BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No: CV 1217 of 2016

BETWEEN

DAVID MURRAY	**Claimant**

AND

NICHOLAS WILSON	**First Defendant**
BRENT PHILLIPS	**Second Defendant**

Before: **The Honourable Mr. Justice Barry L. Carrington, Judge of the High Court.**

Date of Hearing: October 15, 2019

Date of Decision: April 15, 2020

Appearances:

Mr. Leslie Roberts in association with Ms. Patricia White for the Claimant

Mr. Bartlett Morgan in association with Ms. Haylee Shaw for Second Defendant

No appearance by the First Defendant

DECISION

Introduction

[1] This is an application by the Second Defendant to set aside a default judgment entered against the First and Second Defendants as against the Second Defendant or alternatively, the default judgment be varied, and, that the charging order made against the Second Defendant's property be set aside.

Background

[2] The facts of this matter are in dispute. It is alleged by the Claimant that by agreement which was partly oral and partly written between him and the Defendants entered into in December 2010 and June 2013 respectively, the Claimant loaned the sum of approximately $603,130.00 to the Defendants. It is further alleged that except for two (2) payments totaling $11,040.00, the Defendants have failed or refused to pay the balance of the $592,010.00.

[3] On September 8, 2016, the Claimant filed a Claim Form and a Statement of Claim seeking repayment of $592,010.00 from the First and Second Defendant. That sum represented the balance of the money loaned to the Defendants together with the interest, from December 13, 2010 until Judgment or sooner payment.

[4] An Affidavit of Service was filed on November 7, 2016 certifying that the Claim Form and Statement of Claim were served on the Defendants on October 10, 2016. The Claimant filed notices on January 25, 2017 that were issued to the Defendants on January 13, 2017 and January 19, 2017 respectively, requesting the filing of the Acknowledgement of Service within 14 days of service of the notice on them, failing which judgment in default would be entered.

[5] On March 17, 2017, the Claimant filed a Request for Default Judgment to be entered against the Defendants for failure to file an Acknowledgement of Service.

[6] On April 17, 2017, the Registrar ordered the First and Second Defendants jointly and/or severally to pay the Claimant the sum of $614,488.61 together with court fees of $3,952.00 totaling $625,000.61 inclusive of interest and costs of $6,580.00 with interest on the sum of $592,010.00 which accrued at $97.31 per diem commencing on April 28, 2017 until the judgment debt and interest have been fully satisfied.

[7] The Claimant's Attorney at Law alleged that they issued correspondence on January 17, 2018 to the Defendants which contained a certified copy of the default judgment. That correspondence requested the Defendants to satisfy the indebtedness or a substantial part of it together with satisfactory arrangements for payment of the balance, failing which the Claimant would take steps to enforce the Judgment. The Second Defendant denied

receiving a copy of the default judgment. That correspondence was not exhibited or attached to any of the documents filed by the Claimant. The Claimant registered the judgment on April 6, 2018.

[8] On April 6, 2018, the Claimant filed a Notice of Application pursuant to **Rule 48(c) of the Civil Procedure Rules, 2008 (CPR)** for a charging order against the property of the Second Defendant. The Application was supported by an affidavit from the Claimant's Attorney at Law.

[9] On October 23, 2018, the Court granted an interim charging order against the assets of the Second Defendant as described in the Schedule to the Claimant's Application. The hearing of the final charging order was set for January 20, 2019.

[10] An Affidavit of Service evidencing the service of a certified copy of the Notice of Application and Affidavit in Support was filed on January 25, 2019 along with the order of the Court and certifying that the documents were served on the Defendants on November 23, 2018.

[11] The matter came on for hearing on January 20, 2019 and the Defendants were absent. The Court ordered that the wife of the Second Defendant who was the joint owner of the property that was the subject of the charging order, and as such an interested party to the proceedings, should be notified of the proceedings. A further order was made for alternative service of the Notice of Application and Affidavit in Support filed on the April 6, 2018 pursuant to **Rule 48.1(a) of the CPR** together with the interim Charging

Order, through the publication of an advertisement in one (1) weekend edition of a daily local newspaper.

[12] The service referred to in paragraph 11 was effected through the publication in the Nation Newspaper on Sunday March 10, 2019.

[13] Following the newspaper publication, the Second Defendant filed an Application and an Affidavit in Support on April 12, 2019, for an order that the default judgment and interim charging order be set aside.

[14] Interestingly and worthy of note, the Second Defendant's affidavit was the first indication of his version of events. He denied entering any agreement with the Claimant but admitted accepting cheques from the Claimant on behalf of the First Defendant from August 2011 to March 2012.

[15] The Second Defendant indicated that the cheques he accepted amounted to approximately $80,000 and not $592,010.00 as alleged.

