to set aside a default judgment under part 13, the court has no residual discretion to set aside a judgment under rule 39.6 if any of these three conditions are not satisfied.

[6] According to Harrison, Karl JA, in ***David Watson v Adolphus Roper*** SCCA 42/2005 Supreme Court Jamaica (delivered November 18, 2005)*:*

> *"the predominant consideration for the court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits, but the reason why the applicant absented himself from the trial."*

[7] In her affidavit in support of this application Miss Whyte provided a brief chronology of the claim. She stated that after the claim was filed, nothing happened in the claim for several years between 2011 and 2018. She further stated that when she was served with the judgment in this claim on April 16, 2019, she immediately contacted her Attorneys-at-Law who she said had been relentlessly trying to reach her. Their efforts she said were in vain, as she later discovered that they had an incorrect telephone number for her. Miss Whyte concluded by saying that where she had attended the trial, the court would have come to a different decision as she would have been able to participate in the trial.

[8] In her defence she had outlined that she was only contracted by the Claimant to clear his vehicle from the wharf once it arrived in Jamaica. She was unable to do so as the Claimant had not paid the assessed duties when the vehicle arrived in Jamaica. She said he was in settlement discussions with the 1st Defendant whom he had contracted to ship his vehicle to Jamaica and who would have been responsible to account for any damage to the Claimant's vehicle enroute to Jamaica.

[9] There has been no challenge to her evidence that the application was made within 14 days of being served with the judgment. Indeed Mr. Golding in his submissions has conceded that the application was filed within the prescribed time.

[10] The primary consideration for the court is Miss Whyte's reason for being absent on the trial date. Miss Williams in her submissions stated that telephone calls were made to the 2nd Defendant which proved futile. She also directed me to an affidavit

filed in support of an application to remove Attorneys-at-Law's name from the record to substantiate her position that the 2nd Defendant could not be contacted.

[11] The affidavit in support of the application to remove Counsel's name from the record outlined that:

(i) "Certain difficulties have arisen concerning the Defendants whereby efforts in acquiring instructions from them have proven futile.

(ii) The relationship between the Defendant and Zavia Mayne and Company has broken down as a result of the Defendant's inability to provide pertinent information and therefore in the circumstances Zavia Mayne & Company cannot make further meaningful representation to the Claimant.

(iii) It is believed that a severance of the Attorney/Client relationship at this juncture is the best course of action for all concerned parties."

[12] The affidavit did not exhibit or refer to any correspondence between the Attorneys-at-Law and the Defendant notifying her to the trial date, nor did it state that correspondence had been sent to the 2nd Defendant notifying her of the trial date. Neither did it outline any efforts made by the firm to secure instructions from the 2nd Defendant. Counsel also admitted that no correspondence was ever sent to Miss Whyte in relation to the judgment being entered against her.

[13] Mr. Golding strenuously challenged that 2nd Defendant's application on this point. He submitted that she had provided no good reason for her absence. He relied on the affidavit of Miss Shawna-Kay Newby an employee at his firm. Miss Newby deponed that she found Miss Whyte's telephone number in the local telephone directory and was able to contact her easily. Also of note is that the 2nd Defendant was served personally with the judgment. There was no challenge to Miss Newby's affidavit.

[14] Mr. Golding also challenged her statement that no further activity took place on the file and blamed her for failing to keep in touch with her Attorneys-at-Law.

[15] In his submissions, he urged the court not to accept her explanation for failing to attend the trial, as the failure of a litigant to keep in touch with his/her Attorney-at-Law was not a good explanation for failing to attend the trial. He relied on ***David Watson v Adolphus Gayle*** SCCA 42/2004 (unreported) delivered November 18, 2005, where in addressing the Defendant's absence from court Mangatal, J said that his failure to provide his Attorneys-at-Law with a change of address which resulted in their being unable to contact him, was not a good reason for failing to attend the hearing. She said further that parties are expected to stay in touch with their Attorneys when they have been sued. The scope for them to say they were unaware of a court date must be by its nature very limited.

