

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Numbers: **BVIHCV2017/0053**

Between

BRITISH VIRGIN ISLANDS SOCIAL SECURITY BOARD

Claimant/Respondent

and

**KLENTON PICKERING
dba GROUND WORKS BVI**

Defendant/Applicant

Appearances

Ms. Anthea Smith of counsel for the claimant

Mrs. Marie-Lou Creque of counsel for the defendant/Applicant

2020: July, 6th
2020: September, 29th

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: Generally speaking, the exercise of the Court's discretionary power [under the CPR 2000 (as amended)] appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default.

Background/Chronology

- [2] By High Court Claim No. **BVIHCV2012/0120** the British Virgin Islands Social Security Board (hereinafter referred to as the Board) brought a claim against the defendant for the sum of \$49,673.86 in respect of outstanding Social Security contributions due and owing by the defendant

for the business Ground Works BVI for the periods December 2008, January 2009 to December 2009, January 2010 to December 2010 and January 2011 to March 2011. The defendant ultimately was ordered to make the payments. In this said claim **BVIHCV2017/0053**, the claimant obtained on April 14, 2017 a judgment in default against the defendant for the sum of USD\$185,925.05 in addition to statutory interest rate of 10% per annum.

- [3] Accordingly, an Employer Registration Form dated April 10th, 2007 completed and signed by the defendant on behalf of Ground Works BVI, a Plant Nursery & Landscaping business and that the business was registered with the claimant the Board with the employer's name listed as Klenton Pickering. Klenton Pickering as employer was assigned by the Board, Registration No. 5086.
- [4] The defendant filed an Application dated 19th February 2020 and served on the legal practitioners for the claimant on 3rd March 2020 ("the Application") that the judgment in default of acknowledgment and defence entered on 14th April 2017 be set aside and that the claim be struck out as Klenton Pickering as:
 - i. Klenton Pickering does not do business as Ground Works BVI and holds no such licence to so do;
 - ii. there is no cause of action arising from the claim as filed against the named defendant.
 - iii. there is no contractual relationship between the parties; and
 - iv. there is no duty, statutory or otherwise, owed by the defendant to the claimant.

Submissions of the defendant/applicant

- [5] Counsel for the defendant/applicant submitted inter alia that he was not personally served with the Statement of Claim but does acknowledge service of the judgment documents. Since receipt, however, the floods in early July were followed on the heels of the floods in early August. Given the nature of the business, these were crises that had to be immediately handled and the filing of court proceedings were not operating at the forefront of the mind of the directors.
- [6] Counsel also submitted that the end of two back-to-back water disasters in June and July, the trifecta of disasters then ensued in the form of the hurricanes of 2017 that impacted the jurisdiction – Irma, Jose and Maria. The Court was displaced. Businesses were interrupted. Families were torn

asunder. The defendant was no exception, having to relocate his family while trying to save plants and maintain some semblance of a workforce.

- [7] Counsel also posited that the matter was not placed before the Court until 19th November 2018 and not brought to the defendant's attention until 16th September 2019. That the defendant advised the Court accordingly the following day. Also, the defendant then retained counsel and the parties sought to have dialogue which bore no fruit and the application was made on 19th February 2020.
- [8] Counsel further posited that the defendant had a real prospect of successfully defending the claim as he was not the proper party and would need to join the proper party to the proceedings as an ancillary defendant.
- [9] Council submitted that the combined judgment of the appellate court in the three cases of **Denton, Decadent and Davies**¹ made the following observations of what Courts ought to take into consideration when examining a set aside application:

"In future, judges were to adopt a three-stage approach: (a) they had to identify and assess the seriousness or significance of the relevant failure. Triviality was not part of that stage. There were clearly degrees of seriousness and significance. The assessment ought not to involve consideration of past unrelated failures, only the seriousness and significance of the very breach in respect of which relief from sanctions was sought. If a breach was not serious or significant, relief would usually be granted and there would be no need to spend much time on the second and third stages; (b) the second stage did not derive from r.3.9 but was nevertheless important: the court had to consider why the failure or default occurred".

- [10] Counsel posited that the defendant was the wrong party to the Claim which is a good and arguable case which can be proven on the facts.
- [11] Counsel further posited that the issue at the crux of this application of this kind, appeared to be a general issue of balance of weight to be ascribed to all the three aforementioned requirements, but with emphasis on whether or not the defence has any reasonable prospect of success, as there would be little point in progressing a case whether the defence is either superfluous or in essence, non-existent.