[16] The Second Defendant acknowledged and exhibited two (2) letters from Peter Evelyn & Co., Attorneys-at-Law, addressed to the Defendants dated April 16, 2015 and May 19, 2015 respectively, as follows:

> *"Dear Sirs,*
>
> *We act on behalf of Mr. David G. Murray. As you know, Mr. Murray is getting on in age and in an effort to understand his estate, his family were going through his papers and came across an Agreement with you whereby you acknowledged that considerable sums had been paid by him to you as loans and that the same would be repayable by monthly instalments commencing on the 15th March, 2011.*

We can find no record of you having made any payments to date. It appears from Mr. Murray's records that over the years he advanced to you the sum of $603,130.00.

We now call on you to pay to him the said sum of $603,130.00 by the 30th April 2015 or some meaningful sum on account, failing which we will institute proceedings to enforce payment."

And May 19, 2015 as follows;

"Dear Sirs,

We wrote you on 16th April, 2015 in respect of moneys due by you to Mr. David G. Murray. We have not heard from you and are wondering if you would like to make an agreement for the repayment of the amount due in instalments?

In the event that we have to resort to the courts to enforce payment it is likely that the court will award interest at the rate of 8% until payment, and certainly cost of the proceedings will be for your account. We now suggest that you make a proposal to us with regard to the repayment of the debt on or before 4:00 p.m. on May 29th 2015, failing which we will institute proceedings to enforce payment."

[17] The Second Defendant said that he ignored the correspondence because he did nothing wrong. He however admitted receiving the Claim Form and Statement of Claim on November 6, 2018 but did not take immediate steps to do anything. It should be noted that the Affidavit of Service filed on November 7, 2016 certified that the Claim Form was served on October 10, 2016.

[18] The Second Defendant indicated that on March 11, 2019, a friend told him that there was a newspaper advertisement that was related to one of his properties and his name was mentioned in the advertisement. It would

appear, that it is this happening that prompted the Second Defendant to seek legal advice.

Application to Set Aside Default Judgment

[19] By Notice filed on April 12, 2019, the Second Defendant applied to the Court for an Order

1. That the Order made herein on April 27, 2017 whereby judgment in default of acknowledgement of service was entered against the Second Defendant be set aside.
2. In the alternative to relief one (1) above that the Order made herein on April 12, 2017 whereby judgment in default of acknowledgement of service was entered against the Second Defendant be varied.
3. In any event, that the Charging Order made herein on October 22, 2018 be set aside.

[20] **The Grounds of the Application are:**

The Order made herein on April 27, 2017 whereby judgment in default of acknowledgement of service was entered against the Second Defendant (the "default judgment") is irregular for the following reasons:

i. The amount claimed by the Claimant as a specified sum of money- BD$592,010.00 – is different from the amount actually entered on the face of the default judgment – BD$614,488.61.

ii. The amount claimed by the Claimant as a specified sum of money – BD$592,010.00 – even when taken with the interest claimed BD$97.32 per day from December 12, 2010 to April 27, 2017 do not amount to the amount actually entered on the face of the default judgment – BD$614,488.61.

iii. The per diem rate of interest claimed by the Claimant in its claim for the period after judgment is entered – BD$97.32 is different from the rate of interest applied on the face of the default judgment – BD$97.31.

iv. The claim upon which the default judgment is based, is stated to be for a specified sum of money – BD$592,010.00 – but the Statement of Claim does not indicate how, in respect of the Second Defendant, that the sum was ascertained or ascertainable as a matter of arithmetic.

v. The default judgment was prefaced on the claim being for a specified sum of money but the Statement of Claim, in respect of the Second Defendant, does not disclose how the sum claimed, (or entered) was due in its entirety to any default or other action of the Second Defendant.

Second Defendant's Submission

[21] Mr. Morgan Counsel for the Second Defendant provided Written Submissions and augmented them with oral arguments. He argued that

under the **CPR**, 'real prospect of successfully defending the claim' is the primary consideration. He contended that his client's case is totally different from the Claimant's, as his client refutes all of the claims. He submitted that there is no evidence of an agreement between the Claimant and his client.

[22] Counsel challenged the default judgment as being irregularly obtained. He contended that the Claimant claimed the sum of $592,000.00 but the default judgment was entered for the sum of $614,488.61. Counsel also submitted that if the sum requested is wrong then the default judgment is incorrect. Counsel argued that more fundamentally, there is a difference between what was claimed and what was ordered. Specifically, he stated that the Claim Form indicated "jointly and/or severally" while the default judgment read "jointly or severally". Mr. Morgan referred to the case of **Super Plus Food Stores Ltd. v Continental Baking Co. Ltd. (2014) JMCA Civ. 33 (Super Plus Foods)** and argued that to have a default judgment for more than what was claimed in a Statement of Claim was a miscarriage of justice.

[23] Counsel argued that Rule 13.2 is not determinative of the issue of "real prospect". He referred to **Olympiad Inc. v RBTT Bank (Barbados) Ltd. Suit No. 1679 0f 2011 (Olympiad).** He also cited the case of **Thompson v. Glasgow** in which it was stated that there is a three (3)-prong test that must be conducted. Counsel also referred to **Rock v C'bean Credit**

Bureau Ltd BB 2007 HC 33, and **Thorne v. McDonald and Anor [1999] Lexis Citator 2848.**

[24] Mr. Morgan submitted that there was no evidence of a contract between the Claimant and his client and denied that his client is indebted to the Claimant. He contended that there would be no prejudice to the Claimant if the judgment is set aside and emphasized that his client has a real prospect of successfully defending the claim.

