[2010]JMCA App 11

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 75/2010

BETWEEN	**JAMAICA BEVERAGES LIMITED**	**APPLICANT**
AND	**JANET EDWARDS**	**RESPONDENT**

Hart Muirhead Fatta for the Applicant

Nunes Scholefield DeLeon & Co. for the Respondent

12 July 2010

IN CHAMBERS

BROOKS, J.A. (Ag)

[1] Ms Janet Edwards was an employee of Jamaica Beverages Limited. On or about 27 April 2000, she was injured when men armed with guns invaded her workplace and during the course of their attempts at committing robbery at the premises, shot her in the neck. Fortunately she survived and in 2002, filed a claim against Jamaica Beverages, seeking to recover damages for her injuries. Her claim was founded in negligence and/or breach of contract.

[2] Jamaica Beverages, although it thought that the claim was not likely to succeed, delayed in filing an acknowledgement of service. A

judgment in default of appearance was accordingly entered against it. It applied to have the default judgment set aside and for Ms Edwards' claim to be struck out. Sykes J heard the applications and refused the applications. He ruled in favour of Ms Edwards in respect of the former, thus making the latter otiose. He reduced the reasons for his decision to writing. The learned judge, thereafter, refused permission to appeal his ruling. Jamaica Beverages has filed an application in this court seeking permission to appeal against that decision. In considering the application, the issue to be decided is whether Jamaica Beverages has a real prospect of succeeding on appeal.

Brief Chronology

[3] The claim was filed under the regime of the Judicature (Civil Procedure Code) Law (the CPC). Jamaica Beverages, after it was served with the writ of summons and statement of claim, filed an application to strike out the claim. It did not file an appearance or conditional appearance prior to doing so. That application was never heard.

[4] When the Civil Procedure Rules 2002 (CPR) came into force, Jamaica Beverages filed a new application to strike out the claim, again, without having filed an acknowledgement of service. The latter application was adjourned without being heard. That was, however, in its early stages after the CPR were brought into force. Thereafter, Ms Edwards applied for judgment in default of acknowledgement of service.

The judgment was duly entered. Jamaica Beverages subsequently applied to have the default judgment set aside. Up to the time that the hearing of the application to set aside had commenced (over four years later), Jamaica Beverages had still not filed an acknowledgement of service. It did so only after the hearing was adjourned for continuation.

The issues to be determined

[5] In considering whether the judgment should be set aside, there were two main issues analysed by Sykes J. The first was whether the judgment in default of filing an acknowledgement of service had been regularly entered. This would determine whether Jamaica Beverages was entitled, as of right, to have the judgment set aside, or was obliged to demonstrate that it had a real prospect of success at a trial.

The analysis

Whether the judgment in default was regularly entered

[6] In his usual careful manner, the learned judge demonstrated that part 9 of the CPR required an acknowledgment of service to be filed by any defendant who expected to be heard in respect of the claim. The failure by Jamaica Beverages to comply with the provisions of part 9, meant that Ms Edwards was entitled to enter judgment in default of acknowledgment of service. Accordingly, the learned judge found that the judgment had been regularly entered. He rejected the submission of counsel for Jamaica Beverages, who appeared below, that the filing of

the application to strike out acted as a bar to an application for judgment in default. He said, at paragraph 21 of his reasons for judgment:

> "...Part 9 is mandatory and until [Jamaica Beverages] brought itself on the right side of Part 9 it cannot contend that the judgment was irregularly entered. What this means is that when this matter commenced before me in April 2007, [Jamaica Beverages] ought [not] to have been heard because they were not properly before the court. The acknowledgement of service has now been filed and to the extent that there is compliance with Part 9, I conclude that the judgment was regularly obtained and cannot be set aside except under the discretionary power of the court."

[7] His reasoning, in my view, cannot be faulted. Although not strictly applicable, two rules assist this analysis. Rule 9.6 of the CPR requires a defendant, who wishes to dispute the jurisdiction of the court to try the claim, or argues that the court should not exercise its jurisdiction, to first file an acknowledgement of service. Rule 9.5 makes it clear that a defendant, who files an acknowledgment of service, does not, by so doing, lose the right to dispute the court's jurisdiction.