¹ Denton v TH White Ltd, [2013] 12 WLUK 844., Decadent Vapours Ltd v Bevan, [2014] 2 WLUK 571 & Utilise TDS Ltd v Cranstoun Davies [2014] EWHC 834

[12] Counsel also posited that the defendant had a real prospect of successfully defending his position and has documentary evidence to support his position and ought to be allowed the opportunity to present same.

[13] Counsel submitted that whatever prejudice may operate against the claimant for setting aside the judgment it is outweighed by the failure to ascertain the correct party to be sued and two that they were not statute barred from joining/bringing the claim against the correct party and allowing the matter to proceed as per rules of court.

[14] Counsel submitted that in applying the “failure to comply” as well as the basis for “all circumstances”, this is a fit and proper case pursuant to the guidelines emanating from the **Denton, Decadent and Davies cases**², which was to set aside the Default Judgment and have the matter proceed pursuant to rules of court.

[15] Counsel further submitted that in keeping with the overriding objective of the **Civil Procedure Rules, 2000** and the administration of justice that the Court ought to exercise its discretion in favour of the applicant and grant the application as prayed.

Submissions of the claimant/respondent

[16] Counsel for the claimant/respondent submitted inter alia that having established that this is a case in which the court may set aside or vary the default judgment pursuant to CPR 13.3 and not one in which the court must set it aside as of right (by virtue of CPR 13.2), and that the application must fail as there is no affidavit of merit before the court and as such the defendant has not shown that it has a real prospect of successfully defending the claim.

[17] Counsel also submitted that the defendant, having been served with the judgment in default in respect of this matter on 23rd May 2017, took no steps to set aside same, more than two years after being served.

[18] Counsel submitted too that the application did not state the section of the Civil Procedure Rules under which the application was made. Having regards to the grounds of the application the application must have been brought on the basis of CPR Part 13.3. In this regard it is submitted that:

- a. the defendant had failed to apply to the Court as soon as reasonably practicable having found out since 23rd May 2017 that the judgment in default had been entered against

² As above

him. More than two years have passed and the defendant took no steps in respect of the said judgment.

- b. the defendant has given no good explanation for the failure to file an acknowledgment or a defence to the claim. In this regard it is also submitted that the following reasons advanced by the defendant are not good explanations for the failure to file an acknowledgment of service and defence in respect of the claim:
 - i. failing to attend an appointment with his attorney to "dispose of this matter"
 - ii. forgetting about the matter and not receiving any further documents (after the Judgment in default)
 - iii. moving family to the USA in July 2018, para 14 of his Affidavit filed 19 February 2020.
- c. the defendant therefore has no real prospect of successfully defending the claim.

[19] Counsel also submitted that the matters referred to in 18(b) (i) - (iii) above are the three pre-conditions upon which the Court must be satisfied to grant the Application to set aside under CPR Part 13.3 (1). Where the Defendant does not satisfy the Court in respect of any one of those three pre-conditions the Application cannot succeed - See the judgment in **St Vincent and the Grenadines Civil Appeal No. 3 of 2005 - Kenrick Thomas v RBTT Bank Caribbean Ltd. (Formerly Caribbean Banking Limited)** per Barron JA where he ruled at para 10 that:

"If the pre-conditions are not satisfied the court has no discretion to set aside."

[20] Counsel posited that the defendant had failed to satisfy any of the said pre-conditions and therefore the Application should be dismissed.

[21] Counsel further posited that the defendant has failed to satisfy the Court pursuant to CPR Part 13.3(2), that there are exceptional circumstances for the judgment to be set aside. The Court of Appeal in their judgment in - **The Marina Village Limited and St. Kitts Urban Development Corporation Limited** SKBHCVAP2015/0015 referred to (as relied on by Counsel for the Appellant) the explanation of "exceptional circumstances" as stated by Bannister J- **Inteco Beteiligungs AG v Sylmord Trade Inc** BVIHCV2012/0120 as follows at para 31:-

"For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained. "

[22] Counsel further posited that the Defendant had advanced no exceptional circumstances upon which the Court should set aside the judgment.

[23] Counsel finally posited that the defendant/applicant did not satisfy the requirements as set out in Rule 13(3), which would allow this Honourable Court to set aside the judgment in default and as such the defendant averred that the application before the court should be denied.

[24] Counsel for the claimant/respondent had also inadvertently submitted that the discretion of the Court is fettered by the two requirements stated in the requirements of rule 13(3) (1).

Issues

[25] The issues for my determination are:

- (i) whether the judgment in default regularly obtained by the claimant and entered by the Court should be set aside;
- (ii) If yes, whether an extension of time can be granted for the defence, filed out of time, to be allowed to stand and
- (iii) whether the defendant, Klenton Pickering, has a real prospect of successfully defending the Claim?

