IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV05130

BETWEEN	ROBERT DALEY	CLAIMANT
AND	THERMUTIS GRANT-CUNNINGHAM	2nd CLAIMANT
AND	CHINA MOTORS LIMITED	DEFENDANT

Ms. C. Minto and Ms. A. Williams instructed by Nunes Scholefield, Deleon & Co. for the Claimant.

Ms. Ingrid Lee Clarke-Bennett instructed by Pollard, Lee Clarke & Associates for the Defendant.

Heard 30th May 2012 and 12th October 2012

Campbell, J.

Background

[1] The Claimants are members of the Fletchers Grove Baptist Church, located at Mount Pellier. The Defendant is an automobile dealer and is engaged in the business of selling automobiles.

[2] The parties entered into an Oral Agreement on or about the 13th July 2006, for the Claimants to purchase and the Defendant to sell a 2006 Jinbei Panel

van for the sum of One Million One Hundred and Twenty Five Thousand Dollars ($1,125,000.00) plus other charges (the Agreement).

[3] On the 30th October 2008, the Claimants commenced a suit seeking damages for breach of contract, breach of condition or warranty and interest and costs of the Agreement. The Claimants alleged particularly;

> ñThat within a day or so of taking possession of the vehicle and in breach of the said contract and of the said conditions and warranties the claimants discovered that the said vehicle was not reasonably or at all fit for the said purpose, but on the contrary contained faults and defects rendering it unfit, unsafe and defective.ò

[4] The Claimants have catalogued a list of defects, which they alleged the Defendant was aware of and had taken possession of the vehicle on several occasions in failed efforts to repair it. The Defendant has failed to return the purchase monies despite the repeated demands of the Claimants.

[5] On the 22nd January 2009, judgment in default of acknowledgement of service or a defence was entered. On the 29th March 2010, the Claimants served at the Defendantôs registered office, copy of the default judgment, along with Notice of Assessment of Damages, and Notice of Intention to Tender Statements in Evidence.

[6] On the 7th March 2012, an application was made to set aside the default judgment and to be given leave to file and serve a defence. The application relied on the following grounds;

1. That the Defendant did not know about this Claim Form until its directors were served with the Order for Oral examination herein.

2. That the company was never served with the Claim Form and as such the judgment obtained is irregular and ought to be set aside ex debito justiciae.

The Defendant has a good answer for the delay in failing to file its defence within the

[7] In the affidavit of Ingrid Lee Clarke-Bennett, in support of the Defendantôs application at paragraph 5;

> **That the said directors instruct me they have never received the Claim Form nor any other document prior to being served with the Order…and in fact to date are not in possession of any other document relating to this matter.**

And at paragraph 7;

> **That the Defendants wish to contest the claim as they know of no legitimate basis upon which the Claimant could successfully maintain a claim against them.**

[8] In an affidavit in response, Mrs. Ingrid Lee Clarke-Bennett stated, inter alia, at paragraph 4, ñcompany has ceased operating at Bogues Industrial Estate since 2007 and cease operating from their Kingston branch at 31 Hagley Park Road sometime in the latter part of 2009. At paragraph 5, inter alia, ñthat although they received a letter of demand dated 29th November 2007 at 31 Hagley Park Road, they heard nothing further from the Claimants although the Claimants were aware that they could be located at that address.ò And at paragraph 8, ñthe demand letters were met with the Defendantôs contingent proposals, which were rejected by the Claimants. These latter conditions were rejected by the Defendant. That the Company has not operated since 2009.ò

[9] The affidavit further stated that ñMany of the vehicles gave problems and despite the Defendantôs best efforts, they were unable to get compensation or redress from the company from whom the vehicles were purchased. The Defendant had to stand the cost of the repairs done to the vehicles. They were indebted to the landlords at Bogues, and had to move out. The company was being sued in relation to other vehicles they imported.