Claimant's Submission

[25] Counsel for the Claimant, Mr. Roberts disputed the contention that the real possibility of successfully defending the claim is the primary consideration for the court. He argued that the court is given a discretion to set aside the default judgment. He however stated that rule 13.3(2) mandates the court to consider the timeliness of the application to set aside and whether a good explanation for the failure to file an acknowledgement of service, was given.

[26] Mr. Roberts indicated that the application to set aside the default judgment was filed 23 months after it was entered and no good explanation was provided by the Second Defendant for his failure to apply to set aside the default Judgment in a timely fashion.

[27] Mr. Roberts further argued that the first and most important consideration is whether the judgment has been properly entered according to the established procedure under **Part 12 of the CPR.** If it was, then the court

has to consider whether the Defendant (i) can give any sufficient reason for his delay and (ii) he acted promptly based on the information available to him.

[28] Counsel referred to **Bank of Nova Scotia v Emile Elias & Co. Ltd (1992) 46 WIR 33; Apline Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. (Saudi Eagle) [1986] 2 Lloyd Rep. 221; E D & F Man Liquid Products Ltd. v. Patel and Another [2003] EWCA Civ. 472.**

[29] Counsel submitted that the court must have regard to whether the Second Defendant applied to the court as soon as reasonably practicable after finding out that judgment had been entered against him and he has given a good explanation for his failure to file an acknowledgement of service. He cited in support, **Monolaki Constantinides [2004] EWHC 749; E.D. & F Man Liquid Products Ltd. (Supra), and International Finance Corp v Utexafrica SPRL [2001] All ER (1) 101.**

[30] Counsel also criticized the Second Defendant for the period of approximately one year and six months before he applied to have the judgment set aside. He urged the court to consider that period as inordinately long and cited in support **Nolan v Devenport (Deceased) and Another [2006] EWHC Civ. 157, and Mullock v Price (T/A The Elms Hotel and Restaurant) [2009] EWCA Civ. 1222.**

The Issues

[31] The following are the issues that the court has to determine, namely

i whether the default judgment was regularly obtained; and

ii if the judgment was regularly obtained, whether or not it should be set aside.

Issue 1

[32] The conditions to be satisfied to obtain a judgment in default for failure to file an Acknowledgment of Service are stipulated at **Rule 12.4 of the CPR** and have been complied with by the Claimant. The source of the complaint by Counsel for the Second Defendant is the difference in the amount claimed in the Claim Form and the sum awarded in the default judgment.

[33] Mr. Morgan argued that the judgment was irregularly obtained. His earlier contention was that the amount in the claim form and statement of claim was $592,000.00 while the default judgment was for $614,488.61. Counsel contended that the amount awarded was more than what was claimed and subsequently should be set aside as being irregularly obtained. He strongly argued that a judgment sum that was in excess of what was claimed was irregular and could not stand.

[34] Counsel cited the case of **Super Plus Food** that is distinguishable from the present case as that case dealt with an appeal against judgment on admission where the sums award were greater than those that were admitted. In addition, this case deals with the setting aside of a default judgment that has specific rules for granting a default judgment.

[35] **Rule 12 of the CPR** deals with default judgments. It stipulates that "default judgment" means judgment without trial, as in this case, a defendant has failed to file an Acknowledgment of Service giving notice of intention to defend. **(12.1)**

[36] **Rule 12.2** specifies the claims in which default judgment may not be obtained as (a) claim in probate proceedings, (b) a fixed date claim, or (c) admiralty claim in rem.

[37] Claims against the State and claims against a minor or patient require the permission of the Court **(12.3)** while the conditions to be satisfied to obtain judgment for failure to file acknowledge of service and to defend are at **12.4** and **12.5,** respectively.

[38] **Rule 12.6** deals with admission of part of a claim and defendant's request for time to pay, whilst **Rule 12.7** outlines the procedural requirements to be followed to obtain a default judgment.

[39] That part of the Rules that addresses the issues raised by the Second Defendant is **Rule 12.8** that deals with a claim for a specified sum of money. "Claim for a specified sum of money" is defined at **Rule 2.3** as

> "(c) a claim for a sum of money that is ascertained or capable of being ascertained as the matter of arithmetic and is recoverable under a contract".

[40] **Rule 12.8** states:

(1) <u>The fact that the claimant also claims costs and interest at a specified rate does not prevent a claim from being a claim for a specified sum of money (Emphasis added).</u>

(2) A claimant who claims a specified sum of money together with interest at an unspecified rate may apply to have judgment entered for either;

(a) the sum of money claimed together with interest at the statutory rate **from the date of the claim to the date of entering judgment** (emphasis added),

(b) the sum of money claimed and interest to be assessed.