[16] Counsel also relied on ***Neufville v Papa Michael*** [1999] LRL November 23, 2019 where the court held as also in ***Watson v Gayle*** (supra) that where no adequate explanation has been given by a party who failed to attend a trial and failed to keep in touch with his solicitors the application would be refused.

[17] In considering whether she has provided a good reason for failing to attend the hearing I have considered her explanation for her absence from court at the trial. This being that her Attorneys-at-Law were unable to contact her. Of note is that Miss Whyte's reason for being absent from court on the trial date is what she would have been told by her Attorneys-at-Law as to their efforts to contact her.

[18] There was no affidavit from the 2nd Defendant's counsel as to their efforts to locate her or why no correspondence was sent to the 2nd Defendant at her last known address informing her of the case management conference and the orders made which the 2nd Defendant had to comply with before trial and also the trial date. There was no information before the court as to whether any attempt was made to secure an alternative telephone number for Miss Whyte, or her business including a search of the telephone directory. It is to be remembered that Miss Whyte trades as Combined Freight Forwarders and her business telephone number would most likely be in the directory.

[19] Despite Miss Whyte's statement that her Attorneys-at-law were unable to locate her to inform her about the pending trial date, I note that the Claimant's Attorneys-at-Law were able to locate her in the directory and serve her with the judgment. They did not seem to encounter any difficulty in locating the 2nd Defendant.

[20] The importance of outlining counsel's efforts to locate the 2nd Defendant in an affidavit would be to satisfy the court that counsel had indeed taken all reasonable steps to notify Miss Whyte of the developments in this claim, particularly the trial date.

[21] The rapid pace at which the claim proceeded after the court heard the Claimant's application to dispense with mediation, placing the claim on the speedy trial list and setting a trial date within eight months of the case management conference dictated that her Attorneys-at-law had a duty to take all immediate and reasonable steps to contact Miss Whyte. This would include sending correspondence to her last known address outlining the case management orders and the consequences of failing to comply with the orders.

[22] The purpose of this correspondence was twofold; it informed the 2nd Defendant of her obligations and her likely peril where she failed to comply with the case management orders. It also satisfied counsel's duty to their client. This duty also extended to notifying her in writing that judgment had been entered against her as they were present at the trial. Miss Whyte said that she learnt of the judgment nearly six months after it had been entered against her through the claimant's Attorneys-at-Law when they served her with the judgment.

[23] I do agree that Miss Whyte had a duty to keep in touch with her Attorneys-at-Law, irrespective of whether the 1st Defendant was in settlement discussions with the Claimant, or whether or not the claim lay dormant for several years. As long as she remained a Defendant to the proceedings, she had a responsibility to keep in touch with her Attorneys-at-Law.

[24] However, her failure to keep in touch with her counsel though misguided, was not intentional or deliberate. In ***Watson v Roper*** (supra) on which Mr. Golding relied, the 2nd Defendant's Attorneys-at-Law had been served with notice of the trial date and had notified him by correspondence delivered by registered post. This letter was never returned to his counsel. The judge found that he ignored these notifications. She said that he did not expressly state that he had not received prior notification of the trial date. She considered that he also changed his home address without notifying his Attorneys-at-Law although he had also provided his Attorneys-at-Law with his business address at which he could still be contacted.

[25] In ***Sharlton Gilroy v Fernando Hudson*** [2015], JMSC Civ 117 also relied on by Mr. Golding, Williams, Frank J as he then was held that that Defendant had advanced no good reason for his absence from the hearing. He said that it was reasonable to infer that the Defendant had deliberately absented himself from the island to engage in illegal activities abroad, failing to keep in touch with his Attorneys-at-Law during that time.

[26] I am also guided by the dicta of Langrin, JA in ***Thelma Edwards v Robinson's Car Mart Limited & Another*** (unreported) SCCA 81/2000 which was reiterated by Harrison, Karl JA in *David Watson v Adolphus Roper* (supra) where he said at page 6:

> *"If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside, the conduct of the appellant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation."*

[27] Langrin, JA therefore made a distinction between absence by a party that was deliberate, and absence which was as a result of a mistake or an accident. The likelihood of the court granting a rehearing was unlikely in the former and more possible in the latter circumstances.