[8] Rule 12.3 (3) of the English Civil Procedure Rules do prohibit the entry of a default judgment if the defendant to the claim has applied to have the claimant's statement of case struck out, and that application has not been disposed of. The application must, however, have been made pursuant to rule 3.4 of those rules. Even in that context, the clear presumption seems to be that the defendant would have had to have

entered an acknowledgment of service before making the application. The learned editors of ***Blackstone's Civil Practice***, 2005, at paragraph 33.3 state that "[a]pplications to strike out should normally be made in the period between acknowledgment of service and filing of allocation questionnaires". There is no equivalent in our CPR to rule 12.3 (3). Jamaica Beverages cannot secure any assistance from that rule or the learning in respect of that English rule.

[9] It is my view, therefore, that in the absence of an acknowledgment of service by Jamaica Beverages, the judgment was regularly entered.

Whether the Part 13 requirements had been satisfied

[10] The next issue which the learned judge considered, was whether Jamaica Beverages had satisfied the provisions of part 13 of the CPR. These provisions concern the setting aside of a default judgment which had been regularly entered. In this regard, Jamaica Beverages complains that the learned judge:

> "a. ...failed to have any or any adequate regard to the severe problems faced by the Claimant in proving that her injury was caused by a breach of duty on the part of the Defendant, in circumstances where the direct cause of the injury was a criminal attack by a third party.
>
> b. ...failed to pay any regard to the [evidence proffered] that the third party who caused the injury to [Ms Edwards] was unknown to [Jamaica Beverages] and that [it] could not reasonably have foreseen the attack.

c. ...relied on deficiencies in [Jamaica Beverages'] draft Defence, whereas the true approach for the purposes of determining whether [Jamaica Beverages] had a reasonable prospect of success was to consider the facts alleged in the claim and the facts deposed to by Affidavit, and to have regard to the relevant law. On that approach...[Jamaica Beverages]...had...a reasonable prospect...of resisting the claim.

d. ...failed to have regard to the duty of the Court to give effect to the overriding objective to deal with cases justly when interpreting the CPR and exercising its powers under the CPR, in circumstances where:
    i. the basis of the claim was tenuous; and
    ii. [Jamaica Beverages] had from January 31, 2003 onwards manifested a clear intention to resist the claim."

[11] The learned trial judge, in assessing the application to set aside the judgment, ruled that the defence filed consisted of a series of bare denials. He was of the view that the defence, in breach of the rules set out in part 10 of the CPR, did not state Jamaica Beverages' reasons for resisting the assertions in the particulars of claim. He found, at paragraph 35, that "[n]o reason is given for the denials or non-admission[s]" in the defence as filed.

[12] Based on what he found to be a failure to comply with rule 10.5 of the CPR, Sykes J decided that there was "no basis of fact calling upon [the court] to exercise [its] discretion in favour of setting aside" (paragraph 38). He, therefore, refused the application to set aside the judgment.

[13] The learned judge's assessment was based on the content of the proposed defence. It may well be said that the defence was crafted in answer to the particulars of claim, but where the claimant has secured a judgment of the Supreme Court, a defendant in default must go further. It must demonstrate that its defence has a real prospect of success. As the learned trial judge quite rightly concluded, the defence, as filed, did not go far enough.

Conclusion

[14] Jamaica Beverages cannot succeed on its complaint that the judgment entered against it was irregular. It clearly failed to file an acknowledgment of service before the application for the judgment was filed. In that context, there is no juridical foundation for its assertion that its application to strike out, acted as a bar to the judgment in default being entered.

[15] It is true, however, that the fact situation in this case has some very unusual features which could possibly be of much jurisprudential value, were it to have been tried. Jamaica Beverages must first show, however, that it can raise issues which justify setting aside Ms Edward's judgment. I agree with Sykes J that it has not met that standard and that the issues are fairly well settled in this regard. Leave to appeal must therefore be refused.