JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42 OF 2005

BEFORE: THE HON. MR. JUSTICE P. HARRISON, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)

BETWEEN: DAVID WATSON 2ND DEFENDANT/APPELLANT

AND ADOLPHUS SYLVESTER ROPER PLAINTIFF/RESPONDENT

Mr. H. Haughton Gayle instructed by H. Haughton Gayle Co. for the Appellant.

Miss Latoya Green instructed by Forsythe and Forsythe for the Respondent.

July 5 and 6 & November 18, 2005

K. HARRISON, J.A:

Introduction

This appeal challenges the judgment of Mangatal J., who dismissed an application to set aside final judgment entered in suit C.L 1994/R166 on the 31st day of May 2002. We dismissed the appeal on July 6th and promised then, to put our reasons in writing because the appeal raises important issues of civil procedure. This is the fulfillment of our promise.

The background facts

On the 17th May 1993, the respondent was injured by a motor truck in a motor vehicle accident due to the negligent driving of the appellant's servant and/or agent. The appellant, who was owner of the motor truck, was joined as a defendant in the action. He was served with writ of summons and statement of claim in or about October 1994.

A defence was filed on behalf of the appellant and the matter subsequently fixed for trial.

Notice of trial was served on the Attorney at Law representing the appellant. He admitted service on the 4th April 2002. A copy of the notice of trial was also sent by registered mail, to the address of the appellant as stated in the writ of summons.

Shortly after service of the notice of trial, Counsel for the appellant obtained an order on the 8th April 2002, removing his name from the record. It is not clear however, whether all the steps required, to perfect the removal of Counsel's name from the record, were carried out.

The claim was fixed for trial on the 31st May 2002, but the appellant failed to attend the trial. Counsel did not appear on his behalf, on this date either. The learned trial judge dealt with the matter in the absence of the appellant as she was satisfied that proper service of the notice of trial was effected on the appellant and his Attorney. Damages were assessed and judgment in default of appearance was entered in favour of the plaintiff/respondent .

On the 16th December 2004, the appellant flied notice of application for court orders in order to set aside the judgment. This application was supported by an affidavit deposed to by the appellant and sworn to on the 10th December 2004.

The notice of application to set aside the judgment in default was heard on the 10th February 2005 and on the 18th February it was dismissed with costs to the respondent to be taxed if not agreed or otherwise ascertained.

The reasons for judgment

I now turn to the reasons for judgment. After reviewing the affidavit evidence, the submissions and the provisions of the Civil Procedure Rules 2002 ("the CPR") and The Judicature (Civil Procedure Code) Law, ("the CPC), the learned judge stated as follows:

> "13. In my view, the rules set out in Part 39 are applicable and not section 354 of the Civil Procedure Code. Although the judgment was entered at a time when the Judicature (Civil Procedure) Code was applicable, the applications to set aside and to amend are governed by the C.P.R (Part 20 in the case of the application to amend).
>
> 14. I am not sure whether, or for that matter, when the judgment or order was served on the Second Defendant. Without more, I am prepared to accept that the application to set aside is within time and that the second Defendant has proceeded with alacrity in that regard. However, the Second Defendant changed his address without telling his Attorney-at-Law. This was the address stated for the Second Defendant on the Writ.
>
> Whether the Attorney also had a work address for him or not, and this has not been confirmed or denied in any Affidavit by the Attorney-at-Law, the Second Defendant failed to give the Attorney his new home address at his peril. The only way that the Claimant's Attorneys would have been able to learn of a new address would have been through the

> Defendant's Attorney-at-Law. Indeed, quite often the only reason that lawyers representing a litigant attend the hearing of an application by other Attorneys to remove their names from the record as appearing for an (sic) party, is to see if they can obtain the last known address for that party. The only other way for the Claimant to effect service on the Claimant (sic) is through the Attorney-at-Law on the record whose address is the party's appointed address for service.
>
> In my view the explanation advanced cannot constitute a good reason for failing to attend at the hearing. In addition, parties are expected to stay in touch with their Attorneys when they have been sued. The scope therefore for them to say that they were unaware of a court date must by its nature be very limited. Also, bad advice from a lawyer or assumptions by the Second Defendant that the matter was at an end, based on that bad advice, are also not a good reason for the failure to attend or to stay on top of what is essentially one's own business. That is really an end of the matter since in Rule 39.6(3) the court must be provided with evidence both of a good reason for failing to attend the hearing as well as that it is likely that had the applicant attended some other judgment might have been made. The Second Defendant's application cannot therefore get off the ground. There is no residual discretion to set aside the judgment if one of these factors is missing.
>
> 15. However, in any event, it is clear to me that in this case the Second Defendant has also failed to provide evidence that had he attended, it is likely that some other judgment or order might have been given or made. Unfortunately, the Defence which was before the trial judge was quite a hopeless one, with no prospects of succeeding. I am therefore far from convinced that, had the Second Defendant attended the trial, the result would have been any different."

