THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 99 of 2017

EPHRIAM USHER **CLAIMANT**

AND

BERNALDO JACOBO SCHMIDT **DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2017
12th April
25th April

Decision
2017
9th May

Mr. Mark Williams for the Claimant.
Mrs. Magali Marin-Young SC with Mr. Alister Jenkins for the Defendant.

Keywords: Civil Procedure – Setting Aside – Default Judgment – Failure to file acknowledgment – Good Explanation – Counsel's Inadvertence – Litigant's Diligence – Supreme Court (Civil Procedure) Rules 2005 (The CPR)

DECISION

1. This application concerns the setting aside of a default judgment. To accomplish this there are three requirements which must be conjunctively met see ***Belize Telecommunications Ltd. v Belize Telecom Limited et al Civil Appeal No. 13 of 2007***.

2. These requirements pursuant to Rule 13.3(1) of The CPR are:

   1. Apply to the court as soon as is practicable after finding out that judgment had been entered;
   2. Give a good explanation, for the failure to file an acknowledgment or a defence as the case may be and;
   3. Have a real prospect of successfully defending the claim.

3. **Delay:**

   I cannot find that the Claimant delayed unreasonably in filing the application. The evidence is that the Clerk discovered that the judgment had been entered on the 13th March, 2017 and the application was filed on the 21st March, 2017 just over one week later. Perhaps it could have been done more efficiently but by no standard could it be seen as having not been made soon as practicable.

   Good Explanation:

4. The original affidavit in support made by a clerk in the law office, offers that the delay in filing the acknowledgment of service occurred because counsel was taking instructions and drafting the defence. I cannot comprehend what one has to do with the other. If he had by the 13th March been drafting a defence then he must have determined sometime prior that he intended to defend the claim. Hence, the need to file an acknowledgment (which is a formal document only and which does not rely in anyway on the drafting of the defence), would be an obvious part of the overall process.

5. Mr. Schmidt's then counsel sought to rely on a paragraph from ***Sylmord Trade Inc. v Inteco Beteiliguns Ag BV1HCMAP 2013/003 Eastern Caribbean Court of Appeal*** as quoted by Arana J. in ***Lopez Equipment Co.***

Ltd. v Pasa Belize Ltd Claim No. 244 of 2016 at page 4: *"He relies on* ***Sylmord Trade Inc. v. Inteco Beteiliguns AG BVIHCMAP2013/0003*** *Eastern Caribbean Court of Appeal, where the Court of Appeal accepted that the circumstances which can suffice as a good explanation are not exhaustive and that there was no definition for the term "good explanation". In the court below the learned trial judge, in the absence of a definition, sought to explain what could be a good explanation as anything that is not reflective of indifference by the party. Bannister J (Acting) said: "… an account of what has happened since the proceedings were served which satisfied the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered".*

6. It must be noted however that in ***Sylmord*** the Court of Appeal itself made no pronouncement on the correctness of this particular statement, since neither party had made an issue of it. The court said at paragraph 26: *"None of the parties to this appeal took issue with the judge's definition of 'good explanation' and so I will not attempt, for present purposes, to interfere with it."* Further, that case made it clear that the explanation must come from the Defendant. In ***The Marina Village Ltd. v St. Kitts Urban Development Corporation Ltd SKBKCVAP 2015/0012***, on a similar appeal, the Court of Appeal was again referred to the same quotation. But again the court made no comment on same save and except to say that the first instance Judge had not relied on this definition and if she had she would have had to conclude that there existed a good explanation. The reason proffered here was that the appellant was not aware of the claim form and statement of claim because they did not check their

post box regularly. The judge found that this was not a good explanation and that decision was upheld by the Court of Appeal. To my mind, the fact that the court has again chosen not to comment on the definition is significant. It is therefore not correct to say that the Eastern Caribbean Court of Appeal holds this to be good law or that it is best for this interpretation to be adopted.

7. This court, for what it's worth, humbly declines the invitation to rely upon and apply the definition. Not only because rising just above mere indifference could be so easily demonstrated but because it carries the threshold so low as to make it almost non-existent. It devalues a default judgment to very little more than a piece of paper, where it ought to be a thing of value in the Claimant's hand - see ***B & J Equipment Rental v Joseph Nanco Co Supreme Court Civil Appeal No. 101/2013 [2013] JMCA Civ 2***. Setting aside a default judgment must not be seen as a rubber stamping procedure. There should be nothing less than good and compelling reasons to do so.

