

**BARBADOS**

**IN THE SUPREME COURT OF JUSTICE**

**HIGH COURT**

**CIVIL DIVISION**

**No. 771 of 2010**

**Between**

**RWA ARCHITECTS**

**CLAIMANT**

**AND**

**SWISS INTERNATIONAL LIMITED**

**1<sup>st</sup> DEFENDANT**

**ESCAPE MANAGEMENT LIMITED**

**2<sup>ND</sup> DEFENDANT**

**LUDO ALFONS JOSEF MARCELO**

**3<sup>RD</sup> DEFENDANT**

**Before The Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of  
the High Court**

**2014: September 26;**

**July 1;**

**Mr. Hal Gollop Q.C. for the Claimant.**

**Mr. Dale Marshall Q.C. for the Defendants.**

**DECISION**

[1] On 1<sup>st</sup> July 2014, this Court delivered an oral decision in the matter at caption. The Court was subsequently asked to produce its reasons in writing.

I now do so.

[2] On 22<sup>nd</sup> June 2010 RWA Architects filed a claim against the Defendants for breach of contract, the liquidated sum being \$176,304.61. It was served on

1<sup>st</sup> December 2010. No action was taken by the Defendants and judgment in default was entered for that sum together with interests, fees and costs.

[3] The defendants became aware of the Judgment sometime in 2012, and six months thereafter, according to their attorney, the Defendant filed notice of application to set the judgment aside. This is the application to set aside the judgment.

[4] Rule 13.3 of the CPR provides that a court has the discretion to set aside or vary a default judgment entered under Part 12, where:

13.3 (1)...if the Defendant has a real prospect of successfully defending the claim.

(2) in considering whether to set aside or vary all judgments 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.

[5] The Defendants argue first that the interpretation of the rule is such that the primary concern of the Court must be whether the Defendant has a real prospect of successfully defending the claim. Once this is established positively to the satisfaction of the Court, then 2 (a) and (b) operate conjunctively with each other, but separately and subordinately to the 13.3, having really limited effect.

- [6] He contrasts this section to *Eastern Caribbean Civil Procedure Rules 2000* (EC CPR) 13.3 which states –

**13.3. Case where the court may set aside or vary default judgment**

- (1) ...the court may set aside a judgment entered under Part 12 only if the Defendant
- (a) applies to the Court as soon as reasonable practicable after finding out judgment has been entered;
  - (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
  - (c) has a real prospect of successfully defending the claim.

- [7] It is clear on the reading and interpretation of 13(3) OECS that the three conditions are conjunctive (CCP page 1321 Note 11.3). Each must be satisfied before the judgment can be set aside. In *Kenrick Thomas v RBTT Bank Caribbean Ltd (formerly Caribbean Banking Ltd)* Civil Appeal No.3 of 2005, **Barrow JA** noted that:

“Only if” can only mean that if the three matters are not present then the Court may not set aside the default judgment. The difference between the English equivalent and the provision in CPR 2000 lies in the discretion.”

- [8] The Court was clear that this “hardening of the lax practice that previously prevailed in relation to the setting aside of default judgments came about as a result which was an identified abuse that the new rules were intended to correct.” In the UK, the Rule 13.3 reads –

- (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; (b) it appears to the court that there is some other good reason why a judgment should not be set aside or varied.
- (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the Court may have regard include whether the person seeking to set aside the judgment made the application to do so promptly.

[9] As **Barrow JA** said with some restraint –

“No judicial discretion is absolute, of course, but the discretion under rule 13.3 of the English CPR seems fairly wide”.

[10] Indeed it is wide enough for the Court in *Thorn PLC v MacDonald* [1999] **WL 809060 Court of Appeal (Civil Division) CPLR 660, 10-15 1999 Times 809** to state that the absence of a good reason for delay, or in fact no reason at all was not fatal. It said

“I can see nothing in rule 13.3 or in the overriding objective in Part 1 to suggest that if a Defendant does not give reason for the delay, that that is somehow or other a knockout blow....”

[11] The discretion in **EC CPR 2000** is severely limited, that in England, “fairly wide.” How then is our own rule to be interpreted?

[12] First of all it is clear that despite the general lumping together of the EC CPR 2000 and the Barbados CPR, the significant differences in wording must dismiss the interpretation that the three factors (1), and 2 (a) and (b) are conjunctive and that no discretion exists unless they are all satisfied in the clear sense that exists in the EC CPR 2000.