Analysis of the Law

[26] It is necessary at this stage to refer to the provisions of the **Easter Caribbean (EC) Civil Proceedings Rules ("the CPR, 2000")** which are material to this application.

"1.1(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

- (a) ensuring, so far as is practicable, that the parties are on an equal footing;**
- (b) saving expense;**
- (c) dealing with cases in ways which are proportionate to –**
 - (i) the amount of money involved;**
 - (ii) the importance of the case;**

- (iii) the complexity of the issues; and
- (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2 The court must seek to give effect to the overriding objective when it –

- (1) exercises any discretion given to it by the Rules; or**
- (2) interprets the meaning of any rule.**

[27] **Rule 1.1** of the **C.P.R, 2000**, speaks to the overriding objectives which are aimed at enabling the court to deal with cases justly, such as, ensuring that a case is dealt with expeditiously and fairly. The case of **Keene v Martin and another** [1999] ALL ER 1207, made the substantive point that the over-riding objective would more likely be furthered where the Court actively manages cases brought before it.

[28] It is accepted though and the Court must be mindful, as made lucidly in the judgment of Kay, L.J in **Totty v Snowden** [2001] 4 All ER 577, that even though the rules require the court to have regard to the overriding objective in interpreting the rules,

“Where there are clear express words, as pointed out by Peter Gibson, LJ in Vinos’ case, the court cannot use the overriding objective ‘to give effect to what it may otherwise consider to be the just way of dealing with the case’.”

However, **“Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective”.**

[29] There is no doubt therefore that the court, in interpreting the rules, must at all times give effect to the overriding objective, and to that extent in the circumstances of this case, in dealing with the case justly, would include, although would not be limited to, being focused on and endeavouring to ensure that the matter was dealt with expeditiously and fairly, while saving expense and not utilizing too much of the court's time.

[30] The Rules give no guidance as to the way in which the overriding objective is to be applied. In the absence of practice directions, appellate guidance and principles of general application governing the exercise of discretion, which have been enunciated in previously decided cases, may be useful.

[31] The statutory provision in our CPR 1.1 permits relevant common law principles to be considered and applied by a judge when exercising any discretion or interpreting the rules. In my view, since in

this provision, by the existence of the word "includes" in rule 1.1 (2), it contemplates that the considerations listed in CPR 1.1 (2) (a) to (e) are not exhaustive of the matters to be taken into account, when the court strives to deal justly with cases. However, in applying any such principles the court's discretion, by its very nature should be guided and not fettered by the principles. It must also be borne in mind that the **CPR 2000** has significantly changed the practice in relation to applications, and the court must be cautious in applying the common law principles under the old rules, which may not necessarily reflect the transformation under the new regime.

[32] In **Vinos v Marks and Spencer**³ Lord Justice May opined that:

"The Civil Procedure Rules are a new procedural code, and [in considering whether the court has the power to extend time for service of a claim form where the claimant applied after the expiration of the period provided for in Rule 7.6(2) of the English CPR] the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former rules. The court is not in the first instance concerned with the exercise of discretion. Decisions about the exercise of the court's discretion to strike out cases for delay are not in point. There is, in my judgment, no basis for supposing that rule 7.6 in particular was intended to replicate, or for that matter not to replicate , the provisions of former rules as they had been interpreted."

[33] Having regard to the overriding objective, Lord Justice Peter Gibson in **Michael Vinos v Marks & Spencers** (supra) aptly observed and I concur with him, that:

"The language of the rule to be interpreted [in the Civil Procedure Rules] may be so clear and jussive that the Court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischief which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant [or claimant] and to the interest of other litigants may require that a claimant [or defendant] who ignores time limits prescribed by the rules forfeits the right to have his claim tried..."

³ [2001] 3 All E.R., 784 at para. 26

[34] **Vinos** (supra) explained the impact, of the overriding objective. This was an action for damages for personal injuries and the claimant issued proceedings one week before the expiry date of the limitation period. He did not serve the claim form until 9 days after the 4-month period (Page 9 of 11 provided by the rule (7(5)2)) had elapsed. The delay could not be related to any difficulty over service, which was a requirement for extension of time. The English Court of Appeal was faced with a question of construction of the Civil Procedure Rules as the present application had presented. The Court in **Vinos** had to determine whether it had the power to extend time for service of a claim form if the claimant only applied after the period provided for in rule 7.6(2) of the English CPR had expired, and the conditions in Rule 7.6 (3) were inapplicable. It is the principle that is being extracted from **Vinos** as to how rule 3.1(2) (a), which is similar to our CPR 26.1 (2) (k) should be construed where there is a specific rule setting out, in detail, what the non-compliant party must do if that party wants an extension of time, and the circumstances in which the Court may exercise the discretion.