[28] More recently in ***Alice McPherson v Portland Parish Council*** [2019] JMCA App 20 the Court of Appeal offered further guidance in determining what is a reasonable explanation for a litigant's absence from the hearing. The short facts of that application are that the Claimant's Attorney-at-Law's former secretary received notification of the case management date from the court. She failed to record the date in Counsel's diary and thereafter left his employ. As a result, both the Claimant and her counsel were absent from the case management conference. She applied to set aside the order made at the case management conference striking out her claim in her absence.

[29] Her application was refused at first instance and in granting her leave to appeal the order of the lower court, Fraser, David JA considered each criterion that needed to be satisfied under CPR 39.6. He referenced Lord Dyson in ***The Attorney General v Universal Projects Limited*** [2011] UKPC 37 where he said:

> *"to describe a good explanation as one which properly explains how the breach came about" simply begs the question what a "proper" explanation is. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."*

[30] Fraser, JA went on to explain at paragraph[47] that:

> *" the approach to the understanding of what is a "good explanation" for the purposes of the rule that deals with relief from sanctions is clearly transferable to the concept of a "good reason", in the context of explaining absence from a hearing, which led to an adverse order being made against an absent party."*
>
> *"...A "proper" or good explanation or reason must be one which not only adequately reveals why the default occurred, it must also show that the default is excusable in the circumstances. Put another way, an explanation or reason may comprehensively outline what caused a particular failing but to be "good", it also has to have the additional quality of justifying the relief, forbearance or favourable exercise of the discretion sought."*

[31] Straw, JA who delivered the judgment when the appeal was considered adopted Fraser, JA's reasoning. She added that

> *"In assessing whether a reason could be deemed to be good, therefore, it is expected that consideration and due weight would be given as to why the appellant and counsel were absent from the case management conference".*

[32] The learned judge accepted that the court is less sympathetic of administrative inefficiency as an excuse for non-compliance with orders but pointed out that the authorities are clear that the draconian or extreme measure of striking out a claim should be regarded as a sanction of last resort.

[33] This underlying foundational principle should still form part of the rubric of the court's assessment in applications where the ultimate sanction of striking out is being considered or has already been imposed. Straw, JA recommended that a holistic approach be taken in considering these applications, and all the circumstances weighted before a claim is struck out or an application to set aside a default judgment is refused.

[34] The court was balanced in its deliberations as Straw, JA also stated that due consideration must also be given to any prejudice to the other party and whether any prejudice found could be cured with an order for costs including a wasted costs order where appropriate. Another consideration must be the ability to have a fair trial where the order setting aside the judgment is made.

[35] She believed that Lord Denning's often cited guidance in ***Salter Rex & Company v Ghosh*** [1971] 2 All ER 865,886 was relevant to section 39.6 applications where he said that *" we never like a litigant to suffer by the mistake of his lawyers."*

[36] In allowing that appeal, the court considered that the Claimant/Appellant's Attorney-at-Law had a duty and should have made the necessary enquiries at the Registry, having applied for a case management date and being of the belief that none was forthcoming.

[37] The court recognised that the Claimant's failure to attend the case management conference where her claim was struck out was because she was not notified of

the date. There was no deliberate or intentional attempt on her part to breach the court's orders or rules. As such she should not be penalized for her counsel's error.

[38] Edwards, JA also provided some important guidance in ***Sean Greaves v Calvin Chung*** [2019] JMCA Civ 45 where she said that a judge is required to determine at her discretion whether as a question of fact, a good explanation has been provided in all the circumstances of the case. The judge is not required to look for an infallible explanation.