[13] This is so despite the argument for the Claimant that, notwithstanding that unlike the provisions which are set out in OECS which state that the Court may set aside “only if” the preconditions are met, the provisions are similarly conjunctive and that the Court “must” consider. Nor can it be said that the extremely wide discretion of the CPR UK where the provisions are nowhere near absolute applies. There the Court “may have regard” to the promptitude of the application among other things in considering whether to set aside a judgment.

[14] The interpretation of the rule lies somewhere in between the two extremes but veering more towards similarity and not identity with the UK provision.

That provision states:

- "(1) The Court must determine whether there is a real prospect of successfully defending the claim.
- (2) The Court must, before exercising or in exercising its discretion to set aside the judgment, even where a real prospect exists, further consider whether the defendant has acted with promptitude in applying as soon as reasonably practicable after finding out judgment has been entered, and whether the explanation for not filing an acknowledgement or defence is sufficient.

[15] It would appear that from the wording of this section, neither the failure to act with promptitude in applying to set aside, nor the lack of an acceptable reason for filing a defence acknowledgment is in itself fatal (*Thorne plc v McDonald*)

As stated in **Blackstones Civil Practice, 2011 at 2013:**

"Although promptness may not be the controlling factor in the success or otherwise of an application under 13.3 it is a very important factor and can justify a Court refusing to set aside a default judgment even where a defendant has a defence with a real prospect of success. *Standard Bank PLC v. Agginvest International Inc.* [2009] EWHC 1692

[16] The White Book also notes that :

“The discretionary power to set aside in the UK is unconditional. The purpose of the power is to avoid injustice. The major consideration of an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim”.  
see also **Reifer J** in **Doris Stoute v Rosalind Stoute** decided 6th may 2014, High Court of Barbados

[17] Secondly, that said, neither is the consideration of the court to be in vain, or merely cursory as the Defendants suggest. The nature and degree of the delay in filing the application to set aside what is “reasonably practicable” must be actively considered, as well as the strength of the explanation.

[18] Thirdly, the Court must give effect to the overriding objective when interpreting the rules. In *Treasure Island Co Ltd et al v. Audobon Holdings Ltd et al* Civil Appeal No. 20 of 2003 Saunders JA (as he then was) pointed out that:

“The overriding objective does not in or of itself empower the Court to do anything or to grant to the Court any discretion. It is a statement of principle to which the court must seek to give effect where it interprets any provision or where it exercises any discretions specifically granted by the rules”.

[19] Unfortunately our own rule 13.3 does not have the crystalline clarity of the EC CPR 2000 rule which permitted **Barrow JA** to state that the “language that the rule makers chose to frame 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended”. Unlike the EC CPR 2000 rule and the relevant Jamaica rule there does exist in my view, a residual discretion. If our rule makers were seeking absolute clarity, they have succeeded only in introducing a level of obfuscation.

[20] I turn now to the application of the rule by first considering whether determine whether the defendant has a real prospect of successfully defending the claim. I am sustained in this view by the learned textbook writer **Ian Goldrein Q.C. et al**, *Commercial Litigation: Pre-Emptive Remedies* Sweet & Maxwell 2004 page 5 - 188, publishers who in discussing the factors to be considered by a court in deciding to exercise its discretion in favour of the defendant by letting him in to defend with respect to CPR UK, notes that –

“In practice the Courts will consider the merits of the defence first” (as per Lord Hope in **Three Rivers DC v Grosvenor of Bank of England**, citing **Swain v Hillman** with approval and then the other factors.

[21] What does "a real prospect of successfully defending a claim" mean? In *Three Rivers District Council v Bank of England No.3* [2001] 2 All ER 513 HL, Lord Hope pointed out that the question whether the claim has no

real prospect of succeeding at trial has to be answered giving regard to overriding objective of dealing with the case justly. However he noted the point of crucial importance lies in the answer to the further inquiry; what is the scope of inquiry? I would approach the further question in this way: the method by which issues of fact are tried in our courts are well settled. After the normal process of disclosureXXXXXXXXXXXX

[22] He concluded that the object of the rule is designed to deal with cases essentially not fit for trial. These are, where there is a clear matter of law which denies recovery, or a case based on a fanciful factual basis entirely without substance. Such cases are to be stopped. For example, see **Moosai J** in *John Mahabir et al CV 866 [2005]* ; *Stoute v Stoute* per **Reifer J**, Barbados No. 119 of 2008.

[23] It is a defence which must carry some degree of conviction. In this case the claim is one of simple claim for breach of contract. The Claimant, a firm of architects was employed to prepare plans and drawings for the purpose of obtaining planning permission for the erection and renovation of buildings to be used as apartments. The Third Defendant, it is alleged, purported to act as agent for the first two Claimant Companies, hoteliers on the west coast. The Second and Third Defendants are respectively a UK company, and a UK resident.