[10] On the hearing of the application to set aside, the Defendant took two issues, in limini:

(A) That the absence of the Certificate of Truth rendered the judgment irregular. That the Registrar will not enter a default judgment when there is an absent Certificate of Title. The absence of Certificate of Title is a defect in the procedure which has to be remedied before the Defendant can be held bound.

(B) In addition, the Notice of intention was short-served, on the 29th March for the hearing on the 29th April. There should be an amendment of the procedural error or alternatively, the applicant will rely on CPR 13.3.

The Respective Cases

[11] Ms. Minto argued that S 387 of the Companies Act requires service at the Companies registered office. Part 2 of the CPR sets out what the Registrar should look to before entry of default judgment. The Defendant would have to raise a challenge under Part 12.4. Procedural errors are cured by fresh steps. Six fresh steps have been taken, including the filing of witness statements, acknowledgment of service, which failed to raise the defect. Notice of Change of Address conflicts with evidence of Defendant that they removed from the address in September 2007. Letter of the 23rd August

2010 was written to the Defendant at the registered address. Nothing irregular about service, when one takes into consideration the deemed service provisions. The Company admitted liability in letter of the 7th May 2007, an admission against interest, the vehicles gave problems despite their best efforts.

[12] Mrs. Lee Clarke-Bennett, in response, said the judgment is irregular. The Defendant has a good answer, as stated in the defence. There is no affidavit to show compliance. In relation to deem service it is essential whether the document came to attention. Claim Form is defective, that is fatal to service.

[13] In **Dixon v Jackson** SCCA No.120/2005, the defence did not have the Certificate of Truth. Harrison JA, on a procedural appeal, said;

> ñThe purpose of the certificate of truth to verify the statement of case is to bind a party to confine himself to facts within his knowledge and to obviate contentions of facts in which a party had no honest belief. (See **Clarke v Marlborough Fine Art (London) Ltd. {2002} 1 W.L.R. 173**).

Counsel for the Defendant argued that, the decision of the Court of Appeal makes it clear that the absence of a Certificate of Truth is a defect and steps are required to be taken to remedy that said defect.

[14] According to Mrs. Lee Clarke-Bennett, in this case, a default judgment would have been entered on a defective statement of case. The instant Defendant has taken no steps and has not accepted the jurisdiction of the court. The issue is not whether they are properly served, it is whether it came to the attention of the Defendant. Acknowledgment of Service was filed on the 6th March, a day before application to set

aside default judgment. Terms of the letter of the 2nd May 2007 shows no agreement.

Discussion

[15] The Defendant contends that the failure to append the Certificate of Truth on the Particulars of Claim was fatal, and renders the default judgment irregular. The Claimantsô answer is that itôs a mere procedural error, which will not invalidate a step taken in the proceedings. This Court has a discretion, pursuant to S13.3, to strike out a statement of case on the application of a party. See **James Whylie vs David West SSCA120/2007, April 27 and July 30, 2009**, where Smith JA, at paragraph é . says, inter alia, ñThus the failure to comply with Rule 3.12 must be treated as an irregularity and will not nullify the proceedings or any step taken in them. Indeed the statement of case will stand unless otherwise ordered by the court.ò The Court of Appeal upheld the judgeôs decision in treating non-compliance with Rule 22.1 as an irregularity which did not render the proceedings a nullity.

[16] The court can allow the statement of case to stand as an exercise of its discretion. The non compliance will not affect the steps taken, as in this case the entry of judgment, the order for examination, etc. I am minded to allow the particulars of claim to stand. In any event, I would have allowed the Claimants to amend the statement of case to append the Certificate of Truth.

