[2011] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 108/2007

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MR JUSTICE DUKHAHARN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**BAR.JOHN INDUSTRIAL SUPPLIES LIMITED**	**APPELLANT**
AND	**HONEY BEE FRUIT JUICE LIMITED**	**RESPONDENT**

Lancelot Cowan, instructed by Lancelot Cowan & Associates for the appellant

Emile Leiba and Courtney Williams, instructed by DunnCox for the respondent

1 March 2011 and 1 April 2011

HIBBERT JA (Ag)

[1] On 1 March 2011 we heard and dismissed this appeal and ordered that the appellant pay the respondent's costs of the appeal which should be taxed if not agreed.

[2] On 29 January 2007, Honey Bee Fruit Juice Limited (Honey Bee) brought an action against Bar.John Industrial Limited (Bar John) by way of a claim form and

particulars of claim. On 19 February 2007 judgment was entered against Bar John in default of acknowledgement of service, the pleadings having been served on 1 February 2007.

[3] On 26 July 2007 a notice of application for court orders was filed on behalf of Bar John seeking to set aside the judgment which was entered on 19 February 2007. The following was stated as the grounds on which the application was based:

> "While an acknowledgement of service was not filed on behalf of the Defendant, the Defendant did file its Defence on February 19, 2007, well within the time for the filing of the Defence. In filing its Defence, the Defendant has notified the Court and the Claimant of its receipt of the particulars of claim herein and of its intention to defend the matter, thereby satisfying the purpose of the Acknowledgement of Service form."

[4] This application was heard by Master Lindo who refused it and awarded costs in the sum of $16,000.00 to Honey Bee. In giving her reasons for refusal the learned master stated:

> "I am of the view that if the defence was filed after the time within which it was to be filed, it was not properly before the court and not having been exhibited to the affidavit in support of the application, the court could not examine it to determine if the defendant had a real prospect of successfully defending the claim.
>
> The court records show that the time between the entering of the judgment and the application to set it aside was approximately five months.
>
> Mr. Cowan failed to address the issue of whether the application was made as soon as reasonably practicable,

after finding out that judgment was entered and the explanation given for the failure to file the acknowledgement of service is not a good explanation."

[5] It is from this refusal by the learned master to grant the order sought that Bar John has appealed, stating the following as the grounds of appeal:

"(a) The Master should have applied and/or given effect to the overriding objective of dealing with this case justly by granting the Appellant's Application for Court Orders dated July 17, 2007.

(b) The Master should have granted the Appellant's Application for Court Orders dated July 17, 2007 when (i) the Appellant applied to the Court below as soon as was reasonably practicably (sic) after finding out that default judgment had been entered, when (ii) the Appellant gave a good explanation for the failure to file an acknowledgement of service, while (iii) filing a defence on February 19, 2007 that was on the file of the Court below and should have been considered by the Master, and when (iv)the Appellant had a real prospect of successfully defending the claim as evidenced by issues joined between the parties set out in the defence filed in the matter on February 19, 2007.

(c) The Master should have granted the Appellant's Application for Court Orders dated July 17, 2007 when the said Application was supported by evidence on affidavit and when there was a defence filed in the matter on February 19, 2007 setting out the issues joined between the parties.

(d) The Master should have considered the merits of and issues raised by the Appellant in the defence filed in the matter on February 19, 2007, instead of demanding that a 'proposed' defence should have been attached to the Appellant's Application for Court Orders for consideration by the Court below."

[6] Mr Cowan in his skeleton arguments submitted that the appellant had complied with the requirements of part 13.3 of the Civil Procedure Rules (CPR) by applying to the court as soon as was reasonably practicable after finding out that the default judgment

had been entered and giving a good explanation for the failure to file an acknowledgement of service. He also submitted that based on the fact that a defence was filed on 19 February 2007, the learned master should have considered it instead of insisting that a proposed defence should have been filed with the application to set aside the judgment. He further submitted that the defence which was filed set out the issues joined between the parties and revealed that the appellant had a real prospect of successfully defending the claim.

[7] Before this court Mr Cowan for the appellant, as he did before the learned master, argued that the defence which was filed on 19 February 2007 was properly filed within the time specified by rule 10.3 (1) of the CPR, which states:

> "(1) The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form."

