IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 14 OF 2017

BERNALDO JACOBO SCHMIDT Appellant

v

EPHRIAM USHER Respondent

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Mr Justice Samuel L. Awich	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

M Marin-Young SC and A Jenkins for the appellant.
M E Williams for the respondent.

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8 March 2019 and 23 October 2020

SIR MANUEL SOSA P

[1] I concur in the reasons for judgment given, and the orders proposed, in the judgment of Awich JA, which I have read in draft.

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SIR MANUEL SOSA P

AWICH JA

[2] This case is an appeal from the judgment and order made on 9 May 2017, by the learned judge, Sonya Young, in the Supreme Court. The judgment and order dismissed an application by Mr. Bernaldo Jacob Schmidt, the appellant, for an order to set aside a default judgment entered on 10 March 2017, in claim No. 99 of 2017, against Mr. Schmidt, at the request of Mr. Ephriam Usher, the respondent-claimant. It was a default judgment for failure to file an acknowledgment of service of "**a claim form containing a notice of intention to defend**". The judgment sum was $79,659.75 plus interest and costs. The appeal has been opposed by Mr. Usher.

[3] The facts leading to the default judgment are short and simple. But would have to be subjected to cross-examination, in the event of a trial. At this stage, the facts are these.

[4] On 12 August 2016, the appellant-defendant and the respondent-claimant entered into a joint venture agreement whereby the respondent-claimant would "invest" in a stone crushing equipment, "the jaw-crusher," owned by the appellant-defendant. The investment would be 50% of the value of the equipment. It was valued at $26,000. The respondent paid $7,000 deposit and owed the balance of $6,000 out of the 50%.

[5] On 26 September 2016, the respondent took the jaw-crusher to his quarry and processed material there for sale. It is said that, on 15 December 2016, the appellant went and collected the jaw-crusher from the respondent's quarry, without the consent of the respondent, and took it to a quarry owned by the appellant to process material there for sale.

[6] On 16 December 2016, the respondent discovered that, the appellant had dismantled the jaw-crusher and removed some parts of it. It is said that the appellant refused to restore the jaw-crusher. The respondent then made a claim on 2 February 2017, in the Supreme Court, for the total sum of $79,085, plus interest and costs.

[7] The claim form was served on the appellant-defendant personally on the 23 February 2017. He instructed an attorney five days after, on 28 February 2017. Appellant's attorney had 9 days to file acknowledgement of service of the claim form, within 14 days as required by R9.2 of the Supreme Court (Civil Procedure) Rules, 2005. The attorney did not file the claim form. On 10 March 2017, the respondent made a request for a judgment in default of filing acknowledgment of service of the claim form, giving notice of intention to defend the claim. On the same day, 10 March 2017, the registrar of the Supreme Court entered a default judgment for $79, 659.75 plus interest and costs.

[8] On 21 March 2017, the appellant filed an application in the Supreme Court under R13.3 of the SC CPR 2005, for an order to set aside the default judgment entered on 10 March 2017, against him. Upon hearing the application, Sonya Young J. dismissed it on 9 May 2017. So the default judgment remained in effect.

[9] The appellant was dissatisfied, he has obtained leave and has appealed from the order made by the learned judge, dismissing his application for an order setting aside the default judgment. The notice of appeal filed on 14 June 2017, states the grounds of appeal and relief sought as follows:

> "3.1 In reaching her decision to not set aside the default judgment, the Learned judge erred in the exercise of her discretion in not accepting that the negligence of the Defendant's former counsel was a good reason to set aside the default judgement. In light of all the reasonable steps taken by the Defendant, who the Learned judge, nevertheless, found was not a diligent defendant.
>
> 3.2 The decision of the Learned judge was unreasonable and against the weight of evidence.