At paragraph 8, Smith JA, inter alia;

> The failure to comply with Rule 3.12 must be treated as an irregularity and will not nullify the proceedings or any steps taken in them. **Indeed the statement of case will stand unless**

> **otherwise ordered by the court.** As to whether the claim may be prosecuted without a certificate of truth is another matter.ò (Emphasis mine)

[17] The Defendantôs counsel was served with the order for oral hearing in February 2012 and at that time the Claim Form. The oral examinations were to take place the 19th April 2012 and the 3rd May 2012. Having had sight of the documents, the Defendants, in their affidavit in response to the Oral examination filed on the 18th April 2012, contend, (a) that the Defendants have a good defence to the claim, in that the Claimant had paid for and accepted the vehicle after it was inspected, and had driven it for six months, and were still in possession of the vehicle up to December 2006. (b) That the company was no longer operating and was plagued by complaints of defective vehicles. The issue of Courts jurisdiction was not taken on either of the adjourned hearing dates. Both sides had agreed that the Defendants are liable to refund the purchase of the vehicle; the outstanding issue being interest payments and loss of use. There is therefore no danger of there being facts contended by the Claimant in which he has no honest belief. The loss of use would require documentary support and not just throwing figures at the court. The overriding objective to deal justly with the case, includes the expeditious disposal and fairness to all parties, was relied on by the Court of Appeal in **Dixon v Jackson**. See also the comments of Harris JA, in **James v Whylie**, paragraph 70. I think the reasoning is apposite, for the facts of this case.

[18] Was the Defendant served with the Claim Form? S.387 of the Companies Act provides for the service on a company by post at its registered office. The Interpretation Act, at section 52 (1), provides, inter alia, the service will be deemed to be effected by properly addressing, prepaying and posting a

letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be in the ordinary course of post.

[19] At the time of service, the Defendantôs registered office was *Bogue Industrial Estate, Montego Bay P.O. St. James.* The post office issued a registered slip confirming the posting. The Defendantôs director had submitted to the Registrars of Companies, on the 1st May 2008, a Notice of Address, which conflicts with the assertion by the Defendant that they had ceased operating at Bogues Industrial Estate in September 2007. Indeed, as late as the 23rd August 2010, the Defendant was still receiving mail at the Registered Office to which the documents had been posted on the 10th November 2008. The Defendantsô registered office is a post office box. There is no evidence before the court to rebut the deemed service of the documents. I find that the default judgment was not irregularly obtained and therefore will not be set aside ex debitio causa.

[20] I am of the view that the applicant has failed to meet the requirements for the setting aside of a judgment regularly obtained, provided for by Rule 13.3. It cannot be said, for the reasons adumbrated in paragraph 17, that the Defendant has a real or any prospect of successfully defending the claim. In addition, the Claimant has contended there is no affidavit of merit.

[21] **In D&LH Services Limited et al vs The Attorney General & Commissioner of the Jamaica Fire Brigade**, the Court of Appeal was considering an appeal against an order setting aside an interlocutory judgment, on the ground that the Defendant/Respondent had a good defence, per Harrison JA: The discretionary power of a judge to set aside a judgment

by default is therefore exercisable in certain accepted circumstances, and rules have evolved as a guide. Where the default judgment is regularly entered, an application to set it aside must be accompanied by an affidavit revealing a defence on its merits sworn to by someone who can swear to the facts. (***Farden et al v Richter*** (1889) 23 QBD 124), ***Ramkissoon v Olds Discount Co.*** (1961) 4 WIR 73). Again Lord Atkin in ***Evans v Bartlam*** (supra), said of the discretion, at page 650:

> "The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence.ò

[22] There has to be an assessment, or evaluation of what is placed before the court. The evidence before the Court does not assist the Defendant. The Defendantôs letter of the 2nd May 2007 is an admission of liability to refund the purchase price of the vehicle. The Defendant at para 21 of its affidavit complains in similar vein to the Claimant of the problem posed by the vehicles. The Defendantôs affidavits appear to lay the blame for the problems of the vehicles to their source in China, from whom it appears they are unable to secure compensation. The Defendant has not put forward a tittle of evidence on which to mount an arguable case. The defence as I discern, is lacking in what my brother Sykes, J. calls ñgood sense and good logicò. I find that the Registrar had sufficient proof of service, by the production of the registered slip. The application to set aside the default judgment is dismissed. Cost to the Claimant to be agreed or taxed.