(3) Where a claim is partly for a specified sum and partly for an unspecified sum, the claimant may:

(a) abandon the claim for the unspecified sum and enter default judgment for the specified sum; or

(b) with the permission of the court, enter default judgment for the specified sum and for payment or a further amount to be determined by the court.

[41] Complimenting **Rule 12.8,** for the purpose of this discussion, are rules **12.11** (interest) and **Rule 12.12** (costs). Rule 12.11 states:

(1) A default judgment for a specified sum should include judgment for interest for the period claimed where:

(a) the claim form includes a claim for interest;
(b) the claim form or statement of claim includes the details required by **Rule 8.4 (3);** and
(c) the request for default judgment states the amount of interest to the date the request was filed.

(2) Where the application or statement of claim includes any other claim for interest, default judgment shall include judgment for such amount of interest and may be determined by the court."

Rule 12.12 states:

(1) A default judgment gives a claimant a right to costs, which the court may award.
(2) Where an assessment involved an abnormal item or amount, the defendant may apply within 14 days of

service of the judgment on him, for a review of the assessment.

[42] For the sake of completeness, **Rule 8.4(3)** provides that a claimant seeking interest must expressly state that he is doing so on the claim form and include details of the basis of his entitlement, the rate and period for which interest is claimed. If the claim is for a specified sum of money, the total amount of interest claimed to the date of application and the daily rate at which interest will accrued after the date of claim.

[43] The language in **Rule 12.8** is plain and unambiguous. **Sub-Rule (1)** makes it clear that the addition of cost and interest at a specified rate does not negate the fact that a claim is for a specified sum of money. **Rules 12.11 and 12.12** expressly provide that interest and cost are permitted to be part of a claim for a specified sum of money. An examination of the Claim Form shows that the Claimant made a claim for a specified amount of money.

Amount Claimed	**$592,010.00**
Together with interest at 6% per annum from 13th day of December 2010 to date of judgment. Daily rate thereafter = $97.32 per day	
Court Fees	
Attorney's fixed cost on issue	
VAT Reg: 5704137032	
Total amount claimed	

[44] It is significant to note that there is no amount specified in the 'total amount claimed' column.

[45] The order re the default judgment was made on April 27, 2017 and states, so for as is relevant

> "IT IS ORDERED that the First and Second Defendant jointly and/or severally pay to the claimant the sum of $614,488.61 together with cost fees of $3,932.00 totaling the sum of $625,000.00 (inclusive of interest and costs $6,580.00 or ("the judgment debt") with interest of on the sum of $592,010.00 at the rate of 6% per annum which accrues at $97.31 per diem commencing on the 28th day of April 2017 until the judgment debt and interest have been fully satisfied".

[46] There is therefore no doubt that the Claim Form made provision for the arithmetically determined addition of interest and cost to be added to the original debt. The interest rate is stipulated (6% per annum along with the per diem rate $97.32).

[47] Expressed differently, the Claim Form contains the information stipulated in **Rules 12.8(2), 12.11** and **8.4(3)** of the **CPR**. These rules permit the inclusion/addition of interest of costs to the original debt and have the protection of **Rule 12.8(1)** that maintains that a claim for cost and interest at a specified rate does not prevent a claim from being a claim for a specified sum of money.

[48] In support of this view is the case of **Casilda Silvest and Leon Whitfield Samuels v Rupert Ellis and Devon Thomas (2016) JMSC Civ. 83** that

held that interest could be included in a default judgment. Campbell J. stated at paragraph 17:

> "…Part 12.8(2) of the CPR entitles the claimant to interest on a specified sum even if the rate of interest is not specified."

[49] Mr. Morgan referred the court to **Olympiad** re the setting aside of the default judgment. However, that case addressed the issue of the inclusion of interest on amounts not claimed in the claim form and at a rate not specified by rules of court in accordance with **Section 35 of the Supreme Court of Judicature Act, Cap. 117A**.

[50] Kentish J acknowledged that interest maybe claimed for default judgment entered on a claim for a specified sum of money but held:

> (80) "…the Court finds that entry for default judgment for a sum that included interest was in clear breach of the Rules because (i) the claim was not a claim for a specified sum of money and (ii) no interest was claimed in the Claim Form in the manner required by Rule 8.4(3). Further, the Request for Default Judgment filed by the Claimants did not, as required, state the amount of interest to the date on which the Request was filed. To my mind, the failure to claim any interest provides another ground on which the default judgment could be set aside or at least varied".

[51] **Olympiad** is clearly distinguishable from the present case on the facts. Respectfully, the shortcomings in that case were adequately addressed in this matter. It was established that the sum claimed is a sum for a specified sum of money and interest claim satisfied the criteria set out at 8.4(3).

[52] The Second Defendant raised the issue of the Claim Form using the words "joint and several" while the Application for default judgment stated "joint and/or several". In my opinion, nothing turns on that point. **Chitty on Contracts, 32nd Edition, Volume 1, paragraph 17 – 003**, define joint and several liability thus:

> "Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors".

