[2015] JMSC Civ 134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2004HCV2816

BETWEEN	**LEONARD REID**	**FIRST CLAIMANT**
AND	**EDWARD LOTHIAN**	**SECOND CLAIMANT**
AND	**AMON GRANT**	**THIRD CLAIMANT**
AND	**CLIFTON CAMMOCK**	**FOURTH CLAIMANT**
AND	**TANK WELD DEVELOPMENT LIMITED**	**FIRST DEFENDANT**
AND	**ATTORNEY GENERAL FOR JAMAICA**	**SECOND DEFENDANT**

IN CHAMBERS

Mr Humphrey McPherson absent and claimants absent

Stuart Stimpson and Hasani Haughton instructed by Hart Muirhead Fatta for the first defendant

Marlene Chisolm instructed by the Director of State Proceedings for the second defendant

June 15 and July 17, 2015

CIVIL PROCEDURE – APPLICATION SET ASIDE JUDGMENT IN DEFAULT OF DEFENCE – RULE 13.3 OF THE CIVIL PROCEDURE RULES

SYKES J

[1] Tank Weld Development Limited ('Tank Weld) is puzzled. It is now under a judgment in default of defence the request for which was filed on March 31, 2006 in circumstances where it had had filed an application for striking out the claim from as far back as October 5, 2005, some five months before the request was filed. The striking out application has not yet been heard after nearly a decade. The dates stated are the date stamp of the Supreme Court that was affixed on the date documents were filed at the civil registry. Tank Weld is even more puzzled because the well established practice of this court even under the old Civil Procedure Code was that where a striking out application has been filed even if filed after a request for judgment in default of either appearance and defence, the default judgment should not be entered until the striking out application has been heard and determined.

The Chronology

[2] The claim was filed in 2004 and twice amended. In May 2005 King J dismissed the claimants' application for an interim injunction. This was followed by the claimants' appeal to the Court of Appeal.

[3] In June 2005 the claimants filed a request for default judgment. No judgment was granted on this request.

[4] In October 2005 Tank Weld filed an application to strike out claim. At the time of filing this claim, default judgment had not been entered on the June 2005 request.

[5] Tank Weld's application was not heard for the next nine years.

[6] The claimants filed another request for default judgment in March 2006. Judgment was entered on this March 2006 but it seems that the claimants did not know because they filed yet a third request for default judgment in April 2008.

[7] We know that judgment was entered on the March 2006 because the binder and folio indicating where the judgment is recorded was written on the March 2006 request.

[8] There is a letter dated August 8, 2008 asking that a date for assessment of damages be set 'in captioned matter judgment having been entered in Binder 743 Folio No 360.' This is the binder and folio number noted on the request for default judgment filed March 31, 2006.

[9] What is undeniable is that by the time the Registrar entered the default judgment Tank Weld's application to set aside judgment was on the file five months before the March 2006 request.

[10] In July 2009 Tank Weld reissues its application to strike out claim.

[11] According to the affidavit of Mr Conrad George, Tank Weld was served with the default judgment on May 21, 2008. This led Mr George to assert in the affidavit, reasoning by analogy to **Jamaica Record et al v Western Storage Ltd** (1990) 27 JLR 55, that the judgment was irregularly entered in that before it was entered an application to strike out the claimant's case was on the file and that application should have been heard fist.

[12] That was a case under the old Civil Procedure Code ('CPC'). In that case a judgment in default of defence had been entered. A summons to proceed to assessment of damages was also filed. The defendants filed a summons to set aside the default judgment. The narrative of facts is not very clear but it is not unreasonable to conclude that summons for proceeding to assessment of damages was filed before the summons to set aside default judgment. The

summons for assessment of damages came up before the Master. At that hearing the setting aside summons was not before him but he was aware of its existence. Nonetheless the Master rules that the matter proceed to assessment in the face of an application to adjourn the damages summons, subject to cost, so that the setting aside summons could be heard. There was an appeal.

[13] On appeal, counsel for the claimant took the view that there was no explicit rule barring the Master from hearing the damages summons despite the fact that he knew of the setting aside summons. Campbell JA held that despite the absence of an explicit rule dealing with the specific situation, 'common sense, economy in the use of judicial time' suggested that the setting aside summons should be heard first (page 57 I). If more recent language is used Campbell JA would perhaps have said, 'Proper case management techniques include common sense, economy in the use of judicial time which would indicate, in spite of the absence of a specific rule dealing the situation which arose, that the striking out application should be heard before default judgment is entered.'

