

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. CV 1662 of 2009

BETWEEN:

ZILLION GITTENS

CLAIMANT

AND

BARBADOS COMMUNITY COLLEGE

DEFENDANT

Before the Honourable Mr. Justice Marston C. D. Gibson, Chief Justice

2011: November 10

2012: May 10; November 29; December 9

2014: March 3

Appearances:

Ms. Tya Atwell for the Claimant

Ms. Zahidha I. James for the Defendant

DECISION

Background

[1] The Defendant is an educational institution established by the **Barbados College Act, Cap. 38 (“the Act”)** of the **Laws of Barbados**. The Claimant

was employed by the Defendant as a cleaner. This action arose out of an incident which occurred on 20 July 2005 in which the Claimant, while cleaning a laboratory, sat on a chair in order to pick up computer parts from the floor and, according to her, was thrown to the floor when the chair slid and capsized. As a result of that fall, she alleges, she sustained personal injuries.

[2] A writ of summons naming the Defendant as the “Barbados Community College” was filed on 26 August 2009, sometime after the expiry of the three-year limitation period set out in the **Limitation of Actions Act, Cap. 231**. An acknowledgement of service indicating an intention to defend the action was filed on 10 March 2010. However, no defence was ever filed or served and, in the absence of a defence, default judgment was subsequently entered against the Barbados Community College (“BCC”) on 16 February 2011. Intriguingly enough, it took some time before either of the two counsel was able to provide the Court with a copy of the Order granting the default judgment.

[3] The Defendant has not sought dismissal of the action on the ground that the writ was filed and the action commenced outside of the limitation period. It, however, seeks both to set aside the default judgment and liberty to defend the action in the name of the Barbados Community College Board of

Management (“BCCBM”) which, it contends, is its correct corporate name. However, presumably for the avoidance of doubt and in an effort to protect her client’s position, Ms. James nonetheless made submissions grounded in ss. 52 and 53 of the **Limitation of Actions Act**.

The Applications

[4] There are two applications pending before this Court:

1. The Defendant’s Application filed 31 October 2011 for orders that:
 - (1) the Judgment entered on 16 February 2011 in default of defence be set aside in accordance with **Rule 13.3 (1) of the Supreme Court (Civil Procedure) Rules 2008** on the ground that the Defendant has a real prospect of successfully defending the claim; and
 - (2) the Defendant be permitted to defend the action.
2. The Claimant’s Application filed 9 November 2011 for orders that:
 1. The Statement of Claim be amended to re-name the Defendant to the *Barbados Community College Board of Management* in accordance with Rule 20.2(3) on the grounds that:
 - (a) the amendment is necessary to correct a mistake as to the name of the Defendant; and that
 - (b) the mistake was genuine; and
 - (c) the mistake would not cause reasonable

doubt as to the identity of the Defendant;

2. That the Interlocutory Judgment entered on 16 February 2011 against the Defendant be upheld but in the amended name “Barbados Community College Board of Management.”

The Issues

[5] Two issues have arisen for the Court’s determination:

1. Whether the Barbados Community College Board of Management should be substituted as the named Defendant; and
2. Whether the default judgment entered against the Defendant on 16 February 2011 should be set aside.

The Rules of the Supreme Court and The Civil Procedure Rules: Transitional Provisions

[6] Before discussing the two central issues in this matter, a preliminary point arises which neither attorney has mentioned but which, to my mind, is unavoidable. Notably, the action was filed in 2005 and therefore ought to be processed, and disposed of, under the *Rules of the Supreme Court 1982* (“RSC”). However, neither attorney has referred to the RSC during the course of these proceedings. Their submissions, both oral and written, presuppose the applicability of the *Supreme Court (Civil Procedure) Rules 2008* (“CPR”).

- [7] **Part 73 of the CPR** contains the transitional provisions governing actions commenced under the RSC, but still pending after the CPR commencement date. Part 73.2 of the CPR states that the rules “apply to all proceedings commenced on or after the commencement date.”
- [8] Parts 73.3 and 73.4 are more pertinent and provide as follows:

Old Proceedings

- 73.3 (1)** These Rules do not apply to proceedings commenced before the commencement date *in which a trial date has been fixed* unless that date is adjourned.
- (2) In proceedings commenced before the commencement date, *an application to adjourn a trial date* is to be treated as a pre-trial review and these Rules apply from the date that such application is heard.
- (3) Where *a trial date has not been fixed* in proceedings that commenced before the commencement date,
- (a) the Registry must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least 28 days notice of the conference; and
- (b) these Rules apply from the date of the case management conference given under paragraph (a).
- (4) Where *a Summons for Directions has been taken out in proceedings commenced before the commencement date*, the parties may agree in writing to have the case referred to a case management conference; and if the parties so agree, these Rules will apply to govern the future conduct of the case from the date of the case management conference.