Setting Aside a Judgment in Default

[35] The power of the Court to set aside a default judgment regularly obtained is found in Part 13 of the **CPR 2000 (as amended)**

[36] Rule 13.3 (1) of the **CPR 2000**, as amended, provides that 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.

[37] **13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –**

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

(b)Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and

(c) Has a real prospect of successfully defending the claim.

(2) In any event the court may set aside a judgment entered under Part 12 if the

defendant satisfies the court that there are exceptional circumstances.

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

***Rule 26.1(3) enables the court to attach conditions to any order.**

[38] What constitutes a real prospect of success was opined by McDonald-Bishop J (Ag), as she then was, in the Jamaican authority of **Marcia Jarrett v South East Regional Health Authority and Others**, Claim No. 2006 HCV 00816, judgment delivered 3rd November 2006.

[39] McDonald-Bishop J (Ag), as she then was, is quoted as follows:

“[10] The defence must be more than arguable to be such as to show a real prospect of success. This is a restatement of the principle in the case of *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd’s Report 22. ...the Court, in order to arrive at a reasoned assessment of the justice of the case, must form a provisional view of the likely outcome of the case if the judgment were set aside and the defence developed.

[11] Since the test for summary judgment is in the same terms, I would adopt too the meaning ascribed to the words ‘real prospect of success’ in the context of summary judgment proceedings and say that the defence must have a ‘real’ as opposed to a ‘fanciful’ prospect of success and that ‘real’ is taken in its natural and ordinary meaning and so does not warrant any clarification or amplification. *Swain v Hillman and another* [2001] 1 All ER 91 applied.

[12] From the provisions of the CPR and the relevant case law, I think it would be safe to argue that the considerations of the Court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants’ failure to comply with the provisions of the rules as to [the] filing of a defence and the overriding objective which should necessitate a consideration as to any prejudice that the claimant is likely to suffer if the default judgment is set aside...”

[40] In **Sasha-Gaye Saunders v Michael Green, Wendel Hart, Arman White and Michael Bailey**, Claim No. 2005 HCV 2868, judgment delivered on 27th February 2007, Sykes J, as he then was, stated:-

“[21] The English rule provides two grounds for setting aside default judgments properly obtained. These two grounds are independent of each other. The first is whether there is a real prospect of success. The second is whether there is some other good reason. The rule then indicates that the court should consider whether the party has acted promptly. By contrast, the new rule in Jamaica has only one ground and that is whether there is a real prospect of successfully defending the claim.

[22] In the new rule 13.3, the sole question is whether there is a real prospect of successfully defending the claim. This test of real prospect of successfully defending the claim is certainly higher than the test of an arguable defence. See – ED&F Man Liquid Products v Patel & ANR [2003] C.P. Rep 51. ‘Real prospect’ does not mean ‘some prospect’. ‘Real prospect’ is not blind or misguided exuberance. It is open to the Court, where available, to look at contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it. This, in my view, is good sense and good logic.”

[41] It is therefore pellucid from a reading of the authorities that the Court must conduct some evaluation of the proposed defence and decide whether it has a real prospect of success. If the defence has substantial contradictions, then, that may be an indication that the prospect of success is not real. In another case, documentary evidence may make it difficult for the defence to succeed.

[42] I hasten to state that legal practitioners must accordingly again be reminded that the mere existence of some exigency cannot therefore necessarily justify an applicant not abiding by the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance is merely to have a default judgment set aside as the case here. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisors, must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey the rules and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by, the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies the case demands and these exigencies must appear from the affidavits. On the

practical level it will follow that there must be a marked degree of urgency before it is justifiable for the court to exercise its discretion.

[43] **“Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of the matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potentials of occasioning a miscarriage of justice.”**⁴

[44] **“The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities, nor in technicalities nor is the triumph of the administration of justice to be found in successfully picking ones between the pitfalls of technicalities. Justice can only be done if the substance of the matter is considered.”**⁵

[45] In the absence of some explanation for the failure to file an Acknowledgement of Service or a Defence, the prospect of successfully setting aside a properly obtained judgment should diminish somewhat.

[46] Analogously, if the application to set aside a Default Judgment is quite late, then that would have a negative impact on successfully setting aside the judgment.

