IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 1151 OF 2003

BETWEEN	**MITZIE THOMAS**	**CLAIMANT**
AND	**WHITFIELD BAKERY AND PASTRIES LTD**	**FIRST DEFENDANT**
AND	**OSWALD POWELL**	**SECOND DEFENDANT**

IN CHAMBERS

Miss Latoya Green instructed by Forsythe and Forsythe for the claimant

Mr. Ravil Golding for both defendants

May 31, June 9 and 15, 2006

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT OF DEFENCE

SYKES J

1. On June 3, 2003, Miss Mitzie Thomas filed a claim against both defendants. She alleged that she was an employee of Whitfield Bakery and Pastries Limited, the first defendant. Mr. Oswald Powell, the second defendant, was the manager of the first defendant. She alleged further that she was injured, on December 10, 2002, while at work. She sought compensation for her injuries.

2. Whitfield Bakery was served on July 4, 2003, and Mr. Powell was served on August 18, 2003, with the claim form and particulars of claim. Judgment in default of defence was entered on October 23, 2003. On November 27, 2003, the defendants filed a defence that was out of time. The claimant did not consent to this and neither did the defendants receive the permission of the court (see rule 10.3 of the Civil Procedure Rules ("CPR")). The judgment was served on the defendants on December 4, 2003. The notice of assessment of damages was served on the defendants' attorneys on January 1, 2005. This notice infused life into the defendants. By February 1, 2005, they filed an application to set aside the default judgment that was entered on October 23, 2003. This means that the defendants

applied for setting aside the judgment thirteen months after they knew that judgment had been entered.

3. Rule 13.3 (1) provides

Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant -

(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

4. The principal ground relied on by Mr. Golding was that his firm did not receive instructions from the defendants in a timely manner. This might explain why the application to set aside the judgment was made thirteen months after the defendants had notice of it.

5. Ever since the entry into force of the CPR, this rule has been the subject of much criticism. It has been said that the strictures of the rule create injustice. The argument goes like this. It is wrong to deny defendants an opportunity to meet the case against them. It is wrong that the defendant does not have his day in court to refute and possibly defeat the claim. Many reasons might account for this, it is said, such as difficulty in getting instructions. It is vital that cases as far as is possible be disposed of on the merits. When many of the arguments are examined, they amount to, in the main, excuses for tardiness. In the past, the prevailing view was that, it really did not matter how late the defendant turned up, he would be allowed to defend the claim. All he had to do was to put down a defence on paper. Even though it was said that he needed to establish a "good defence," we all know that in practice, the test was exceptionally easy to pass. So easy was the threshold that one has to scour the reports to find many cases where the judgment was not set aside. Laxity became the order of the day. The legal framework for delay was established. All that was needed were litigants to accept the open invitation. In Jamaica, there was no shortage of such persons. Delay had become endemic. So bad had it become that the Honourable Chief Justice while a member of the Court of Appeal called for a special law to deal with the situation in Jamaica (see ***Wood v H. G. Liquors Ltd and Another*** (1995) 48 WIR 240, 256). Panton J.A. in ***Port Services Limited v MoBay Undersea***

Tours Limited and Fireman's Fund Insurance Company SCCA No. 18/2001 (delivered March 11, 2002) at page 9 lamented the then current state of affairs. Since the new rules have come on stream, the Judges of the Supreme Court have been struggling to nourish the new plant that has three roots. The roots are speed, efficiency and dealing with cases justly. Some litigants would wish to turn the clock back.

6. So bad had the situation become that a defendant could even tell a lie. That did not matter. There can be no doubt that the old system was abused to the detriment of diligent claimants. Costs were said to be the great cure all. Citizens could properly feel that something had gone seriously wrong with our system of civil justice. They were correct. Fortunately, lawyers and judges thought so too. The civil justice system has been reformed. The new rules are intended to foster a new culture which has greater regard for time and resources, the courts' as well as other litigants'. I shed no tear for the bad old days of civil litigation. It would be a sad thing if the approach to the new rules should have the effect of readmitting unnecessary delay at the rear door having banished him from entering through the front. The new culture has been confirmed by the Court of Appeal. The bar has now been raised.

7. In ***Ken Sales & Marketing Ltd v James & Company (A firm)*** SCCA No. 3/05 (delivered December 20, 2005), Harrison P. emphasized the defects of the past and welcomed the new approach at pages 5 – 6

> *Under the old rules, the prime emphasis was placed on the defendant having a good defence. Even if the explanation for the failure to file the acknowledgement was not prompt or the explanation was unsatisfactory, the good defence would predominate, and influence a court greatly in setting aside a default judgment. The approach of the court as was established by Lord Atkin in* ***Evans v. Bartlam*** *[1937] A.C. 473 as to setting aside judgment by default, at common law is significant. Where there was no determination of the case on its merits a court would always lean towards setting aside a judgment entered due to a procedural breach. Note also* ***Vann v. Awford*** *[1986] Times L.R. 23/4/86; (1986) 130 SJ, where even a lie told by the applicant did not deter the court from setting the judgment aside where a good defence existed. In the case of* ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.*** *[1986] 2 Lloyd's Rep. 221 where the defendant deliberately allowed judgment to be entered by default, the Court of Appeal took that into account in assessing the justice of the case, and because, in addition, no defence with any reasonable prospect of success was shown dismissed the appeal against a refusal to set aside the default judgment.*
>
> *Under the new rules of 2002, the provisions are required to be interpreted more strictly.*

8. The President confirmed that the correct interpretation of rule 13.3 is that all three conditions stated there must be met. In the instant case, the application was not made as soon as reasonably practicable after the defendants were served with the judgment on December 4, 2003. The application came thirteen months after the judgment was served. The explanation for the delay is not a good one. There was nothing complicated about the claim. It was one in which the claimant alleged that she lost her fingers in a machine at the first defendant's business place because of the negligence of both defendants. I am unable to appreciate the difficulty that the defendants had in properly instructing their attorneys. They could have filed a defence and then seek to amend it as more information became available. The argument about some perceived great injustice if the defendant is not allowed back in after he has had his chance by pointing to rule 20.1 of the CPR which allows amendments to the statement of case at anytime before the case management conference, without the court's permission, unless rules 19.4 and 20.6 applies. This provision is clearly designed to accommodate defendants and claimants who feel the need to amend their statements of case should they see fit. There is no limit to the amendments that can be made to a statement of case before the first case management conference. Obviously, defendants can amend their case as new information becomes available. I must confess that I am unable to see what prevented the defendants in this case from taking advantage of this provision. They had more than ample time from July/August 2003 to October 23, 2003. There is nothing unjust about a claimant securing judgment after the defendant has had more than enough time and opportunity to defend the claim. There is nothing unjust about enforcing a judgment properly obtained against a defendant who has been properly served and had no difficulty in filing a defence but failed to do so. I would have thought that this was the essence of justice: tell the defendant about the claim and give him sufficient time to respond failing which judgment would be entered. The defendants have failed to clear two of the three mandatory hurdles that are gate keepers of the discretion.

9. The application is dismissed with costs to the claimants. Leave to appeal granted.