- [24] The Claimant alleges that an oral agreement was made on or about 25<sup>th</sup> October 2007, between Claimant and Third Defendant acting for First and Second Defendant, with regard to those drawings. The oral agreement was made at the offices of Peter Harris and were later reduced to writing in the form of emails.
- [25] The terms of the agreement were that **RWA Architects** would prepare plans and drawings for the development of Escape Hotel, and that the fee would be \$150,000 payable within 30 days of receiving the Town and Country Planning permission.
- [26] It is alleged also by the Claimant that it was an implied term of the contract the Claimants would be reimbursed for all expenses in making the application. The Claimant did the work, and obtained the permission on 3<sup>rd</sup> July 2009. However when it submitted its invoices for \$176,304.61, being the fee and the expenses (\$3,308.36) of obtaining the permission, the Defendants refused to pay.
- [27] The Claimant also seeks an injunction to restrain the First and Third Defendants from disposing of the property and interest. The defence of the Defendant is a meritorious one. Except for the fact that the Town and Country Planning permission was granted, the terms of the contract between the parties is not certain.

[28] In addition it is clear that the Third Defendant acted in any negotiations as a director and therefore has no personal liability. There is no ground for the injunctive relief in the claim. There is also an allegation that the Second Defendant does not own the hotel known as Escape. As such the defence cannot be said to be fanciful factual basis entirely without substance, it is one that carries some degree of conviction.

[29] I turn now to consider whether the defendant has applied with promptitude “as soon as reasonably practicable” after finding out that judgment had been entered, and secondly whether a “good explanation” has been given for failure to file an acknowledgment or defence.

[30] As soon as reasonably practicable whatever the current state of lassitude affecting the profession, and the judiciary, the requirement of celerity in responding to default judgments is not to be understated. Simon Brown LJ in *Regency Rolls Ltd v. Murell Carnall* [2002] EWCA CW 279, defined “promptly” in respect of the UK act as acting with “all reasonable celerity in the circumstances.”

[31] How may a litigant show that he applied “as soon as reasonably practicable?” He may, as noted in *Commercial Litigation Pre-emptive Remedies* (supra) at A5-186, for example “seek to satisfy the court that he

was too ill to attend to his affairs” in which event some written medical evidence ought to be exhibited to the witness statement.

[32] What he cannot say, where there is a delay of six months in making the application is nothing, but this is what the Defendants have done. Absolutely no evidence exists upon which the Court can determine that six months is a reasonably practicable time in the circumstances. To the contrary in *Choo Lo Poi et al v Donald Frederick Caneda 0556 of 2008*, six weeks was held not to be in accordance with their rules. In *Benny v Benny CV 2475 of 2008 (T&T High Court decided 28<sup>th</sup> July 2009)* one month was acceptable. It cannot be said that six months is a reasonably practicable period after finding out that judgment had been entered. In *Henry Chanek v Amos Wright Civil Appeal 1 of 2011*, one month is not reasonably practical.

[33] Secondly, was there a good explanation of the defendant’s failure to file a defence? The affidavit of Ludo Marcelo indicates that the claim was served on him while he was on a visit to Barbados. He caused the claim to be delivered to the Defendant's attorneys-at-law and shortly afterwards had to leave the island and was unable to instruct the attorneys-at-law. He claims that “constant travelling on business” has made it difficult to instruct the

Defendant's attorney-at-law. He makes no explanation for failing to instruct attorneys on his own behalf.

[34] Sadly, this entirely fails as a good explanation. Inadvertence, business, forgetfulness are not acceptable. Thus, on considering these two factors, I find that the Defendants have totally failed to present their failures in anything other than a negative light.

[35] Should the judgment therefore be set aside? Mr. Marshall argues that the decision to set aside should be almost entirely predicated on the first limb of the test with little regard being given to the second bipartite requirement. The Court cannot agree. The drafters of the rules, while not totally pellucid in their intent, clearly intended that the Court should seriously consider delay as a significant factor in exercising the discretion.

[36] It cannot have been the intention of the framers that the requirement on promptitude have no repercussion. Applying the overriding objective, can it be said that justice between the parties is done where perfectly proper judgment is set aside where there has been a complete absence of compliance of the rules for inordinate period with no acceptable explanation? To say yes would run a coach and horses through the rules and further ingrain a sense of lassitude in the legal system.

[37] In the circumstances, I decline to exercise my discretion in favour of the Defendants in this application. The Claimant shall have their costs to be taxed or assessed.

**Jacqueline A.R. Cornelius**  
**Judge of the High Court**