[53] Professor V.C.R.A.C. Crabbe in his seminal text **Legislative Drafting,** deprecated the use of the 'symbol' "and/or" stating that the ambiguity created by its use is obvious. He referred to the statement by Lord Reid in **Stein v. O'Hanlon (1965) A.C. 890 at 904** when he said, 'The symbol and/or is not yet part of the English Language'. Professor Crabbe also referred to the case of **Bonitto v Fuerst Bros. Co. Ltd. (1944) A. C. 75 at 82,** where Viscount Simon L. C. referred to the symbol as 'a bastard conjunction.'

[54] Without embarking on any protracted statutory interpretation, there is no difference between 'jointly and severally' and 'jointly and/or severally'. The use of the conjunction 'and/or' adds nothing to the meaning of the phrase. Read with or without that conjunction, the parties may be held liable together (jointly) and individually (severally). Consequently, there is nothing to this point on which a decision should be made.

[55] I therefore hold that the default judgment was regularly obtained.

Issue No: 2

[56] Caution must be exercised when referring to legal authorities from other jurisdictions since the provisions relating to setting aside a default judgment are different across the jurisdictions. In Barbados, Rule 13.3 deals with cases where the court has a discretion to set aside or vary a default judgment. It provides as follows:

> (1) The court may set aside or vary a judgment under part 2 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 acknowledgment 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.

[57] In Trinidad and Tobago, there is a two (2)-stage approach to setting aside a default judgment namely, a realistic prospect of success, and**,** the defendant acted as soon and reasonably practicable on finding out that judgment was entered. In the OECS, there is a three (3) stage approach, namely (a) applying to the court as soon as reasonably practicable after finding out; (b) gives a good explanation for failure to file an acknowledgment of service or a defence; and (c) has a real prospect of successfully defending the claim.

[58] In the U.K., the standard is somewhat different. There are two (2) approaches, namely, (a) the defendant has a real prospect of successfully defending the claim, or (b) it appears to the court that there are some other good reasons why, (a) the judgment should be set aside or varied, or (b) the defendant should be allowed to defend the claim. However, the matter to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

[59] Jamaica's provisions are identical in every respect to Barbados' rule 13.3 and consequently, some useful guidance, though persuasive, may be culled from those authorities. Prior to the 2006 amendment to the Jamaican CPR, the old rule 13.3(1) previously provided that a Court might set aside a default judgment "only if" all three conditions in that rule were met, namely, that a defendant had a real prospect of successfully defending the

claim, that he applied to the court as soon as is reasonably practicable and that he gave a good explanation for the failure to file a defence.

[60] However, the revised rule was explained in the case **Kenneth Hyman v Audley Matthews and Another SCCA No. 64/2003 and The Administrator General for Jamaica v Audley Matthews and Another SCCA No. 73/2003**, delivered on November 8, 2006. Harrison P said that formerly the three conditions were to be read cumulatively but that is not the position today, following the 2006 amendment. The Jamaican Court of Appeal has since emphasized that in determining whether to set aside a default judgment, the "foremost consideration" is the defendant's prospects of success (see **Denry Cummings v Heart Institute of the Caribbean Limited [2017] JMCA Civ. 34 at paragraph 66, per McDonald-Bishop JA**).

[61] There has been much discussion on the meaning and application of the provisions of rule 13.3. In construing the provisions of our rule 13.3(1), the sole ground on which a court may set aside or vary a default judgment entered under Part 12 is if the defendant has a real prospect of successfully defending the claim. This rule vests in the court, the discretion to set aside the default judgment as is evidenced by the use of the word "may". This is to be contrasted with the mandatory provision of Rule 13.2 which stipulates that "the court ***must*** set aside a judgment entered under part 12"

and specifies particular circumstances that would give rise to that occurrence.

[62] Rule 13.3(2) is therefore the 'sine qua non' of the entire rule as it mandates the court to take into consideration the timeliness of the application to set aside the default judgment on the defendant's knowledge of the order and whether or not a good explanation has been proffered for his failure to acknowledge service or file a defence.

[63] It is, in my opinion, quite clear that the condition for setting aside a default judgment is the real prospect of successfully defending the claim. However, the exercise of the discretion to set aside the judgment if there is a real prospect of successfully defending the claim may be displaced by the tardiness of the application to set aside and/or the absence of a good explanation.

[64] Examined from a different perspective, there is every likelihood that if a defendant has a real prospect of successfully defending the claim and has made an early application and provided a good explanation, for his failure to act, the court's discretion will likely be exercised in his favour. Conversely, if he has a real prospect of successfully defending the claim but was not reasonably prompt in his application and/or did not provide a good explanation for his failure, there is a possibility that his application will not succeed.

[65] Before embarking on an analysis of the parts of this case, it is important to examine and understand key phrases in rule 13.3. For example, "real prospect of successfully defending the claim" has been subject to interpretation and analysis in a number of cases. In **Federal Republic of Nigeria v. Santolina Investment Corp. [2007] EWAC 437 (Ch.)** the guiding principles to be used in determining if a case has a real prospect of success, were summarized as follows:

(i) The court must consider whether the Defendant has a "realistic" as opposed to a "fanciful" prospect of success.