Relief Sought

4.1 An Order setting aside the judgment/order of the Honourable Madam Justice Sonya Young namely.

4.1.1 The Application to set aside the default judgment entered on the 10th March, 2017, dated 21st March, 2017 is hereby dismissed, and

4.1.2 Cost to the Claimant in the amount of $2000.00

4.2 AND that the Court of Appeal exercises its discretion and grants the following reliefs:

4.2.1 The Default judgment in Claim No. 99 of 2017, entered on the 10th March, 2017 is set aside;

4.2.2 Cost in the appeal and in the court below."

[10] I have not sought to do corrections in the quoted text of the grounds of appeal and relief. The several errors aside, I have understood the grounds of the appeal and the relief sought. The sole complaint in the appeal is simply that, the trial judge erred in rejecting, "the negligence of the defendant's former attorney," as a good reason given by the appellant for the failure by the appellant to file acknowledgment of service of the claim form within the time limited by the Rules. The complaint that the decision of the judge was unreasonable and against the weight of the evidence was merely a back-up ground.

[11] The relief that the appellant seeks is that, his appeal be allowed and the default judgment entered on 10 March 2017, be set aside. The consequence would be to have the claim, No. 99 of 2020, revert to the pleading stage; the appellant would be allowed to file an acknowledgment of service of the claim form and, or a defence. The claim would then proceed to trial.

Determination.

[12] The law of procedure, *R 13.3 of the Supreme (Civil Procedure) Rule 2005*, authorizes a judge, as a matter of discretionary power, to set aside a default judgment entered for failure to file an acknowledgment of service of a claim form, or for failure to file a defence, within the time limit. In the exercise of this discretion to set aside the default judgment, the law requires the judge to ensure that: the applicant has applied soon after the default judgment was entered; he has a good explanation for failing to file the acknowledgment(or defence) within the time limit, and he has a real prospect of defending the claim successfully.

[13] The wording of **R13.2** and **R13.3** is as follows:

> **13.2 (1) The court must set aside the judgment entered under Part 12 if the judgment was wrongly entered because-**
>
> > **(a) in the case of a failure to file an acknowledgment of service, any of the conditions in Rule 12.4 was not satisfied; or**
> >
> > **(b) in the case of judgment for failure to defend, any of the conditions in Rule 12.5 was not satisfied.**
>
> **(2) The court may set aside judgment under this Rule on, or without an application.**
>
> **13.3 (1) 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.

(2) Where this Rule gives the court power to set aside judgment, the court may instead vary it.

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.

[14] The learned trial judge decided the application for the order to set aside the default judgment mainly by answering the question posed in **R.13.3 (1) (b)**, that is, the question whether the applicant-appellant **gave a good explanation** for the failure to file acknowledgment of service of the claim form. She decided that, the applicant-appellant did not give a good explanation. Based on that decision, she declined to set aside the default judgment, and dismissed the application.

[15] The judge observed on the side that, "[She could] not find that the claimant delayed unreasonably…, the appellant made the application as soon as reasonably practicable, on 21 March 2017, just over one week later." There has been no cross-appeal from that observation. The learned judge did not decide the third question, namely, whether or not the applicant-appellant had a real prospect of successfully defending the claim. There has been no appeal or cross-appeal on the point as well. In my view, the claim is arguable anyway, so there is prospect of it succeeding.

[16] The only question in this appeal, therefore, is whether Young J. erred when she held that, the applicant-appellant did not give a good explanation for failure to file acknowledgment of service of the claim form within 14 days under **R.9.2 of the SC CPR**. In my respectful view she erred. She erroneously raised the standard by which a good explanation is decided.

[17] The judge decided the question of a good explanation on two sets of evidence. The first set of evidence was stated in the affidavit of Bernard Felix as follows:

> "8. … at the same time, we were still working on the Defence as the receipts and documentation for the case is quite voluminous.
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> 10. … as soon as the draft defence was completed we filed an application to set aside the default judgment.
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> 12. … failure to file an acknowledgment of service was not intentional but the Attorney-at-Law for the Applicant was in the process of taking instructions and drafting a defence and the time lapsed, there was never any indifference to the Claim.
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> 13. … the bill and receipt that grounds the defence are quite voluminous and we were in the process of establishing prima facie case before we filed an acknowledgement of service.
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> 14. … produced here and shown to me is a copy of the draft defence marked "BF-1" for identity.
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> 15. I have been advised by the Attorney-at-law for the Applicant and do verily believe that the prospect of success is very good."