[47] As Moore-Bick J, in **International Finance Corporation v Ute Africa Sprl.** [2001] CLC 1361, noted the worth of a Default Judgment. He stated as follows:-

“A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside.”

[48] Phillips J.A., in **Marlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, considered the nature of the discretion to set aside a default judgment under Rule 13.3, (as amended in 2006), of the Jamaican CPR, and cited the case of **Rahman v Rahman** (1999) LTL,

⁴ Savannah N. Maziya Sandanezwe V GDI Concepts and Project Management (Properties) Limited High Court Case No. 905/2005 Her Lordship, Ota J, said in page 7.

⁵ Phumzile Myeza and Others v The Director of Public Prosecutions and Another Case No. 728/2009.

judgment delivered on November 26th, 1999, for the proposition that in Applications such as these, the Court should have regard to the following:-

- (a) The nature of the defence;
- (b) The period of delay; and
- (c) Any prejudice that the Claimant was likely to suffer if the Default Judgment were to be set aside as well as the overriding objective of the CPR.

Whether the application to the court has been made as soon as is reasonably practicable after finding out that the judgment had been entered

[49] A defendant who seeks to have a default judgment set aside under **Rule 13.3(1) CPR 2000 (as amended)** is required to act as quickly as possible in filing his application to set aside judgment. The defendant is also required to provide an explanation for any delay, which separated his discovery of the default judgment and his eventual filing of an application to set aside judgment. In **Nizamodeen Shah v. Lennox Barrow**⁶, Mendonça JA identified two categories of cases. In the first category, one finds cases where the Court can simply look at the facts and conclude that the Defendant acted as soon as was reasonably practicable. In other cases, the Defendant has an 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 practicable⁷. At paragraph 12 of his judgment, the learned Mendonça JA had this to say:

“There are no doubt cases where the application to set aside the judgment is made a very short time after the judgment is entered so that, on the face of it, the Court can say that the defendant acted as soon as reasonably practicable. In this case however the application was made at least two months after the date when the Appellant found out that judgment was taken up against him. This delay does not fall into that category of case where you can simply look at it and say that the Appellant acted as soon as reasonably practicable after finding out that the judgment was entered. In those circumstances what then is the obligation of the Appellant. The obligation to put some material before the Court on which

⁶ Nizamodeen Shah v. Lennox Barrow C.A. Civ. 209 of 2008.

⁷ Nizamodeen Shah v. Lennox Barrow C.A. Civ. 209 of 2008 at paragraph 12.

the Court can come to the conclusion that he has acted as soon as reasonably practicable.”

[50] I considered whether the defendant had satisfied the requirement of **Rule 13.3(1) CPR 2000 (as amended)** to act as soon as reasonably practicable in seeking to set aside a default judgment, and in particular whether the defendant provided an explanation for his delay in applying to set aside the default judgment. The defendant stated that he had no recollection of being personally served on 16th March 2017 and challenged the Affidavit of Service of Ripton Jack filed 12th April 2017, which stated that Jack personally served the defendant with the Claim Form, Statement of Claim and supporting documents by handing them to him, his stating so on the basis that his copy stated that it was sworn after it was filed.

[51] The Court finds as very interesting, why the defendant would wait until May 18th, 2020, to raise this issue with the Affidavit of Service of Ripton Jack. Also, the Court notes that the defendant, in paragraph 10 of his Affidavit filed 19th February 2020, accepted and admitted that he was personally served on 23rd May 2017 with the Judgment in Default as filed on 14th April 2017.

[52] The defendant also in paragraphs 10 and 11 of his Affidavit filed 19th February 2020 accepted and admitted that he was personally served on 23rd May 2017 with other documents that touched and concerned the default that was filed 14th April 2017, but did not immediately attend to them because of several intervening circumstances occurring in 2017.

[53] In **Anwar Wright v Attorney General of Jamaica** 2009HCV04340 at paragraphs 23 and 24, Master Simmons (as she then was) had to consider the explanation for the delay in filing an Acknowledgment of Service which was stated as inadvertence on the part of Counsel in the Attorney General’s office. Master Simmons (as she then was) referred to the case **Ken Sales & Marketing Limited v James & Company [A Firm]** Supreme Court Civil Appeal No. 3/05 delivered on 20th December 2005. She noted that the delay in that case was approximately one month due to “inadvertence and certain procedural problems in the Attorney General’s office.” Master Simmons (as she then was) stated that the Court of Appeal held that the reason advanced was not a good explanation for failure to file on time.