Exercise of discretion

- 73.4** Where in proceedings commenced before the commencement date the court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular Parts 1 and 25.

(Emphasis added)

- [9] The application of Part 73 of the CPR prompts several comments. First, the central determinants of the CPR's applicability to "old proceedings" is the fixing or adjournment of a *trial date* (Rule 73.3 (1), (2) and (3)), or the taking out of a *summons for directions*, the analogue in the RSC to the case management conference in Parts 25 to 27 (Rule 73.3(4)).
- [10] Where a trial date has *not* been fixed in proceedings commenced under the RSC, the Supreme Court Registry is required, *after a defence has been filed*, to fix a date, time and place for a case management conference. Moreover, the only instance in which the parties may "agree" for their case to transition from the RSC to the CPR is where a summons for directions has been taken out, in which case the parties may "agree" in writing to have the case referred to a case management conference. In the context of the instant application where the Defendant has sought leave to file a defence, the CPR appears to be inapplicable to old proceedings. This suggests that recourse must be had to the RSC.
- [11] I am, however, of the view that this is unnecessary. Part 73.4 of the CPR provides that "where in proceedings commenced before the commencement date the Court has to exercise its discretion, it may take account the principles set out in these Rules and, in particular, Parts 1 and 25." Rule 1.1

(1) states that the overriding objective of the CPR is to “enable the court to deal with cases justly” which includes “saving expense” (Part 1.1(1)(b)) and “ensuring that it is dealt with expeditiously and fairly” (Part 1.1(1)(d)).

[12] If this matter was allowed to continue under the RSC regime, the increase in the length of time for final disposition of this matter would be inevitable, to say nothing of the concomitant increase in the expense to the litigants. Moreover, both counsel have proceeded as if the CPR applies. In light of the overriding objective, I find that the parties have impliedly “agreed”, albeit not in writing as that phrase is ordinarily encountered and interpreted, that the CPR will apply to this action. It is my determination that their written filings and submissions which presuppose the applicability of the CPR suffices as an agreement in writing for this purpose. For these reasons, I will apply the CPR and no further reference will be made to the RSC.

The Submissions

The Claimant’s Submissions

[13] Whilst Ms. Atwell, counsel for the Defendant, has not objected to the late filing of the Writ of Summons, Ms. James, in her Affidavit in Support filed 9 November 2011, explained and gave reasons for the Claimant’s late filing. She explained that the Claimant’s former counsel was instructed to file the writ “sometime around the year 2006”. However, through no fault of the

Claimant's, it was not filed until 26 August 2009, by which time the limitation period had expired. She referred the Court to **s. 52 of the Limitation of Actions Act, Cap. 231** which confers discretion on the Court, where it is equitable, to permit an action involving personal injury despite the expiration of the three-year limitation period in **s. 20 of Cap. 231**.

[14] Citing the decision of *Best v CP Hotels (Barbados) Inc., Civil Suit No. 185 of 2004 (date of decision 16 February 2005) ("Best")*, Ms. James also contended that, in the circumstances at bar, it would be prejudicial to deny the Claimant the benefit of the default judgment since the injuries she sustained have left her unable to walk without a cane and, as determined by the National Insurance Appeal Tribunal, with a 30% permanent partial disability.

[15] As to her application to amend the Writ of Summons with the name of the BCCBM, counsel submitted that the difference in the name of the Defendant used in the writ ("BCC") and its true name, the BCCBM, was a mere technicality and that the error in naming the BCC was no fault of the Claimant. Moreover, she contended, not only was the mistake in naming the Defendant genuine, there was no reasonable doubt as to the Defendant's identity.

- [16] As to the application to set aside the default judgment, Ms. James submitted that the Defendant and/or BCCBM's executives and their insurers, the Insurance Corporation of Barbados Limited ("ICBL") received notice of the claim and acknowledged receipt thereof. She also referred the Court to correspondence dated 13 July and 23 August 2006 between the BCCBM, its insurers and the Claimant's attorney showing that the Defendant and/or BCCBM was aware of the potential claim against it from as early as 2006.
- [17] Counsel further submitted that, on a reading of the 23 August 2006 letter, ICBL intimated that it would, at the very least, consider settlement of the Claimant's medical expenses. However, she said, since the filing of the writ of summons, the Defendant and/or their representatives have deliberately and/or negligently ignored the Claimant's claim and/or communications.
- [18] She further argued that the default judgment had been properly entered and that the Claimant has a legitimate expectation that the judgment will be upheld. Furthermore, she said, the Claimant would be severely prejudiced should the default judgment be set aside as any evidence as to the nature and cause of the accident, which, at the time, occurred some 6 years prior, would be difficult to verify.