[39] I recognise that the facts of this case are slightly different from those in ***Alice McPherson*** (supra). It is an inescapable fact that Miss Whyte failed to keep in touch with her Attorneys-at-law. This cannot be overlooked. She did so on the misguided belief that the 1st Defendant was in settlement discussion with the Claimant. She also erroneously took comfort in the fact that the claim lay dormant for several years. Her actions were misplaced, but I do not find that they were a deliberate or intentional attempt to disregard the rules of this court.

[40] More importantly, the information before me does not reflect that she was ever notified of the trial date by her Attorneys-at-Law or that they took any reasonable steps to notify her of the case management orders, trial date or even that a judgment had been entered against her. I have formed this view from Counsel's admission that attempts were only made to contact the 2nd Defendant by telephone. Sufficient effort was not made to notify her of the trial date and the fact that the claim had been placed on the speedy trial list. I am not satisfied that the 2nd Defendant was notified of the trial date which is a requirement under CPR 39.5.

[41] In assessing the explanation put forward by the 2nd Defendant for her absence from the trial I find that she is not without fault for failing to keep in touch with her Attorneys-at-Law. However, I also find that she was never notified of the trial date because sufficient effort was not made by her Attorneys-at-Law. Miss Whyte's failure to attend the trial to my mind is excusable in these particular circumstances and she should benefit from the favourable exercise of the court's discretion.

[42] Lastly, I must also consider whether where the 2nd Defendant was present at the trial, it is likely that some other order or judgment would have been made. There was no challenge to Miss Whyte's evidence that had she been present at the trial, she would have been able to give evidence on behalf of her business and would have been an active participant in the trial. I am not required to embark upon a mini trial nor am I to determine whether she has a good or reasonable defence as in an application to set aside a default judgment, where that is the primary condition that must be satisfied.

[43] In her defence Miss Whyte alleges that her contractual obligations to the Claimant were limited to clearing his vehicle from the wharf. This obligation was also contingent upon his payment of the associated customs duties. She says that she did not receive the funds to clear the vehicle and was thus unable to carry out her contractual obligations. She has joined issue with the Claimant's claim and raise a triable issue.

[44] Where she is able to establish her defence, it is likely that the court may make an order contrary to the order made in her absence. I am satisfied that she would have satisfied this third requirement and in doing so would have satisfied all three preconditions to the granting of an order to set aside the judgment entered in her absence.

[45] While not stated in the rules, I must also consider any prejudice to the Claimant. Mr. Golding has argued that the Claimant is now 85 years of age and that he travelled to Jamaica and was present for both the case management conference and the trial. I have not been provided with any information that would lead me to conclude that a fair trial of the Claimant's claim is no longer possible. Mr. Bennett can be compensated for his trip to Jamaica to attend the trial.

[46] While the 2nd Defendant has succeeded on her application to set aside the judgment entered against her, I have awarded the Claimant the costs of this application as these costs were only incurred because of the 2nd Defendant's

failure to attend the trial and were unnecessary costs that the Claimant has had to incur.

[47] After careful consideration of the information before me I therefore make the following orders;

(i) The order made on October 16, 2019 granting judgment against the 2nd Defendant in the sum of CAD$21,194.00 with interest at 3% from June 22, 2006 to October 16, 2019 is set aside.

(ii) The costs of the Claimant's travel expenses from Canada to Jamaica for the trial on October 16, 2019 are to be paid by the 2nd Defendant.

(iii) The 2nd Defendant is to comply with all case management orders made on or before May 31, 2021.

(iv) A Pre-Trial review is scheduled for September 29, 2021 and both parties are to attend by teleconference or video link.

(v) The trial of this claim is now scheduled for December 20, 2021 for one day before a judge alone in open court.

(vi) Skeleton arguments and a list of authorities are to be filed on behalf of both parties and exchanged no later than December 10, 2021.

(vii) The claimant's Attorney-at-Law is to file a Judge's bundle and serve the index to the Judge's bundle on counsel for the 2nd Defendant by December 10, 2021.

(viii) The costs of this application are to the Claimant to be taxed if not agreed.

(ix) The 2nd Defendant's Attorney-at-Law is to prepare file and serve this order.