[54] I therefore find that the defendant has not satisfied the Court under this heading in rule 13.3(1) (a) of the **CPR 2000 (as amended)**. In the circumstances, I do not accept that there was a good explanation for the failure to file the defence within the prescribed time. I do not accept that the

defendant applied to the court as soon as reasonably practicable after finding out that the default judgment had been entered. As previously stated this application was more than two years after finding out about the default judgment.

Whether the Defence has a Real Prospect of Success

[55] I now turn to consider the second limb of rule 13.3(1) **CPR 2000**, that is to say, whether the defendant had a realistic prospect of success in the claim.

[56] One of the primary considerations for setting aside a Default Judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim as opposed to a fanciful prospect of success. According to Sykes, J as he then was, at paragraph 22 of his judgment in **Sasha Gaye Saunders v Michael Green et al supra**:

“The test of real prospect of successfully defending the claim is higher than the test of an arguable Defence.”

See the case of **ED&F Man Liquid Products v Patel & ANRF (supra)** in which it was held:

“Real prospect of success test is the same that is applicable to Summary Judgments. It does not mean some prospect. Real prospect is not blind or misguided exuberance. It is open to the Court, where available, to look at contemporaneous documents and other material to see if the prospect is real.”

[57] It is considered that in evaluating whether the test has been satisfied, there must be exhibited to the Affidavit of merit, a Defence which meets the requirements of rule 10 of the **CPR 2000**. The draft Defence must reflect the facts on which the Defendants are seeking to rely on as set out in evidence.

[58] In the case of **Furnival v Brooke** [1883], it was said that where the judgment is regular the Court has a discretion in the matter and the Defendant, as a rule, must show by Affidavit that they have a defence to the action on the merits. Stuart Sime in his text, **A Practical Approach to Civil Procedure**, 6th edition, p. 248 noted that the written evidence in support of the application to set aside will have to address, in particular, the alleged defence on the merit, the reason for not responding to the claim in time, and the explanation for any delay in making the application to set aside. This is in keeping with the prerequisites that must be satisfied pursuant to the rules.

[59] Furthermore, according to Craig Osbourn, **Civil Litigation Practice Guides 2005-2006**, p. 364, the defendant must file evidence to persuade the Court that there are serious issues, which provide a real prospect of him successfully defending the claim. The evidence filed must set out the case in sufficient detail to satisfy the test.

[60] The law is clear; the affidavit must contain the facts being relied on and that the draft defence should be exhibited. In **Evans v Bartlam** [1937] A.C 473, it was said that before a judgment regularly obtained could be set aside an Affidavit of Merit was required, and when the application is not so supported it ought not to be granted except for some sufficient cause shown.

[61] It is noted that the aforementioned authorities demonstrate that there must be an Affidavit of Merit and a Defence which provide the Court with sufficient evidence to persuade that there is a real prospect of a Defendant successfully defending the Claim. However, in exercising the discretion whether or not to set aside a judgment regularly obtained, the Court must also consider the matters set out in rule 13.3(2).

[62] It is also to be noted that the defendant has not filed any draft Defence for the Court to examine. The defendant through his legal practitioner has sought to introduce his defence through an alternate means which would be the submissions of his legal practitioner. Therefore, what is the Court to do in the event that the defendant has not placed a draft defence before this Court to consider? Can the Court consider the submissions of his Counsel in the absence of his draft defence?

[63] In determining whether a defendant has a reasonable prospect of success for the purpose of rule 13.3 (1) **CPR 2000**, the Court is required to apply the same test, which is applicable in applications for summary judgment. There is one difference however. In applications for summary judgment, the claimant carries the burden of proving an absence of a realistic prospect of success. Whereas in applications to set aside default judgments, the defendant carries the burden of proving that she has a realistic prospect of success. See **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc** [1986] 2 Lloyd's Rep. 221 a decision referred to and relied upon by the claimant.

[64] In **Copyright Music Organisation of Trinidad and Tobago v. Columbus Communications Trinidad Limited Trading as "FLOW"** CV2009-04722, the Honourable Justice Devindra Rampersad, in the course of determining an application for summary judgment under the

provisions of Rule 15 of the **CPR 2000**, as amended, applied the test which was laid down by the House of Lords in **Three Rivers District Council and others v. Bank of England No.3** [2001] UKHL 16. In that case, Lord Hope considered the meaning of “no realistic prospect of succeeding”. He had this to say:

“The important words are ‘no real prospect of succeeding’. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a discretionary power i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is 17 Civil Proceedings Rules 1998 as amended 18 Rule 15.2 Civil Proceedings Rules 1998 as amended 19 At paragraph 1 of Justice Rampersad’s judgment Page 11 of 12 ‘no real prospect’, he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made ‘findings’ of fact. He did not so. Under RSC Ord 14 as under CPRT Pt 24, the judge is making an assessment not conducting a trial or a fact-finding exercise...”

