

**THE REPUBLIC OF TRINIDAD & TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Port of Spain High Court (Virtual Hearing)

Claim No. CV 2016-03080

Between

**Azaha Shahad Mohammed**

1<sup>st</sup> Claimant

**Charmion Gunness**

2<sup>nd</sup> Claimant

**Kennyon Bisram**

4<sup>th</sup> Claimant

**Michael Parmel**

5<sup>th</sup> Claimant

**Ashton Ali**

6<sup>th</sup> Claimant

**Zainool Ali**

7<sup>th</sup> Claimant

**Sonnylal Jadoonanan**

8<sup>th</sup> Claimant

**Raymond Padarath**

9<sup>th</sup> Claimant

**Latiff Mohammed**

11<sup>th</sup> Claimant

**Ganesh Maharaj**

12<sup>th</sup> Claimant

<b>Sookdeo Ramjawan</b>	13 <sup>th</sup> Claimant
<b>Devanand Seebalack</b>	14 <sup>th</sup> Claimant
<b>Darrel Persad</b>	15 <sup>th</sup> Claimant
<b>Kurt Lookoor</b>	16 <sup>th</sup> Claimant
<b>Rondel Shannon Lutchman</b>	17 <sup>th</sup> Claimant
<b>Joseph Rampaul</b>	18 <sup>th</sup> Claimant
<b>Rudolph Joseph</b>	19 <sup>th</sup> Claimant
<b>Feiaz Ali</b>	20 <sup>th</sup> Claimant
<b>Derick Ramjass</b>	21 <sup>st</sup> Claimant
<b>Henry Gou</b>	22 <sup>nd</sup> Claimant
<b>Daineam Schneider</b>	23 <sup>rd</sup> Claimant
<b>Vishade Ramjeawan</b>	24 <sup>th</sup> Claimant
<b>Ramsajan Lallchan</b>	25 <sup>th</sup> Claimant
<b>Utting Sumesarai</b>	26 <sup>th</sup> Claimant

<b>Henry James</b>	27 <sup>th</sup> Claimant
<b>Gavin Singh</b>	28 <sup>th</sup> Claimant
<b>Ragoonanan Bhola</b>	29 <sup>th</sup> Claimant
<b>Naadir Ali</b>	30 <sup>th</sup> Claimant
<b>Deorani Jaggernath</b>	31 <sup>st</sup> Claimant
<b>Kevin Feroz Ali</b>	32 <sup>nd</sup> Claimant
<b>Sherwyn Lawrence</b>	33 <sup>rd</sup> Claimant
<b>Ameena Ali</b>	34 <sup>th</sup> Claimant
<b>Stanley Lawrence</b>	35 <sup>th</sup> Claimant
<b>Kevin Colin Bharat</b>	36 <sup>th</sup> Claimant
<b>Vishal Mohammed</b>	37 <sup>th</sup> Claimant
<b>Randy Sooklal</b>	38 <sup>th</sup> Claimant
<b>Baldat Samaroo</b>	39 <sup>th</sup> Claimant
<b>Curtis Sooklal</b>	40 <sup>th</sup> Claimant

<b>Premchand Harricharan</b>	41 <sup>st</sup> Claimant
<b>Francis Bissoon</b>	43 <sup>rd</sup> Claimant
<b>Stephen Alfred</b>	44 <sup>th</sup> Claimant
<b>Anthony Rambert</b>	45 <sup>th</sup> Claimant
<b>Vinod Mohan</b>	46 <sup>th</sup> Claimant
<b>Basdeo Ramjattan</b>	47 <sup>th</sup> Claimant
<b>Basdeo Ramcharran</b>	48 <sup>th</sup> Claimant
<b>Govin Massey</b>	49 <sup>th</sup> Claimant
<b>Raesh Ramdass</b>	50 <sup>th</sup> Claimant
<b>Allen Gajadhar</b>	51 <sup>st</sup> Claimant
<b>Lyon Nurse</b>	52 <sup>nd</sup> Claimant
<b>Ralph Boodram</b>	53 <sup>rd</sup> Claimant
<b>Victor Lemessey</b>	54 <sup>th</sup> Claimant
<b>Gidharry Maharaj</b>	55 <sup>th</sup> Claimant

<b>Sanjay Mahase</b>	56 <sup>th</sup> Claimant
<b>Ijaz Ali</b>	57 <sup>th</sup> Claimant
<b>Richard Sookram</b>	58 <sup>th</sup> Claimant
<b>Ronnie Baboolal</b>	59 <sup>th</sup> Claimant
<b>Hazrat Ali</b>	60 <sup>th</sup> Claimant
<b>Farhad Ali</b>	61 <sup>st</sup> Claimant
<b>Richard Gay</b>	62 <sup>nd</sup> Claimant
<b>Peter Bissoon</b>	63 <sup>rd</sup> Claimant
<b>Kishore Paltoo</b>	64 <sup>th</sup> Claimant
<b>Donald Dipchan</b>	65 <sup>th</sup> Claimant
<b>Jaggernath Bissoon</b>	66 <sup>th</sup> Claimant
<b>William Chong Chickurie</b>	67 <sup>th</sup> Claimant
<b>Bernadine Gour</b>	68 <sup>th</sup> Claimant
<b>Curtis Merez</b>	69 <sup>th</sup> Claimant