8. So instead, we consider the reason provided. In this case time slipping away or inadvertence is offered. These have already been held not to be a good excuse. Justice Hafiz-Bertram made this clear in ***Franco Nasi v David Richards Civil Appeal No. 4 of 2011***. She is well supported by decisions of this court and others. And while I do agree that in some circumstances an oversight may amount to a good reason ***(see The Attorney General v Universal Projects Ltd. [2011] UKPC 37 at paragraph 23)*** and I share my sister Griffith J's sentiment in ***Belize Electricity Limited v Rodolfo Guiterrez Claim No. 242 of 2014*** that the particular circumstances of the

case must always be considered; I find that the new explanation proffered by this Defendant is insufficient to bring this case outside that general rule.

9. Mr. Schmidt changed counsel mid application and leave was granted for him to file an additional affidavit. In this new affidavit he distanced himself entirely from the contents of the original affidavit filed. He explained that he, personally, had done all he could to ensure that this matter was properly defended and he had a good defence. To ensure that there would be trial on the merits, he retained and instructed counsel five days after being served with the claim. At that time counsel informed him that only a defence was required and assured him that it would be prepared and filed on his behalf within twenty-eight days. He made subsequent checks to ensure that the defence was being attended to. In his estimation, he was as diligent as he could possibly be. He offered no new explanation for the omission in filing other than that he personally did not know that an acknowledgement of service had to have been filed. However, the circumstances are such that knowledge must be imputed to him.

10. The fact remains that Mr. Schmidt had been served personally with the claim form, statement of claim and all documents required by the rules to be served therewith. There is an affidavit of service filed by the Claimant attesting to this and it is not disputed. The notice on the claim form states quite plainly that an acknowledgment of service must be filed within fourteen days of service of the claim form, the notes for the Defendant stated fourteen to twenty-one days which may have caused some confusion, but the Defendant does not say that he was confused. There is at the end of those notes a warning in bold capital print which reads: ***"REMEMBER THAT IF YOU DO NOTHING, JUDGMENT MAY BE ENTERED AGAINST YOU WITHOUT***

ANY FURTHER WARNING." Further, the acknowledgement of service form (also served on the Defendant) states that it must be completed and served within fourteen days of service of the claim form. The Defendant does not claim illiteracy and he cannot say now that he is, since his second affidavit bravely affirms at paragraph 12:

> *"12. Concerned that I would lose the claim against me and upon seeking some advice, I visited the office of the Registry where I met with Mr. Edmund Pennil on the 22nd March, 2017, to check the records to ensure that Mr. Panton had indeed filed the application to set aside the default judgment. I discovered that the application to set aside the default judgment was indeed filed. I did not, however, review the affidavit of Bernard Felix."*

11. Additionally, the receipt and contract annexed to his draft defence and counterclaim are all in writing and signed by him. It stands to reason that if he could review that affidavit, receipt and contract, he could very well indeed have reviewed the documents served. That he failed to do this, (which he has not alleged) is of no importance. Reasonably, therefore, the assertion that he was unaware that an acknowledgement was to be filed, holds no merit. To my mind he was simply not as diligent as he ought to have been in the circumstances and this does not constitute a good reason.

12. It is accepted that a legal practitioner must be held to a higher standard than an ordinary litigant. But even an ordinary, literate prose litigant is greatly assisted by the documents with which they are served. Further, many prose litigants have ably filled out the acknowledgment of service themselves and filed same as required. It is a simple form requiring no extraordinary skill. The notes are easy to comprehend and are particularly so in acknowledgement of the existence of pro se litigants and their right to access the court. It is intended to further the overriding objective of the Civil

Procedure Rules where dealing with a case justly includes ensuring, so far as is practicable, that the parties are on equal footing. I can see no reason why this particular litigant, represented from the start by counsel should be held to a lower standard.

13. I therefore find the reasons given, to be unacceptable. Without more, whether the Defendant or his counsel did not attend to the matter as diligently or efficiently as perhaps they should have, is insufficient. So too is not harbouring any indifference to the claim.

14. Having failed to pass this second hurdle there is no need to consider the prospects of a successful defence as it cannot change the inevitable.

IT IS ORDERED:

The application is dismissed with costs to the Claimant in the sum of $2,000.00.

SONYA YOUNG
JUDGE OF THE SUPREME COURT