- [65] The defendant who seeks to establish that he has a reasonable prospect of succeeding in the claim must prove that he has a defence which is more than merely arguable. The Court is neither required however to conduct a microscopic assessment of the evidence nor to conduct a mini trial.
- [66] The defendant is also required to provide an affidavit of merits, supplying the Court with evidence in support of both limbs of rule 13.4 **CPR 2000**. The defence must not be a bare denial.
- [67] The application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed defence (rule 13.4(2) and (3)). The substantive test for setting aside a default judgment is, therefore, whether the defendant has a real prospect of successfully defending the claim. See **Swain v Hillman and another** [2001] 1 All ER 91.
- [68] In arriving at a decision on the setting aside of a judgment regularly obtained, the guidelines outlined in **Marcia Jarrett v SERHA (supra)** are useful. They require an assessment of the nature of the quality of the defence, the period of delay between the judgment and the application to set it aside, the reasons for the [respondent’s] failure to comply with the provisions of the rules as to the filing of a defence and the overriding objective which would necessitate a consideration as to any

prejudice the claimant is likely to suffer if the default judgment is set aside.

[69] The claimant submitted that the Affidavit is in contravention of the rules particularly 13.4(3) and that there is no valid application to set aside the Default Judgment and consequently, the Court has no jurisdiction to consider whether the defendants had established a real prospect of successfully defending the claim.

[70] Having regard to the dicta of Lord Atkins from the case of **Evans v Bartlam (supra)** it is clear that the court can waive the requirement for the affidavit of merit in rare but appropriate cases. His Lordship opined at page 480:

“The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavits of merit could, in no doubt rare but appropriate cases be departed from.” (Emphasis added)

[71] The reasoning of Lord Atkins was adopted by McDonald-Bishop J (as she then was) and upheld by the Court of Appeal of Jamaica in the case of **B&J Equipment Rental Limited v Joseph Nanco**, [2012] JMSC Civ. 81; and upheld on appeal [2013] JMCA Civ 2 . I would similarly adopt the reasoning as summarised in paragraph [66]:

“[66] It is with all this in mind that I have set out to examine the affidavit evidence filed in support of the application to see the substance and quality of the proposed defence. The evidence put forward in support of the application had prompted Mrs. Mayhew to argue that there is no affidavit of merit. The law is clear that the affidavit must contain the facts being relied on and that the draft defence should be exhibited. In Evans v. Bartlam [1937] A.C. 473, it was said that before a judgment regularly obtained could be set aside, an affidavit of merit was required and when the application is not so supported, it ought not to be granted except for some sufficient cause shown. I do note however, that Lord Atkins, at the same time, has stated that in rare but appropriate cases this requirement could be waived so as not to prevent the court from revoking its coercive powers.” (Emphasis added)

[72] To my mind therefore, it is clear that the affidavit of merit can be waived. However, I am mindful that this discretion is to be exercised sparingly and only in exceptional circumstances.

[73] I am of the considered view that rule 13.4 of the **CPR 2000** must be strictly complied with and that the application must be accompanied by an Affidavit in Support with a draft Defence. Hence, the application to set aside the default judgment in the instant case has not been properly grounded in accordance with rule 13.4 where compliance is mandatory.

Findings & Conclusion

[74] The court must take into account all relevant circumstances in considering all the possibilities available to it. In fact, all parties must help the court to further the overriding objective. It is no longer appropriate to “let sleeping dogs lie” (See **Asiansky Properties Television plc and Anor v Bayer – Rosin (a firm)** [2001] EWCA Civ. 1792).

[75] Therefore, I examined the decision in **Watson v Fernandes** [2007] CCJ 1, where reference was made to **Baptiste v Supersad** (1967) 12 WIR 140 at 144B, in which Wooding CJ cautioned that: **“the law is not a game, nor is the court an arena. It is...the function and duty of a judge to see that justice is done as far as may be according to the merits”**. It has also been said that **“the attainment of true justice is over the highway of realities and not through the valley of technicalities”**: Musmanno J in **Potter Title & Trust Co. v Lattavo Bros Inc.** 88 A.2d 91 at 93.

[76] This court has said repeatedly that the **CPR, 2000** provides for timelines that should be adhered to, unless good reason is given for non-compliance. Litigants cannot flagrantly abuse the process and expect the Court to sanction such abuse.