Defendant's Submissions

- [19] In response to the Claimant's submissions on the expiration of the limitation period, Ms. Atwell contended that the decision in *Best* is distinguishable from the current circumstances since, in that case, the defendant had made payments on behalf of the plaintiff thus creating the impression that it had accepted liability.
- [20] In relation to the arguments surrounding incorrect service of the Barbados Community College, counsel advanced the argument that pursuant to **sections 6(1) and 7(1) of the Act**, the management of the Barbados Community College is vested in the BCCBM which is a body corporate. Therefore, she submitted, the BCCBM should have been the named defendant to this action.
- [21] Counsel submitted that the default judgment should be set aside. She deposed to her belief that "the failure to file a Defence to the action was due to inadvertence on the part of the Insurers." She also deposed that she received no notice of a summons for default judgment and was not aware that default judgment had been entered against her client until 03 June 2011 when she saw the action had been listed for hearing on 6 June 2011.
- [22] She argued that the BCCBM had a real prospect of successfully defending the claim and referred the Court to the draft defence which disputed any

negligence on the part of the Defendant and/or BCCBM. Her position was that ICBL had always denied liability. She referred to the letter of 23 August 2006 and contended that the contents therein indicated ICBL's position that the circumstances surrounding the incident showed no evidence of negligence on the part of the Defendant. She also referred to a letter dated 22 January 2010 from ICBL to the Claimant's then attorney which confirmed that the Claimant's claim would not be honoured.

Discussion

[23] For the reasons which follow, it is determined that the Defendant's application should be granted in its entirety while the Claimant's should be granted only insofar as she seeks to amend her statement of case to reflect the true name of the Defendant. The default judgment must be set aside and the application to uphold it dismissed.

[24] I turn first to the parties' submissions concerning the expiration of the limitation period. Although Ms. James referred to **s. 52 of the Limitation of Actions Act**, Ms. Atwell has never sought dismissal of the action on the ground of the expiry of the three-year limitation period in **s. 20** of that Act. Nonetheless, in accordance with **s. 53 of the Limitation of Actions Act**, I have had regard to the particular circumstances of the case and, in particular, the reasons advanced by counsel for the Claimant as to the reasons for the

delay and the prejudice which may be suffered by the Claimant should the Court refuse to exercise its judicial discretion.

[25] In *Best, Inniss J* granted the plaintiff an enlargement of time on the basis that while it did not prejudice the defendant's claim, a refusal of the application for the enlargement would gravely prejudice the claimant who had remained under a disability some three years after the accident. In that case part of the potential prejudice to the plaintiff, as noted by *Inniss J* at [18], stemmed from the defendant's conduct after the cause of action arose, including "paying for and organizing the travel arrangements for the plaintiff to undergo Magnetic (Resonance) Imaging Testing in May 1999 as well as the request of its insurers for the submission of a quantified claim could have raised a reasonable inference that there was no problem with the respect to liability." I agree with the reasoning of the Learned Judge and for those reasons, I find, and hold, that it would be equitable to allow this action to proceed.

[26] I move next to the issue of the service of the Defendant. The Barbados Community College was established under s. 3(1) of the Act. That provision provides "There shall be established an educational institution to be called the Barbados Community College." That entity has no corporate status. Such corporate identity as exists inheres in the Barbados Community

College Board of Management established under **s. 6(1) of the Barbados Community College Act** which provides that “There shall be established for the purposes of the management of the College a body to be called the Barbados Community College Board of Management.” **S. 7(1)** provides that “the Board shall be a body corporate and **section 21 of the Interpretation Act Cap 1 of the Laws of Barbados** shall apply thereto.” **S. 21 of the Interpretation Act** provides that words in an Act which provide for the establishment of a body corporate vest in that body the right to sue, and the concomitant liability to be sued, in its corporate name.