[18] I agree entirely with Young J. that, being engaged in drafting a defence is not a good explanation for failing to file an acknowledgement of service of a claim form. The judge put it this way: "I cannot comprehend what one has to do with the other. If he had by the 13 March been drafting a defence, then he must have determined some time prior that he intended to defend the claim, hence the need to file an acknowledgement (which is a formal document only and which does not [depend] in anyway on drafting of a defence)…."

[19] The second set of evidence presented by the applicant-appellant for failure to file an acknowledgement of service of the claim form is in his own affidavit sworn on 29 April 2017. The relevant parts are the following:

> "3. I was served with claim No. 99 of 2017 on 23rd March, 2017.
>
> 4. On the 28th February, 2017, having been served with the Claim No. 99 of 2017, I visited the office of Panton & Associates where I met with Mr. Herbert Panton.
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> 5. On that occasion, I explained to Mr. Panton that I was served with Claim No. 99 0f 2017 on the 23rd of February, 2017, and I expressed my wishes to and did retain Panton & Associates as my Attorneys-at-Law to represent me in the said claim. I instructed Mr. Panton to defend me in the said claim and I paid half of the retainer fee in the said amount of $2,500.00. On that occasion, Mr. Panton informed me of the importance of the 28 days within which to file a defence, and made no mention of an acknowledgement of service.
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> 6. Having retained Panton & Associates and having given instructions to pursue a defence on my behalf, I expected that all reasonable steps would have been taken by my attorney on my behalf to defend the claim.
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> 7. Unbeknown to me, however an acknowledgement of service was not filed on my behalf. At that time, I did not understand the importance of filing an

acknowledgment of service, nor was it mentioned or explained to me by my former Attorneys-at Law, as only the 28 days within which to file defence was stressed.

8. As a result of the failure to file and acknowledgement of service, the Claimant applied for and entered judgment in default of the acknowledgment of service on the 10th March, 2017.

9. After the default judgment was entered, I again visited the office of Panton & Associates on the 13th and 15th of March 2017, for the purpose of providing further instructions and information regarding my defence. In fact, I took several receipts for the purpose of my defence. On those occasions, however, Mr. Panton did not inform me that a default judgment was entered against me in the claim herein.

…

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.

14. While it is true that my former Attorneys-at-Law were in the process of drafting a defence, my instructions to defend the claim were clear and complete and given well before the Defence was due.

15. I have been advised and verily believe that this includes filing an acknowledgment of service which is an antecedent to defending the claim against me.

16. The true reason for the failure to file the acknowledgement of service is negligence and lack of diligence of my former Attorneys-at-Law.

17. Having duly paid what was required of me by Mr. Panton and relying on his integrity and expertise, it is unjust that he failed to take the steps required to properly represent me. This is especially so because I had no knowledge of what needed to be filed, if not, I would have done so at the General Registry.

18. I have taken all reasonable steps to defend the claim, including retaining former counsel only five days after Claim No. 99 of 2017 was served on me. Mr. Herbert Panton of Panton & Associates therefore had ample time to carry out my instructions to defend the claim, which would have included the filing of the acknowledgement of service of claim. I even visited the offices of Panton & Associates on the 13th and 15th of March, 2017, as part of my duty to provide counsel with the necessary information so that I could pursue my defence.

…

20. The negligence of my former Attorneys-at-Law, was a matter beyond my control, having relied on Mr. Panton's expertise, and I respectfully offer the same as my reason for the acknowledgement of service not being filed, and pray that the Court will find them good and sufficient."

[20] It has been stated in several judgments in common law jurisdictions that, what is a good explanation for failure to file an acknowledgment of service of a claim form or a defence, depends on the circumstances of the particular case. For examples, see *Martin v Chow (1985) 34 WIR 397, and Joseph Hyacinth v Allan Joseph No. WAHCV AP 2015/0025*. I agree. I understand that to mean that: The supporting affidavit evidence must prove facts regarding the failure, that are together objectively acceptable as reasonable excuse for the failure.