[77] Additionally, it was stated that:

“...Courts exist to do justice between litigants through balancing the interests of an individual litigant against the interests of litigants as a whole... Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys...”

[78] It is common ground that a default judgment is a thing of value and that the claimant ought not to be arbitrarily deprived of same. However, having regard to the particular facts of this case and the court’s duty to give effect to the overriding objective when exercising its powers, any other outcome would in my view be unjust. Therefore, in the circumstances, I am willing to vary the default judgment which will reflect the addition of the Pickering Group Limited.

[79] The law is clear that where a defendant seeks to set aside a regular judgment: “the defendant must, by evidence, establish that he has a defence that he has a realistic prospect of success. He or others should, therefore, depose in an affidavit or affidavits to such facts and circumstances that demonstrate that the defendant has a realistic prospect of success”: **Anthony Ramkissoo v Mohanlal Bhagwansingh** Civil Appeal No. S-163 of 2013. This principle was buttressed in **Knolly John v Brenda Mahabir** et al CV2005-00866 p.5 as follows: “The prospect of success must be real i.e. the court will disregard prospects which are false, fanciful or imaginary. A realistic prospect of success means that the defendant has to have a case which is better than merely arguable”.

[80] However, I do believe that the Court retains the jurisdiction and discretion to correct or cure certain defects or technicalities depending on the circumstances, if the interests of justice require it, and, it is my view that the formal defect or procedural technicalities in the application in this matter may be cured by the court and in fact should be so cured at the date of the hearing of this application. I find that it amounted to a procedural inadequacy which should not be fatal to the claim as the court should in the circumstances be able to exercise its discretionary powers to put things right in order to give effect to the overriding objective.

[81] However, based on the authorities, it is pellucid that the paramount consideration for the court is whether the defendant has a real prospect of successfully defending the claim. In order to make such a determination, the court is to have regard to the evidence. This is why the affidavit of merit is crucial. CPR 13.4(2) and (3) set out two distinct requirements, namely that the application must be supported by evidence on affidavit and that the affidavit must exhibit a draft of the proposed defence.

[82] What the defendant has not done in the instant case is to exhibit the actual defence (filed out of time) to his affidavit.

[83] I must emphasise that the affidavit as it stands amounts to irregular pleadings, not evidence. So notwithstanding how enticing Ms. Creque’s submission that the affidavit of Mr. Klenton Pickering contains his defence, has already been filed and contains the requisite certificate of truth, this is not sufficient to elevate it from pleadings to evidence.

[84] In resolving the present ‘Issues’ I find then, that the application of the defendant/respondent does not satisfy the requirements as set out in rule 13(3) (1) (a), (b) and (c), which would allow this

Honourable Court to set aside the judgment in default.

[85] Finally, it is clear to me that the defendant did not display a genuine intention to defend the claim. I say so for the following reasons:

- a. firstly, an acknowledgment of service was not filed at any time which stated unequivocally that the defendant intended to defend the claim;
- b. secondly, a defence was not filed, albeit that the defendant has asserted in his affidavit that he was not served with certain documents in the claim but even at its highest, the affidavit of Mr. Klenton Pickering is contradictory on the salient issues of lack of service and not being cognizant of the claim; and
- c. thirdly, when the defendant became cognizant of the default judgment, he made no efforts to have it set aside by bringing this fact to the attention of its attorneys. This evidence, in my judgment, tends to show that the defendant did not attend upon his attorneys to have the default judgment set aside, and did not demonstrate an ardent desire on his part to defend the claim;

[86] Therefore, I find that this matter does not meet the threshold of being “the rare but appropriate case” to justify the waiver of the affidavit of merit and I have not exercised my discretion to do so.

[87] **Order**

- (i) The defendant’s/applicant’s application to set aside the judgment in default is refused on the basis of the foregoing reasons.
- (ii) The defendant’s/applicant’s application to have the Pickering Group of Companies added as a second defendant is granted.
- (iii) The judgment in default is varied with the addition of the second defendant and is to be served on the second defendant, in light of the second defendant being added to these proceedings within 14 days of this judgment.
- (iv) The claim form and statement of claim is to be served with the accompanying documents on the second defendant within 14 days of this judgment.
- (v) Costs to the claimant/respondent in the sum of USD\$2,500.00.

- (vi) Matter is to be referred to mediation at the pre-crystallisation stage of these proceedings.
- (vii) Matter is to be set for case management on December 1st, 2020 at the next sitting of the Master's Court in the British Virgin Islands.
- (viii) The claimant shall file and serve this order.

Ricardo Sandcroft
Master [Ag.]

By the Court

Registrar