(ii) A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than arguable…

(iii) In reaching its conclusion, the court must not conduct a "mini trial".

(iv) This does not mean that the court must take at face value and without analyzing everything that a Defendant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be exported to be available at trial.

[66] In **Royal Brampton Hospital NHS Trust v. Hammond, The Times, May 11, 2001, CA**, it was held that when deciding whether a defence has a real prospect of success, the court should not apply the same standard as would be applicable at the trial, namely, the balance of probabilities on the evidence presented. Instead, the court should also consider the evidence that could reasonably be expected to be available at trial.

[67] A useful description of the meaning of "good explanation" was given in the case **Inteco Beteiligungs AG v. Sylmord Trade Inc., Claim No: BUIHCM (COM) 120 of 2012 (Inteco**), where at paragraph 15 the learned trial Judge stated:

> "*The expression "good explanation" is not an easy one. In its ordinary sense, an explanation is a statement or account, which explains something. It may be a bad explanation if the person to whom it is made is unable to understand what it is that is sought to be explained and a good one if the recipient is fully enlightened, but in the context of CPR 13.3 I do not think that a 'good explanation' is to be understood in that way. In my judgment, the expression 'good explanation', where it occurs in CPR 13.3(1) means an account of what has happened since the proceedings were served which satisfies the court that the reason for the failure to acknowledge*

service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purpose of CPR 13.3. Muddle, forgetfulness, an administrative mix-up, are all capable of meaning good explanations, because each is capable of explaining that the failure to take necessary steps was not the result of indifference to the risk that judgment might be entered".

[68] Rule 13.3 must be considered along with Rule 13.4 of the CPR which outlines the procedure to set aside or vary a default judgment. That rule states:

(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.

(3) The affidavit must exhibit a draft of the proposed defence.

This requirement, as previously stated, has been satisfied by the Second Defendant.

<u>Is There A Real Prospect Of Successfully Defending The Claim?</u>

[69] The Second Defendant filed an affidavit with a draft defence attached. He denied entering into an agreement with the claimant written, oral or otherwise. He indicated that at the First Defendant's request, he consented to accept cheques from the Claimant on behalf of the First Defendant

simply because the First defendant did not have a bank account. He said that the money was advanced to the First Defendant through him, to assist the First Defendant with financial problems he was encountering.

[70] He pointed out that the Claim Form and Statement of Claim did not provide particulars of a contract involving him and the claimant simply because there was none. He acknowledged receiving two (2) letters from Peter Evelyn & Co, Attorney-at-Law that indicated that he had entered an agreement with the Claimant for the money but that he ignored the letters because he did not owe the Claimant any money.

[71] In his draft defence, the Second Defendant denied entering a loan agreement with the Claimant. He admitted receiving cheques from the Claimant on behalf of the First Defendant that he cashed and handed the money over to the First Defendant.

[72] A perusal of the Claim Form and Statement of Claim shows that no particulars of the loan agreement were pleaded. Rather, reference was made to a written agreement for the repayment of $36,310.00 but it was not exhibited. In addition, it was stated "…it was orally agreed that the sum advanced would be repayable on DEMAND".

[73] In my opinion, the defence raised by the Second Defendant is not fanciful, rather it as arguable. The absence of any specifically pleaded particulars of a loan agreement involving the Second Defendant and the Claimant provides an avenue for there to be doubt about its existence. I have

considered the evidence that could be adduced at trial, including evidence from the First Defendant who has not participated in these proceedings. He can speak to the nature of and the parties to the contract and can identify the cheques specifically issued to the Second Defendant. In addition, putting the Claimant to strict proof of the existence of the contract may yield results that are favourable. All of this is to be contrasted with the copies of cashed cheques that were exhibited that shows that cheques were issued by the Claimant to and cashed by both Defendants. In the circumstances, though there is no guarantee of success, I hold that the Second Defendant may have a realistic prospect of successfully defending the claim.

Was An Application Made To The Court As Soon As Reasonably Practicable?

[74] Rule 13.3(2) mandates that the court must consider whether the defendant has applied to the court as soon as reasonably practicable after finding out that judgment had been entered. On examination of the chronology of events, it is noted that on April 27, 2017, an order was made granting judgment in default against the Defendants.

[75] Order 42.6 of the **CPA** stipulates that every judgment or order must be served on every person or party to the proceedings in which the judgment or order was made, unless the court otherwise directs. There is nothing

before the court to show that the Order was served on the Second Defendant.

[76] That notwithstanding, rule 42.2 provides that a party is bound by the terms of a judgment or order whether or not the judgment or order is served but the party is notified of the term of the judgment or order where that party is notified of the terms of the judgment or order by telephone, FAX, email or otherwise.