[21] The circumstances that the courts may accept as sufficient to establish a good explanation are numerous and vary greatly. Perhaps they cannot be fitted in one definition. In *Attorney General v Universal Project Limited [2011] UK PC 37*, an appeal

case from the Court of Appeal of Trinidad and Tobago to the Privy Council, their Lordships stated one guide at paragraph 23 of their opinion as follows:

> *"23. The Board cannot accept these submissions. First, if the explanation for the breach ie. the failure to serve a defence by 13 March,* ***connotes real or substantial fault on the part of the defendant****, then it does not have a 'good' explanation for the breach. To describe a good explanation as one which 'properly' explains how the breach came about simply begs the question of what is a 'proper' explanation.* ***Oversight may be excusable in certain circumstances****. But it is difficult to see how inexcusable oversight can ever amount to a good explanation.* ***Similarly, if the explanation for the breach is administrative inefficiency****."*

[22] In *The Attorney General v Universal* case, the evidence disclosed disgraceful failures by the attorneys in the Attorney General's Chambers, to enter appearance (now to file acknowledgment of service), and to file a defence. The failure continued even after time was extended eventually to file a defence. The explanation in court was embarrassing really.

[23] A claim form for a huge sum of over $31 million was served on the Solicitor General. The attorney in charge of the case did nothing. She took it that, it was the responsibility of the "advocate attorneys" in the Chambers. She put the case file away until the defendant applied for a default judgment for failure to enter appearance. The advocate attorneys in turn took the decision that, an outside law firm be instructed to represent the Attorney General. It was said that, only the Solicitor General had the authority to instruct a law firm; but there was no Solicitor General in office at the time. In the meantime the claimant applied for a default judgment on the ground of failure to enter appearance. The court granted extension of time to file a defence instead, since the time to file defence had also expired. The extended time expired before a defence was filed. The court granted leave to the claimant to enter default judgment. It dismissed the subsequent application for an order to set aside the default judgment because there was no good explanation for the failure to file defence. Also, there had

been no good reason for the failure to enter appearance. The Court of Appeal of Trinidad and Tobago upheld the decision of the trial judge. The Privy Council dismissed the further appeal.

[24] Mr. Schmidt's plea in support of his application for an order to set aside the default judgment in this case was this. He was diligent in taking steps to defend the claim against him. He took the claim form to his attorney just five days after he had been served with it. He properly instructed his attorney to defend the claim. He paid the retainer fee asked for. He relied on the attorney. He returned on the 13th and 15th March 2017, to check with the attorney the progress in defending the claim. Unknown to him, a default judgment had been entered against him on the 10th March 2017. He did not know about the requirement for filing an acknowledgement of service of a claim form within 14 days. He relied on his attorney. He learnt later that his attorney was negligent in his duty. The negligence of his attorney was a matter beyond his control.

[25] The learned judge rejected Mr. Schmidt's plea as not good enough an explanation for failure to file an acknowledgement of service of the claim form. She stated: "In my mind, he simply was not as diligent as he ought to have been in the circumstances, and this does not constitute a good reason."

[26] The bases for the judge's conclusion were that: (1) "setting aside a default judgment must not be seen as a rubber-stamping procedure; **there should be nothing less than good compelling reasons to do so**"; (2) in the circumstances, knowledge by the attorney for Mr. Schmidt that acknowledgment of service of the claim form must be filed in 14 days, "**must be imputed to him**"; (3) the acknowledgment of service form states that it must be completed and served within 14 days; and (4) the warning attached to the claim form stated: " remember that if you do nothing, judgment may be entered against you without any further warning, and Mr. Schmidt was literate, he would have read all that.

[27] In my respectful opinion, Young J. set too high a standard for deciding what is acceptable as, "a good explanation", under **R.13.3 (1)(b)**, for failure to file an acknowledgment of service of a claim form. She stated that, there should be **"nothing less than good and compelling reasons**…" That was an error of law, the standard directed in **R.13.3 (1) (b)** is, "**a good explanation**", not, nothing less than a good and compelling reason. A good explanation does not mean nothing less than a good and compelling reason. The latter conveys a higher standard.