[14] It would seem to this court, by parity of reasoning, that an application to strike out the claimant's statement of case should generally be heard before any decision is made regarding the entry of judgment. A judgment in default may be set aside even after the assessment of damages. There is nothing in the new procedural rules to suggest that this principle, albeit decided under the old rules, has been undermined (**Strachan v Gleaner Company Ltd** (2005) 66 WIR 268). This means that a default judgment while of value is not regarded in the same way as a final judgment entered after a trial. Since this is how a default judgment is regarded then prudence would suggest that an application for striking out should be heard before default judgment is entered if the application is made before the judgment is entered even if it was made after the request for default judgment was filed.

[15] The court is fully aware that there is no explicit rule in the Civil Procedure Rules ('CPR') on this but the internal logic and structure of the CPR, particularly part 9

as explained in **John Issa v Jamaica Observer** Claim NO 2005HCV0765 (unreported) (delivered June 28, 2009), make it plain that a defendant can file his acknowledgement of service (which he must do regardless of what he wants to do in the case) and then take issue with the jurisdiction of the court. He can either say the court, while having the legal authority to hear the matter, should not exercise the power to do so or he can say that the court does not have the legal authority. Either way, he must file the acknowledgment of service. A striking out application often times falls in the former category because the defendant is usually saying that the court has the legal authority to hear the claim but should not exercise the power to do so.

[16] In this case the acknowledgement of service was filed and the striking out application made before judgment was entered. The judgment was irregularly entered and so must be set aside.

[17] In addition to what has been said, there is another rule under which the judgment can be set aside assuming it was regularly entered. That is rule 13.3 (1) and (2) of the CPR reads:

> *(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.*
>
> *(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:*
>
> > *(a) applied to the court as soon as 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.*

[18] The sole criterion is whether there is a real prospect of successfully defending the claim. Tank Weld states boldly that it was served with judgment on May 21, 2008. The setting aside application was filed July 18, 2008. The reason for the delay in filing the application is said to be the confused state of the court file and time spent deciphering what the claimants had done. It was also said that the file did not reveal a full and complete set of documents which would have enabled Tank Weld to appreciate what has been happening in the course of the litigation. The court has great sympathy for Tank Weld in this regard because on examination the court must say that deciphering what happened in this and other related cases has not been an easy task. None of the file appears to have complete records and orders.

[19] The setting aside application was filed within two months of being served with the judgment. This reason for the delay in making the application to set aside is a good one in light of the incomplete nature of the file. The court accepts the reason given and in the circumstances the date of the filing of the application was reasonable.

[20] It must be observed that the affidavit in support of the application was not sworn until June 2015 nearly seven years after the application was filed. This delay is not to be encouraged but it is fair to say that the court did not set the matter for hearing at any time in the last nine and one half years.

[21] The exercise of the discretion to set aside the judgment is subject to the applicant filing a proper affidavit of merit accompanied by the proposed defence. The affidavit in this case while being sworn by an attorney at law contains matters that are matters of court record. The affidavit raises the issue of res judicata and abuse of process. The court has had to deal with a related matter (**The Pear Tree Bottom Land Owners Association Limited v Grand Bahia Principe Hotel and others** Claim NO 2014HCV05470 [JMSC Civ 133]). From what was said in that judgment it is clear to this court that Tank Weld has a

reasonable prospect of successfully defending the claim. The judgment is accordingly set aside.

[22] There was also an application for striking out. The court declined to make a decision on this application so that the claimants can be present with yet another opportunity to be present.

[23] The court proceeded to hear and determine this matter in the absence of Mr McPherson and his clients for reasons given at the end of this judgment and in [2015] JMSC Civ 133. Pursuant to orders made on June 1, 2015 in the presence of Mr McPherson, this matter was listed before Sykes J on June 15, 2015.

[24] The court also wishes to add that counsel for all the parties were contacted and notified of the date of delivery of judgment. All were present except counsel for the claimant.

[25] Finally, the court has declined to make a decision on the application for striking out the claimants' case. That is to be set for another date in order to give the claimants or their attorney the opportunity to be heard on such a far reaching application. The attorney needs to be aware that on the next occasion if he is absent then the court will proceed with the hearing and decide accordingly.

Disposition

[26] The judgment in default of defence is set aside.