[2007–09 Gib LR 77]

FRANCIS v. CLIFTON-PSAILA

SUPREME COURT (Dudley, J.): April 20th, 2007

Civil Procedure—Service of process—time of service—claim served by registered mail—Gibraltar postal system different from England because notice of arrival of mail delivered to addressee, who then collects item from Post Office—under Supreme Court Rules, r.3(2)(a) service deemed to be when "letter would in the ordinary course be delivered," reasonable time being 14 days after posting—CPR, r.6.26 deeming service after 2 days inappropriate and inapplicable

The respondent brought proceedings against the appellant in the small claims jurisdiction of the Supreme Court in respect of alleged damage to his property.

The respondent sent a claim form to the appellant by registered mail on November 2nd, 2006. Having not received a reply, and in the absence of any appearance by the appellant, she obtained judgment in default on November 30th. This decision was made on the basis that the claim form was deemed to have been served two days after it had been sent, on November 4th, as specified in the Civil Procedure Rules, r.6.26. The appellant applied to have the judgment set aside on the ground that he had not received the first notice sent out on November 2nd and had only been notified by the Post Office's second notice on November 29th that an item of registered mail was awaiting collection, which he collected on November 30th. As this was the same day that the court entered the judgment in default, the appellant did not have time to enter an appearance or defend the claim. The Master dismissed the appellant's application to have the judgment set aside.

On appeal, the appellant submitted that (a) the wording of the Supreme Court Rules regarding the service of registered mail, was inappropriate as it reflected the English system and not the Gibraltar system. Unlike England, in Gibraltar, a notice (not the actual item) was delivered to the

address of the recipient. Rule 3(1)(b) of the Supreme Court Rules could not therefore be applied literally, since it required the item of mail to be delivered to him "at his usual or last known address"; (b) he should have been given more time to respond to the claim because allowing only two days for service (by applying r.6.26 of the Civil Procedure Rules) did not allow sufficient time for delivery of the notice and collection of the letter from the Post Office before it was deemed to be served; and (c) the court should exercise its discretion pursuant to r.13.3 of the Civil Procedure Rules to set aside the judgment in default.

Held, allowing the appeal:

(1) The judgment in default would be set aside to give the appellant sufficient time to reply to the claim. The court had entered the judgment in default too early, as it was incorrect to deem the letter to have been served after two days by reference to the Civil Procedure Rules, r.6.26. A reasonable length of time for service of an item of registered mail in Gibraltar was 14 days, on the basis that r.3(2)(a) of the Supreme Court Rules deemed service to take place "at the time at which the letter would in the ordinary course be delivered" and this allowed sufficient time for the appellant to defend the claim following the service of the claim form. The period of 14 days allowed for delivery of the notice to the recipient's address (4 days after posting) and then for collection of the item from the Post Office (a further 10 days after receipt of the notice) as these steps formed the "ordinary course" of delivery of an item of registered mail in Gibraltar. Allowing a further 14 days for the appellant to acknowledge service of the claim form, the earliest date that the respondent could have filed a request was December 1st, by which time she had already filed the request. The court had therefore entered the judgment in default too early and it would be set aside (paras. 4–8).

(2) Although it was not necessary for the decision of the case, the Supreme Court should have exercised its discretion to set aside the judgment under r.13.3(1)(b)(ii) of the Civil Procedure Rules as the appellant "should [have been] allowed to defend the claim" as he did not have time to appear or prepare a defence. The exercise of the discretion did not depend on whether he had "a real prospect of successfully defending the claim" under r.13.3(1)(a) of the Civil Procedure Rules as they were separate grounds upon which the court could exercise its discretion, though the appellant's prospects of success were not negligible (paras. 9–12).

Case cited:

(1) *Godwin* v. *Swindon Borough Council*, [2001] 1 W.L.R. 997; [2001] 4 All E.R. 641; [2002] C.P. Rep. 13; [2001] EWCA Civ 1478, applied.

Legislation construed:

Supreme Court Rules (L.N. 2000/031), r.3: The relevant terms of this rule are set out at para. 4.

Civil Procedure Rules (S.I. 1998/3132), r.6.26: The relevant terms of this rule are set out at para. 4.
r.13.3: The relevant terms of this rule are set out at para. 9.

J.J. Neish, Q.C. for the appellant;
The respondent appeared in person.

1 **DUDLEY, J.:** This is an appeal from a refusal by the Master to set aside a judgment in default obtained in the small claims jurisdiction of this court. The claim relates to a pair of curtains allegedly damaged whilst being dry cleaned at "Quick Sec Dry Cleaners." Although for the purposes of this appeal the point is not taken by Mr. Neish, it is said that the respondent is not the correct party but rather that the business is owned by a limited company.

2 It is not in dispute that on November 2nd, 2006 the respondent sent the claim form by registered mail. A request for judgment was filed on November 30th and on that same day, a judgment in default was entered.

3 According to the appellant, a notice sent by the Post Office, advising that there was an item of registered mail for collection at the Post Office, was received by him on November 29th, and the envelope collected on November 30th. In effect, he did not have time to enter an appearance, judgment having been entered that same day. An application to set aside the judgment was filed by the appellant on December 14th.