The submissions

Although two grounds of appeal were filed, Mr. Haughton Gayle, for the appellant, concentrated on ground 2. This ground complained inter alia, that the learned judge had misdirected herself on the law by applying rule 39.6 of the

CPR instead of sections 352 and 354 of the CPC when she considered the application to set aside.

Mr. Haughton Gayle submitted that although the CPC has been repealed, the authorities decided under section 354 of the former rules are nevertheless relevant when one comes to consider rule 13.3(1) of the CPR. Section 354 provides as follows:

> "354- Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within ten days after the trial".

Mr. Haughton Gayle referred the Court to the case of **Kenneth Morris v Owen Taylor** SCCA No. 39 of 1983 (un-reported) delivered 22nd November 1984 in support of his arguments. In that case Campbell J.A. (Ag.) said:

> "What section 352 and 354 contemplate is a case in which the defendant has had a judgment of the court at a trial against him at which trial he was not heard wholly or partially in his defence, had not participated fully in the trial and had not waived his right so to do. In this regard the right of a party to full participation in his trial before condemnation is succinctly expressed by Jenkins, L.J., in **Grimshaw v Dunbar** (1953) 1 All E.R. 350 at p. 355:
>
> "A party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, common justice demands, so far as it can be given effect to, without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to court and present his case, no doubt on suitable terms as to costs."

Mr. Haughton Gayle submitted further that the above dicta support a liberal interpretation of sections 352 and 354. He also referred to and relied on the case of **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle** [1986] 2 Lloyd's Rep 221. He submitted that these authorities do not in any way run counter to the overriding objective of the CPR, which is, to enable the Court to deal with cases justly.

Mr. Haughton Gayle also submitted that if the CPR. were applicable, then a case management conference would have had to be held. He submitted that in the circumstances, since no case management conference had taken place, the application to set aside the judgment is clearly governed by section 354 of the CPC.

The transitional provisions

I now turn to examine briefly, the transitional provisions of the CPR. These Rules came into operation on the 1st day of January 2003. They were made subject to transitional provisions contained in Part 73.

It is expressly stated in the introduction to these rules that all previous rules relating to the procedure in civil proceedings in the Supreme Court are revoked, once the new rules become operative.

Part 73(4) makes it abundantly clear however, that where in any old proceedings a trial date has not been fixed to take place within the first term of 2003, it is the duty of the claimant to apply for a case management conference to be fixed. When this application is received, the registry must fix a case management conference pursuant to Part 27 of the CPR. The parties are

thereafter advised of the date, time and place for the case management conference. (See 73(5) of the CPR)

In relation to new proceedings Part 73.2 of the CPR states:

> "These Rules apply to all proceedings commenced on or after the commencement date."

In construing this provision, it is my view that a literal interpretation must be given to the words "all proceedings". In the instant matter, the notice of application for court orders was filed on the 16th December 2004, so, rule 39.6 of the new rules which deals with absence of a party at trial, would apply, and not section 354 of the CPC. The learned judge was therefore correct in concluding that the application before her was governed by the CPR.

It is also my considered view that Mr. Haughton Gayle's submission regarding the applicability of Part 13 of the CPR. to the application before the learned judge is without merit. The rules contained in Part 13 deal with setting aside or varying default judgments made in the default of appearance and/or default of a defence. Those rules have no relevance where a trial date has been fixed and one of the parties failed to attend the trial.

The procedure to be followed

Part 39.6 of the CPR. provides as follows:

> "(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing-
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

The predominant consideration therefore for the court in setting aside a judgment given after a trial in the absence of the applicant, is not whether there is a defence on the merits but the reason why the applicant had absented himself from the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation. This court has approved these principles, and have applied them, from time to time - See ***Thelma Edwards v Robinson's Car Mart and Lorenzo Archer*** SCCA 81/00 (un-reported) delivered 19th March 2001.

Rule 39.6 therefore gives the absent party the opportunity of explaining why he did not attend and that he has a reasonable prospect of success. It also gives the party in whose favour the judgment was given, the chance of not having to prove his case all over again, with all the attendant expense that this will involve and, if a court is satisfied that there is in truth no reasonable prospect that the judgment would be reversed.