[77] The Order was entered on May 11, 2017. It was alleged by the Claimant and denied by the Second Defendant that correspondence dated January 17, 2018 was sent to the Second Defendant that notified him of the judgment in default and included a certified copy of the Order.

[78] If one were to utilize the *ejusdem generis* rule, a letter sent by post, in my opinion, would be part of that *genus*. As it was with the service of the Order, there is nothing on file to show that the correspondence was sent. Consequently, the court can place no reliance on it to establish when notice of the Order re. the default judgment was brought to the Second Defendant's attention.

[79] On April 6, 2018, the Claimant filed a Notice of Application for a Charging Order "to secure payment of the amount owing under the default judgment made on the 8th day of May, 2017…" The Order was made on October 23, 2018 and entered on November 5, 2018. On January 25, 2019 an Affidavit of Service was filed which stated that the Second Defendant was, on

November 23, 2018, served personally with a true copy of the Notice of Application, Affidavit of Patricia White as well as the Order dated October 23, 2018". I have determined that the Second Defendant had knowledge of the default judgment on November 23, 2018.

[80] The Claimant procured an order dated March 12, 2019 for service of the Notice of Application for the Charging Order, the accompanying affidavit and the Order of October 23, 2018 on Mrs. Mary Aldyth Philips, the wife of the Second Defendant, by publication of an advertisement in one (1) weekend Edition of a daily newspaper. On April 12, 2019, the Second Defendant filed a Notice of Application to set aside the default judgment.

[81] It was approximately four and a half months from the time I have determined that the Second Defendant ought reasonably to have become aware of the default judgment, to his filing an application to set aside. In the ordinary scheme of things, that period is rather lengthy since it involved judgment entered in an uncontested matter in which a large sum of money was at stake. Generally, there is no yard-stick to determine what constitutes promptitude in these matters. Acting as soon as reasonably practicable must of necessity, depend on the facts of the case.

[82] It is useful at this stage, to put into context, the difference in approach to delay under the old Rules and the present Rules. Moore-Bick LJ, in **Standard Bank PLC & Anor v. Agrinvest International Inc. [2010] 2**

CHC 866 (**Agrinvest)** made the following poignant statement about the procedure under the old rules:

> *"The authorities relating to setting aside default judgments laid considerable emphasis on the desirability of doing justice between the parties on the merits. Delay in making an application to set aside rarely appears to have been a decisive factor if the defendant could show that he had a real prospect of successfully defending the claim against him. Thus in* ***J.H. Rayner (Mincing Lane) Ltd v Cafenorte S.A****…. judgment was set aside after 7½ years on the applicants' showing that they had a defence with a real prospect of success".*

[83] Moore-Bick LJ found this approach to be incompatible with the present CPR procedural regime, with its regard for efficiency, avoidance of delay, and expeditious and fair disposal of proceedings. He posited the view that that was the rationale for new rule in CPR13.2 (2) requiring consideration of the promptness of making the application to set aside. Accordingly, he contended, an application to set aside might fail even where the defendant would be denied the opportunity to put forward a potentially successful defence, if the application had not been made promptly.

[84] The onus therefore is on the Second Defendant to put something/material before the court that would illustrate that he acted as soon as reasonably practicable. In **Niyamodeen Shah v. Lennox Barrow, CA 209 of 2008 (T&T) (ex tempore judgment)** a delay of two (2) months was considered. Mendowza JA observed that the length of the delay in that case

"does not fall into that category of case where you can simply look at it and say that the Applicant acted as soon as reasonably practicable after finding out that the judgment was entered. In those circumstances what then is the obligation on the Applicant. The obligation to put some material before the court on which the court can come to the conclusion that he has acted as soon as reasonably practicable".

[85] What then has the Second Defendant put before the court to explain a delay of four and a half month since he became aware of the entry of the default judgment? He stated that he only became aware of the default judgment on or about March 11, 2019 when someone told him about the notice in the newspaper (published on March 10, 2019). He thereafter sought counsel who obtained copies of the pleadings and helped him to appreciate the gravity of what had occurred.

[86] The Second Defendant also admitted receiving correspondence from Peter Evelyn & Co. (Attorney-at-Law) re his alleged indebtedness to the claimant, but did nothing because he did not owe any money to the claimant. He also said that some time on or about November 6, 2018 he was served with a Claim Form and Statement of Claim but he did not take immediate steps to do anything about it.

[87] The chronology of events will illustrate that the Claim Form and Statement of Claim were served on the Second Defendant on October 10, 2016. On November 23, 2018, a Notice re the grant of the Interim Charging Order and details of the default judgment and when entered, was served on the

Second Defendant. At the very latest, the Second Defendant should have been aware of the entry of the default judgment against him on November 23, 2018. The period of delay before applying to set aside the default judgment was four and a half months.

[88] When considered along with the fact that at that stage, an interim charging order was granted that could have resulted in the loss of the charged property, in my opinion the Second Defendant did not apply to set aside the default judgment as soon as reasonably practicable after finding out that judgment was entered against him.

Was A Good Explanation Given For Failure To File An Acknowledgement Of Service?