[27] Counsel for the Claimant is seeking to amend the default judgment to replace the named Defendant with the BCCBM. That request must fail since it seeks to substitute a corporate entity which has legal and juridical status for an entity which has none. The default judgment, as it stands against the Defendant BCC, has been irregularly obtained. In reality, it is a nullity which could not be enforced against the BCCBM if it so chose, despite **s. 8 of the Act** which reads “[n]o act done or proceedings taken under this Act or the Schedule shall be questioned on the ground of any omission, defect or irregularity not affecting the merits of the case

[28] However, this irregularity does not prevent the BCCBM, the inaccurately named defendant, from defending the claim. Pursuant to **Part 19 of the**

CPR the court may substitute a party with or without application. However, a reading of **Part 19.4(2)(a) of the CPR** shows that this discretion may only be exercised in circumstances where an action was commenced prior to the expiry of the limitation period. It is, nonetheless, clear to this Court that the substitution of the BCCBM for the BCC is necessary for the proper adjudication of this matter, particularly since BCCBM desires to mount a defence. The Court has the discretion to make such substitution under **Part 26.4(3) of the CPR** which provides that the Court may make an order to rectify an error of procedure or failure to comply with a rule. On this basis, the Barbados Community College Board of Management is permitted to be substituted for the Barbados Community College as defendant.

[29] Finally, I turn to the issue of setting aside the default judgment. A convenient starting point is **Part 13.3 of the CPR** which pertains to situations where a court may set aside or vary a default judgment. The rule provides as follows:

Part 13.3(1): The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2): In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as reasonably practicable after finding out that judgment had been

- entered; and
(b) given a good explanation for the failure to file an acknowledgement of service or a defence as the case may be.

(3): Where this rule gives the court power to set aside a judgment the court may instead vary it.

[30] In *Colmenares v Fields*, Civil Suit No. 208 of 1998 (date of decision 10 October 2005) *Reifer J* observed that merely showing an arguable case is not enough to justify the setting aside of a default judgment. A defendant's application must evince "a case that has a real prospect of success and carry some degree of conviction".

[31] I determine that the Defendant has fully complied with **Part 13.4 of CPR**. Its notice of application was supported by affidavit evidence and accompanied by a draft defence. I have had regard to the evidence outlined in the supporting affidavit of 31 October 2011, the draft defence attached thereto and Counsel's oral submissions. I am satisfied that counsel has surmounted the threshold which requires proof of a real prospect of defending the claim.

[32] I accept counsel's arguments that the position of the Defendant has always been to deny liability. In the 23 August 2006 letter, ICBL stated that the incident showed "no evidence of negligence on the part of our insured." The position was then affirmed by the 22 January 2010 letter.

- [33] Paragraphs 4 to 8 of the draft defence concern the issue of liability and refute the claim of negligence made by the Claimant, issues to which the court must have regard in exercising its discretion under **Part 13 of CPR** (see the decision of *Chandler J* in *Hawkins v Arthur et al*, Civil Suit No. **302 of 2003 (date of decision 30 October 2003)**). The Defendant submitted that the chair which the Claimant alleged caused her to fall was in good repair and condition and that, in the alternative, the Claimant's injuries were caused by her own negligence. These are triable issues which ought to be ventilated at a full hearing.
- [34] Furthermore, I have noted the Court's duty to give effect to the overriding objective, as outlined in **Part 1 of the CPR**. This provision enables the Court to deal with cases justly and includes ensuring that the parties are on equal footing and ensuring that the case is dealt with expeditiously and fairly (see **Parts 1(2)(a) and (e) of the CPR** respectively).
- [35] The Defendant has requested that the default judgment be set aside and that the BCCBM be afforded the right to be heard. I have ordered that the Claimant be permitted to continue her claim despite the fact that the limitation period for the action had expired. In my opinion and in furtherance of the overriding objective, there is no justification for not allowing the BCCBM, an entity separate and distinct from the BCC, and

which is now sued for the first time, the opportunity to defend this action.

Disposal

[36] In light of the foregoing it is hereby ordered that:

1. The default judgment entered on 16 February 2011 against the Barbados Community College is set aside in accordance with Rule 13.3 (1) of the CPR;
2. The Barbados Community College Board of Management shall replace the Barbados Community College as the proper Defendant to this action, and it is directed that the caption of the action shall be changed accordingly with immediate effect;
3. The Claimant shall file and serve an amended claim form and statement of claim on the Barbados Community College Board of Management within 10 days of this Order;
4. The newly added Defendant, the Barbados Community College Board of Management, is permitted to defend the action;
5. The Barbados Community College Board of Management shall file and serve its defence within five

days of its receipt of the Claimant's amended statement
of claim.

A handwritten signature in blue ink that reads "Marston C. Gibson". The signature is written in a cursive style with a large, stylized initial "M".

Chief Justice