The conditions in rule 39.6 are similar to those enunciated in the case of ***Shocked v Goldschmidt*** [1998] 1 All ER 372 but under the CPR they are

cumulative. There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied: ***Barclays Bank plc v Ellis*** (2000) The Times, 24 October 2000.

The question now for consideration is whether the learned judge in exercising her discretion erred in principle.

Time for making the application

I turn now to consider rule 39.6(2). The rule provides that an application must be made within a period of 14 days after service of the judgment or order. It envisages that the application must be made with some degree of promptness: ***Regency Rolls Ltd v Carnal*** (2000) LTL 16/10/2000.

Mr. Haughton Gayle submitted that the record did not indicate that the order containing the judgment was served on the appellant or his Attorney. The application to set aside was made however, in December 2004, some two years after judgment was delivered. There is no record of an affidavit regarding service of the order or judgment but, the learned judge dealt with the matter at paragraph 14 of her judgment as follows:

> "14. I am not sure whether, or for that matter, when the judgment or order was served on the Second Defendant. Without more, I am prepared to accept that the application to set aside is within time and that the second Defendant has proceeded with alacrity in that regard ..."

The learned trial judge was apparently of the view that the first criterion in rule 39.6 was satisfied. We see no reason to differ from the learned judge.

I will now turn next to consider the criteria set out in rule 39.6(3). What information should the affidavit contain? The rule speaks of (a) good reason

being shown for the applicant's absence and; (b) the prospects of success had he attended the trial.

The reasons for the appellant's non-attendance at trial

The phrase "good reason" in 39.6(3)(a) is sufficiently clear and covers a situation where for example, the applicant did not receive notice of the trial date. The judgment in that situation will be set aside: ***Brazil v Brazil*** [2002] EWCA Civ 1135, The Times, 18 October 2002. In ***Neufville v Papamichael*** (1999) LTL 23/11/99) an application to set aside a judgment was refused, primarily because no adequate explanation was given by the claimant, who failed to attend trial, and who failed to have kept in contact with his solicitors.

The application to set aside, in the instant matter, was supported by an affidavit sworn to by the appellant on the 10th December 2004. He also filed supplemental affidavits in support.

Mangatal J., would have had to be satisfied before any consideration is given to the affidavit evidence that the notice of trial was served. She stated at paragraph 3 as follows:

> "3. On the 31st May 2002 the trial judge entered a final judgment against the Second Defendant. The judge was satisfied of service of notice of the trial on the Second Defendant by an Affidavit of Service sworn to on the 18th of April 2002 by one Donna Griffin, a legal clerk employed to the Claimant's Attorney-at-Law. In this Affidavit it was indicated that on the 4th of April 2002 the Second Defendant was sent notice of the trial by registered mail at his address as stated in the Writ of Summons. Miss Griffin went on to say that the registered letter and notice were not returned. There was also admission of service on the Second Defendant's then Attorney-at Law on the 4th of April 2002. The Attorney-at-Law

> obtained an order removing his name from the record on the 8th April 2002, but it is not clear whether all the steps required to perfect the removal from the record as set out in the then applicable Judicature Civil Procedure Code were carried out. Service on the Attorney would technically constitute proper service on the Second Defendant, in addition to the service effected by registered mail."

The learned judge next considered whether or not the appellant had satisfactorily explained his non-appearance at the trial. She stated at paragraph 8 of her judgment:

> "8. ... Essentially, the Second Defendant is saying that he was served with the Writ of Summons in 1994. He went to his original Attorney-at-law. The Attorney assured the Second Defendant that as he was not on the scene at the time when the accident took place he could not be held responsible for it. The Second Defendant says that as a result of the assurance given to him by the Attorney he concluded that that was the end of the matter as far as the claim against him was concerned. It was not until a bailiff in November 2004 informed him that the judgment had been entered against him that he realized that the suit was alive and that he had been deemed culpable by the court.
>
> He says that shortly after he received the assurance from the Attorney he innocently changed his home address and did not think it necessary to inform the Attorney of the change of address since he had from day one given the Attorney his business address, at which, up to now, he may still be contacted. The Second Defendant has not expressly said that he received no notification of the trial date. However, in so far as he has said that he changed his address and that on retrieving his file from his Attorney-at- law he saw where letters sent to him at his former home address as stated in the Writ were returned unclaimed, I understand the Second Defendant to be saying that he did not know of the trial date."