[89] The explanation proffered by the Second Defendant for his failure to file an acknowledgement of service is simply that he did not owe any money and consequently did nothing wrong. That explanation was provided notwithstanding that the action was commenced against him in September 2016 and served on November 7, 2016. Notice to file the acknowledgement of service was sent to him on January 25, 2017 and a Notice of Application for the charging order was served on April 6th, 2018 while the Order re the charging order was purportedly brought to his attention on January 25, 2019.

[90] Having reviewed the information at the different stages of the progression of the claim against him, it is indeed perplexing that the Second Defendant's explanation is that he did nothing wrong and owed no money.

[91] The Second Defendant is a medical doctor and is reportedly a relative of a distinguished Caribbean legal luminary. It cannot be truthfully said that he does not understand the legal process, the implications of an action commenced against him and the consequences of not defending it.

[92] Following the guidance provided by **Inteco,** the Second Defendant has not provided a good explanation of what happened since judgment was entered to satisfy me that his reason for failing to acknowledge service is something other than mere indifference. He has provided nothing to show that the failure to take steps was not the result of his indifference or recalcitrance.

[93] Although I am of the view that the Second Defendant may have a real prospect of successfully defending the claim, he has failed to apply to the court as soon as was reasonably practicable after finding out that judgment was entered against him. He has also not provided any good explanation for his failure to file an acknowledgement of service on time.

<u>Prejudice</u>

[94] In order to determine whether or not there is likely to be any prejudice to the Claimant if the application to set aside is granted, I have considered the dictum of Edwards J at paragraphs 58 and 59 of **Shaun Baker v O'Brian**

Brown and Angella Scott-Smith, Supreme Court, Jamaica, Claim No. 2009 HCV 5631:

> *"Justice must be considered both for the applicant and for the respondents. It is only fair and just for a potential claimant, who has a good claim, not to be shut out from the courts to which he has turned for redress. It is however, also justice for a potential defendant to, at some point, be able to rest with the full knowledge that he will not be asked to answer to the merits of a claim, which due to the passage of time, he can no longer adequately respond to…. [I]f a claimant has indeed rested upon his laurels until so much time has passed that it cannot fairly be expected that any cogent response can be made to his claim, then, it may indeed be unjust to allow such a claim to proceed".*

[95] In order to resolve this issue a number of factors must be considered. The Claimant is getting on in age as indicated in the April 16, 2015 letter that the Second Defendant acknowledged that he received from the Claimants then Attorneys-at-Law. Five (5) years have elapsed since then and it is not unreasonable to expect that the Claimant's health and well-being would have deteriorated since then.

[96] I have come to that conclusion based on the fact that the affidavit in response to the application to set aside the default judgment was deponed by Mr. Robert Andrew Bruce Skeete, his duly appointed attorney pursuant to a power of attorney, The Claimant commenced this action in September 2016 and one can imagine, expended money engaging counsel to file the action, serve the pleading, applied for default judgment and received an

order to that effect. In addition, he made an application for an interim charging order and facilitated substituted service of the application on the Second Defendant's wife.

[97] In the meantime, the Second Defendant refused to participate in the process despite receiving notices about the different stages of the litigation. As stated earlier, it was at the point when the Second Defendant was notified of the newspaper notice that related to one of his properties that he was spurred to action. Even so, it took four and a half months for the application to be filed and, according to Lord Justice Moore Bick in **Agrinvest,** his explanation for the delay can be regarded as "*conspicuously unconvincing*".

[98] If the court is minded to set aside the default judgment it would mean putting the Claimant, at this stage of his life, through a process that he commenced, that the Second Defendant had every opportunity to defend and which process is almost completed. That in my opinion, would not be fair to the Claimant. I am of the view that the prejudice to the claimant would be far too great if the default judgment was set aside.

<u>The Overriding Objective</u>

[99] The overriding objective of the **CPR** requires that the court dispense justice by resolving issues between the parties in a manner that saves time and

expense. In **Villa Mora Cottages Limited and Monica Cummings v Adele Shtern, SCCA No. 49/2006,** Harris JA said:

> *"It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits".*

[100] In the circumstances, bearing in mind the overriding objective of the CPR to deal with matters justly, I am of the view that the discretion to set aside the default judgement ought not to be exercised by the court.

[101] I am fortified in my view by the direction of Edwards JA (ag) in **Russell Holdings Ltd. v. L&W Enterprises Inc. and ADS Global Limited [2016] JMCA Civ. 39** who said

> *"A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation. If the factors in rule 13.3(2) (a) and (b) are considered against his favour and if the likely prejudice to the respondent is so great that in keeping with the overriding objective the court forms the view that the discretion should not be exercised in the Applicant's favour".*

Disposal

[102] (i) The Application to set aside or vary the default judgment is denied.

(ii) The application to set aside the charging order made against the Second Defendant's property is denied.

(iii) Costs are awarded to the Claimant to be assessed if not agreed.

BARRY L. CARRINGTON
Judge of the High Court