[28] Because Young J. applied too high a standard, she was unable to conclude that, the evidence provided by Mr. Schmidt furnished sufficient good explanation under **R.13.3 (1) (b)**, for the judge to set aside the default judgment entered on 10 March 2017. Had the judge not applied too high a standard, she would have allowed Mr. Schmidt's application and set aside the default judgment.

[29] Both learned counsel, M. Young SC, for the appellant, and learned counsel Mr. M. Williams, for the respondent, agreed on the statement of law that, failure by an attorney to comply with rules of court is generally taken as failure by the client-party to the case. I accept the common submission by counsel. While on many occasions failure by the party's attorney may be regarded as failure by the party-client, it must not be overlooked that, on some occasions the particular circumstances (the surrounded facts) may render it objectively unjust not to accept the offending act or omission by the attorney or by his staff as sufficient excuse, "a good explanation," by the party-client for his failure to comply with a rule of court. This was mentioned in *Joseph Hyacinth GDAHCVAP 2015/0025***;** and *Carleen Pemberton v Mark Brantley SKBHCVAP 2011/0009*.

[30] It is my respectful decision that, the evidence attendant to the failure to file the acknowledgement of service of the claim form in this case provided a good explanation for Mr. Schmidt, the appellant-defendant, for his failure. He acted earnestly and diligently in pursuing his claim. He took the claim form to an attorney and instructed the attorney to defend him, only five days after receipt of the claim form. So, Mr. Schmidt's attorney had 9 days in which to file an acknowledgment of service of the claim form.

Mr. Schmidt paid the fee asked for. He returned to the attorney in 13 days to check on the actions taken to defend the claim. He returned again 2 days after. Mr. Schmidt showed by the evidence that, the failure to have an acknowledgment of service of the claim form filed was not only substantially the fault of Mr. Schmidt's attorney, but wholly the fault of the attorney.

[31] The learned judge suggested that, because Mr. Schmidt did not himself file the acknowledgment in the court, Mr. Schmidt did not act diligently. That, in my view, was to demand too much from a person who had instructed an attorney well in time to defend him. It would also signal lack of trust in the attorney, and introduce a bad working relationship with the attorney. In the circumstances, I cannot take the failure by Mr. Schmidt's attorney as Mr. Schmidt's failure. Instead I take the failure by the attorney as a good explanation by Mr. Schmidt in his application for an order of court to set aside the default judgment entered on 10th March 2017.

[32] A good approach to deciding whether failure by an attorney would be a good explanation by an applicant for a court order to set aside a default judgment was given by the Eastern Caribbean Supreme Court, The Court of Appeal Division, in the *Joseph Hyacinth v Allan Joseph* case at paragraph [18] as follows:

> *"8. Timelines in conducting litigation must be observed by a litigant, but an attorney's error can be a good reason for missing a deadline and applying for an extension of time to appeal. However, the applicant must show that the delay was substantially due to the conduct of the attorney and litigants must show some degree of vigilance in protecting their own interest. Failing to make at least periodic enquires with an attorney can result in the court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason. In this case, the appellant showed very little interest in defending himself against the respondent's claim. Accordingly, the reasons for the delay in applying for an extension of time were not sufficient to justify the long delay*."

[33] I propose the following orders. 1. The appeal be allowed; the case be returned to, and proceeded with in the Supreme Court on the conditions that, (1) the appellant-defendant file a defence in 14 days, and if he fails, the claimant-respondent may request default judgment; (2) the appellant-defendant pay costs of the application in the Supreme Court, and of this appeal to the respondent-claimant in the sum of $4,000.00 within 30 days, and if he fails, the respondent (claimant) may request a default judgment.

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AWICH JA

DUCILLE JA

[34]

I have had the benefit of reading the draft judgment of Awich JA and I am in agreement with the reasoning and disposition and I cannot add anything further.

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DUCILLE JA