Then at paragraph 14 she states inter alia:

> "14. ... Whether the Attorney also had a work address for him or not, and this has not been confirmed or denied in any Affidavit by the Attorney-at-Law, the Second Defendant failed to give the Attorney his new home address at his peril. The only way that the Claimant's Attorneys would have been able to learn of a new address would have been through the Defendant's Attorney-at-Law. Indeed, quite often the only reason that lawyers representing a litigant attend the hearing of an application by other Attorneys to remove their names from the record as appearing for an party, is to see if they can obtain the last known address for that party. The only other way for the Claimant to effect service on the Claimant (sic) is through the Attorney-at-Law on the record whose address is the party's appointed address for service. In my view the explanation advanced cannot constitute a good reason for failing to attend at the hearing. In addition, parties are expected to stay in touch with their Attorneys when they have been sued. The scope therefore for them to say that they were unaware of a court date must by its nature be very limited. Also, bad advice from a lawyer or assumptions by the Second Defendant that the matter was at an end, based on that bad advice, are also not a good reason for the failure to attend or to stay on top of what is essentially one's own business. That is really an end of the matter since in Rule 39.6(3) the court must be provided with evidence both of a good reason for failing to attend the hearing as well as that it is likely that had the applicant attended some other judgment might have been made. The Second Defendant's application cannot therefore get off the ground. There is no residual discretion to set aside the judgment if one of these factors is missing."

The affidavit evidence of the appellant has been accurately summarized in the learned judge's judgment above. Having reviewed that evidence I do agree with the learned judge that there was no evidence before her that satisfactorily explained the reason for the appellant's absence at the trial.

The chances of success at the trial

I now turn to consider the next criteria which the appellant has to satisfy under rule 39.6(3)(b) that is, that it is likely that had the applicant attended, some other judgment or order might have been given or made. This is how the learned judge dealt with this issue in her judgment. At paragraph 10 she states:

> "10. The Defence which was filed on behalf of the Second Defendant was in reality no defence at all. The Defence admitted that the driver the Third Defendant was the agent of the Second Defendant but stated that the Second Defendant made no admission as to how the accident happened and stated that the Second Defendant was not at the scene of the accident and therefore is unable to give any details about the accident. An owner or person for whose purposes a motor vehicle is being operated cannot escape vicarious liability for the negligent driving of his servant or agent on the basis that he the principal was not at the scene or present in the vehicle when the accident happened."

In a supplemental affidavit, sworn to on the 28th December 2004, the appellant sought leave of Mangatal J., to amend his original defence. A proposed amended defence containing major amendments was filed. After some twelve (12) years have elapsed the appellant now seeks to rely upon allegations of mechanical defect and inevitable accident. The learned judge correctly in my view, refused the application to amend, and at paragraph 11 of her judgment she states:

> "11. The defence which the Second Defendant now seeks the Court's leave to raise for the first time is a defence of mechanical defect, based on observations which the Second Defendant now for the first time is claiming to have made of the truck in question at the scene after the accident. This is a strange turn of events, particularly since in the defence filed it was merely

> pleaded on his behalf that the Second Defendant was not at the scene of the accident. In addition to his own alleged findings, the Second Defendant would now be seeking to rely on what he was told by the driver as to the manner in which the accident happened, including the allegation that the steering became loose and uncontrollable. The driver on the Second Defendant's own account has migrated and is by inference not available to give evidence".

In concluding, the learned judge said:

> "15. However, in any event, it is clear to me that in this case the Second Defendant has also failed to provide evidence that had he attended, it is likely that some other judgment or order might have been given or made. Unfortunately, the Defence which was before the trial judge was quite a hopeless one, with no prospects of succeeding. I am therefore far from convinced that, had the Second Defendant attended the trial, the result would have been any different".

I agree entirely with the above sentiments expressed by the learned judge. The defence before the learned trial judge was indeed a hopeless one and had no prospects of succeeding.

Conclusion

The appellant failed in my view, to satisfy the conditions set out in Rule 39.6 (3.) (a) and (b). I have said earlier in this judgment that the conditions in this rule are cumulative. The learned judge has no residual discretionary powers to come to the appellant's aid if he succeeds with respect to one of the conditions. The appellant is required to satisfy all of the conditions set out in Rule 39.6 (2) and (3). In my opinion, the learned judge had correctly exercised her discretion in refusing to set aside the judgment. Not only did she consider the likelihood of a

defence succeeding but she had also given proper consideration and due weight to the relevant principle why he had absented himself at the trial.

It is for these reasons that we made the order dismissing the appeal with costs to the respondent both here and in the court below, to be taxed if not agreed.