[8] Counsel therefore submitted that since a defence was properly filed, rule 12.4 (c) of the CPR prohibited the entry of judgment. It states:

> "12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgement of service, if -
>
> (a) ...
>
> (b) ...
>
> (c) that defendant has not filed -
>
> (i) an acknowledgement of service; or

(ii) a defence to the claim or any part of it.

[9] Consequently, he submitted, the judgment was wrongly entered and must be set aside as is mandated by rule 13.2 (1) (a) of the CPR, which states:

> "(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –
>
> (a) in the case of a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied."

He further submitted that the learned master erred in not setting aside the default judgment.

[10] Mr Leiba for the respondent challenged the assertion made by Mr Cowan that a defence was properly filed. He drew the court's attention to part 9 of the CPR rule 9.2 (5) which states:

> "(5) However the defendant need not file an acknowledgement of service if a defence is filed and served on the claimant or the claimant's attorney-at-law within the period specified in rule 9.3."

Rule 9.3 (1) states:

> "(1) The general rule is that the period for filing an acknowledgement of service is the period of 14 days after the date of service of the claim form."

[11] Counsel, therefore, submitted that in light of these provisions the defence filed on 19 February 2007 was filed out of time. Consequently, the default judgment entered on 19 February 2007 was regularly and properly entered.

[12] In dealing with the application to set aside the default judgment, Mr Leiba pointed out that the only ground relied on was that the judgment was wrongly entered and this was predicated on the assertion that the defence was filed in time. He consequently submitted that the provisions of rule 13.2 (1) of the CPR could not assist the appellant.

[13] Counsel further submitted that the appellant could not rely on the provisions of rule 13.3, as there was nothing before the learned master to show that the application was made as soon as was reasonably practicable after finding out that the judgment was entered, neither was there any explanation given for the failure to file an acknowledgement of service or a defence.

[14] He further submitted that there was nothing before the learned master to cause her to conclude that the appellant had a real prospect of defending the claim since this was not addressed in the affidavit of Lancelot Cowan in support of the application, nor could the learned master look at the defence which was filed out of time and was not exhibited to the affidavit.

[15] In conclusion he submitted that the learned master was correct in refusing to set aside the default judgment.

[16] The court agrees that where a defence is filed in the absence of an acknowledgement of service, as is permitted by rule 9.2 of the CPR, the time for filing the defence is not within 42 days after service of the claim form as is stated in rule 10.3 (1). Instead, the period for the filing of the defence is within 14 days of the service of the claim form, as stated by rules 9.2(5) and 9.3 (1). Since the defence was filed out of time, we agree that the judgment in default of an acknowledgment of service was regularly and properly entered.

[17] The appellant, having failed to show that the judgment was improperly entered, cannot therefore rely on the provisions of rule 13.2 (1) which could only assist if any of the conditions in rule 12.4 was not satisfied.

[18] Mr Cowan, in his skeleton arguments, submitted that the appellant in applying to set aside the judgment in default, had complied with the requirements of rule 13.3 of the CPR by showing that the application was made as soon as was reasonably practicable after finding out that the judgment was entered and giving a good explanation for the failure to file an acknowledgement of service. Evidence to satisfy these requirements could only come from the affidavit filed in support of the application. The affidavit of Lancelot Cowan failed to address these issues. Not surprisingly therefore, these contentions were not pursued before us.

[19] Rule 13.4 sets out the procedure to be followed for the making of an application to set aside a default judgment. It states:

"13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence."

Mr Cowan's affidavit filed in support of the application to set aside the judgment exhibited no draft of the proposed defence and accordingly did not comply with the provisions of rule 13.4 (3) of the CPR.

[20] Rule 13.3 (1) of the CPR provides that a court may set aside a default judgment if the defendant has a real prospect of successfully defending the claim. This court finds that there is nothing contained in Mr Cowan's affidavit from which the learned master could be so satisfied. Neither could the learned master examine the defence which was filed out of time for this purpose.

[21] It is for these reasons that we dismissed the appeal and awarded costs to the respondent.