4 The rules governing the service of documents in Gibraltar differ from those in the Civil Procedure Rules ("CPR"). Rule 6.26 of the CPR provides, *inter alia,* for service by "first class post (or other service which provides for delivery on the next business day)" and where such a method of service is used, r.6.26 deems service to have been effected "the second day after it was posted . . . provided that day is a business day; or if not, the next business day after that day." In some contrast, the Supreme Court Rules 2000 ("SCR") provide that:

> "3(1) A document may be served—
>
> . . .
>
> (b) by post in a registered letter addressed to the person to be served at his usual or last known address . . .
>
> (2) A document shall be deemed to be served:
>
> (a) if served by registered post, at the time at which the letter would in the ordinary course be delivered . . ."

5 Mr. Neish's first point is that r.3(1)(b) provides for the delivery of documents at the address of the person to be served. That, however, he says is not how the process of registered mail operates in Gibraltar.

6 I think I can properly take judicial notice of the operation of the registered mail service which is indeed in line with the explanation afforded by the C.E.O. of the Royal Gibraltar Post Office in his letter to Mr. Neish on December 6th, 2006. Registered letters are not delivered; rather a notice is sent to the addressee advising him that the item of mail is available for collection at the Post Office. According to the Chief Executive's letter, in the present case, the first such notice was, he says, delivered on November 6th. Mr. Francis says he never received such a notice. If the item is not collected within three weeks, a second notice is sent. On this occasion, that was done on November 27th. As aforesaid, the notice was received on November 29th and the letter collected on November 30th.

7 Whilst on a literal reading of the rule, I can see the strength of Mr. Neish's interpretation, I am of the view that a more purposive approach is necessary. The purpose of service of a claim is, in essence, to bring the existence of the action to the notice of the appellant. This can be done with equal effectiveness whether a letter is sent to the appellant's address or he receives a notice advising him that such a letter is available for collection from the Post Office. The advantage of registered mail is that it records the posting and is capable of recording its collection. That said, it is apparent that the learned Master erred in importing the two-day deeming provision from the English rules. Rule 3(2)(a) of the SCR deems service "at the time at which the letter would in the ordinary course be delivered." To my mind, that is to be interpreted as allowing for the delivery of the notice and thereafter for a reasonable period, for the collection of the letter. Whilst ideally I would have before me detailed information as to the average time it takes to deliver the first notice, and the average time for collection of registered mail; I can for the purposes of this appeal, only proceed on the information before me. In the present case, the letter was posted on November 2nd, and the first notice delivered on November 6th, that is four days later. Thereafter, one must allow for a reasonable period for the collection of the letter by the addressee. To my mind, such a period would be 10 days. Therefore, in my judgment, a document served by registered mail may be deemed to have been served 14 days after it was posted.

8 Given the foregoing determination, in the present case, service could not be deemed to have been effected until November 16th. Thereafter, the appellant would have had 14 days in which to acknowledge service. It was not therefore open to the respondent to seek judgment in default until December 1st. In the circumstances, I am of the view that the judgment was wrongly entered and I deem it set aside.

9 Albeit not strictly necessary given my determination, it is useful that I deal with Mr. Neish's alternative argument. The CPR provide, at r.13.3:

"(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if—

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why—

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim."

10 The thrust of Mr. Neish's argument is that r.13.3(1)(a) and (b) of the CPR are two distinct bases upon which the court can exercise its discretion to set a default judgment aside, but that the learned Master failed to consider the exercise of her discretion under r.13.3(1)(b). *Godwin* v. *Swindon Borough Council* (1) is certainly authority for the proposition that r.13.3(1)(a) and (b) are distinct alternatives. It is also authority for the proposition that under r.13.3(1)(b) it is open to the court in the exercise of its discretion to set aside judgment where the appellant has not received the claim form, and that the exercise of such discretion is not dependent upon there being a real prospect of success. Moreover, it is also apparent that in considering whether the claim form was received in a timely manner, it is open to the appellant to prove that he did not receive the claim form until after the deemed date of service.

11 The appellant's unchallenged evidence before the learned Master was to the effect that he did not collect the envelope containing the claim form until November 30th, having received the notice from the Post Office on November 29th. It is unfortunate that only half of the envelope has been exhibited since the other half may have assisted in ascertaining whether a first notice was sent and received. However, the fact remains that the claim form was, in fact, not received by the appellant until November 30th. The appellant, having made his application promptly, and the respondent not suffering prejudice in her conduct of action, it would, in my view, be unjust not to allow the appellant to defend the action. In the circumstances, had I not found that judgment was wrongly entered, I would, in any event, (pursuant to r.13(1)(b)(ii) of the CPR), have exercised my discretion to set it aside.

12 There is a final issue which, although not raised by the appellant, I think is worthy of consideration. Having read through the transcript of the proceedings and the ruling of the learned Master, it strikes me that this is a case where much turns on the credibility and reliability of the evidence of the parties. To my mind, whether the curtains were damaged before being taken to the dry cleaners; whilst at the dry cleaners or indeed subsequently; is an issue which can only be determined by testing the evidence of the witnesses through cross-examination. It cannot at this stage be

properly said that the appellant's prospects of success are false, fanciful or imaginary in the circumstances. For this reason, I would also have allowed the appeal.

13 The appeal is allowed, the judgment of November 30th, 2005 is to be set aside and the appellant is to have permission to file his defence within 14 days hereof or such further period as may be agreed by the parties or granted by the Master.

14 Given that this is an appeal from an action in the small claims jurisdiction, and indeed that the respondent, no doubt guided by the Registry, cannot be criticized for having sought judgment when she did, each party is to bear its own costs of this appeal.

Appeal allowed.