<b>Rasheed Mohammed</b>	70 <sup>th</sup> Claimant
<b>Mustafa Mohammed</b>	71 <sup>st</sup> Claimant
<b>Kelvin Bajan</b>	72 <sup>nd</sup> Claimant
<b>Vacash Massey</b>	73 <sup>rd</sup> Claimant
<b>Martin Bissoon</b>	74 <sup>th</sup> Claimant
<b>Ramdeo Moonilal</b>	75 <sup>th</sup> Claimant
<b>Benjie Mohammed</b>	76 <sup>th</sup> Claimant
<b>Karamchan Dan</b>	77 <sup>th</sup> Claimant
<b>Ramcharitar Massey</b>	78 <sup>th</sup> Claimant
<b>Kevon Ramcharran</b>	79 <sup>th</sup> Claimant
<b>Suklal Mannah</b>	80 <sup>th</sup> Claimant
<b>Dennison Moodie</b>	81 <sup>st</sup> Claimant
<b>Kelvin Moodie</b>	82 <sup>nd</sup> Claimant
<b>Jeffery Sadoo</b>	83 <sup>rd</sup> Claimant

And

**Gary Edwards**

1<sup>st</sup> Defendant

**Icacos United Fishermen**

2<sup>nd</sup> Defendant

**Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell**

Delivered on: 11 January, 2021

**Appearances:**

Mr. Ravi Rajcoomar, Ms. Alisa Khan, and Mr. Majeed Imran Juman, Attorneys-at-Law for the Claimants

Ms. Renisa Ramlogan, Attorney-at-Law for the First Defendant

**RULING**

**A. Introduction**

1. The First Defendant seeks by the application determined in this ruling, to set aside a Judgement entered against him in default of appearance. The Judgement was entered against him and the Second Defendant some two years prior to the said application but the First Defendant's position is that he had no knowledge of the proceedings at that time.
2. The First Defendant was the President of the Second Defendant's organisation. It was set up to advocate on behalf of fishermen/boat owners in the Icacos area. Specifically, it was to negotiate for compensation regarding seismic bombing activities of the Petroleum

Company of Trinidad and Tobago [“Petrotrin”], which affected the work of fishermen in the area. A compensation scheme was agreed between Petrotrin and the Second Defendant for a five-month period wherein Petrotrin would pay \$6000 for each boat registered with the Second Defendant.

3. The fact scenario that gave rise to the filing of a Claim by the Claimants was the receipt by the Second Defendant of monies from Petrotrin. The money was received on behalf of the Second Defendant’s membership, which includes the Claimants.
4. In a Claim filed initially on 14 September 2016 which was amended on 09 March 2017, the Claimants were alleging breach of trust by the Defendants and seeking compensation for alleged non-payment of sums owed to them under the arrangement. Judgement against both Defendants was entered in default of appearance on 22 December 2017 for \$5,715,856.06.
5. The grounds of this application are contained in the First Defendant’s application filed on 27 June 2019. The First Defendant’s approach, as fully set out in the application, is two-pronged. Firstly, he contends that the Judgement obtained in this matter was irregular and must to be set aside as he was not served with the Claim or any other documents in the matter until he was served with a Copy of the Judgement in June 2019. Shortly thereafter, he filed this Application. Part 13.2(1) (a) of the Civil Proceedings Rules 1998 (as amended) [“CPR”], mandates the Court to set aside a Judgement if the Defendant was not served.
6. Secondly, the First Defendant contends that even if the Court finds that he was duly served and the Judgement is regular, the Judgement should be set aside because he meets the requirements of Part 13.3(1) of the CPR. This second ground appears to be the more critical basis for the First Defendant’s Application as he referred at the outset only to Part 13.3 of the CPR as the rule pursuant to which the application was filed. Specifically, pursuant to 13.3(1) the First Defendant contends that he:



- a. Met the requirement for promptitude in filing his application to set aside the Judgement just a few days after receipt of the Judgement and,
  - b. Has a realistic prospect of success in defending the Claim.
  
7. Devanand Seebalack, current President of Icacos Fisher Folk United, swore to the Claimants' affidavit in response to the First Defendant's application. The Affidavits sets out the history of this matter regarding service of the Claim and Amended Claim which was purportedly effected on different occasions, first by advertisement and then personally on the First Defendant, as follows:
  - a. The Claim Form and Statement of Case in this matter were filed on 14 September 2016. Soon after, on 29 September 2016, an order was granted for substituted service of the Claim by way of advertisement in a daily newspaper of general circulation. The basis for the request for substituted service was duly sworn by Affidavit to be that personal service was a difficult endeavour and that service of the Claim would be more successfully effect by alternative means. This Affidavit contained details of several attempts at service by the process server at the First Defendant's home where there was no response by the First Defendant or anyone to calls made.
  - b. On 21 October 2016 and 28 October 2016, the advertisement of the Claim was posted in the Newsday Newspaper and an affidavit attesting to it was then filed.
  - c. On 05 January 2017, parts of the Claim were withdrawn in order to obtain Judgement in default of appearance, which was thereafter applied for on 09 January 2017. On 09 March 2017, following on queries made by the Registrar about the Claim, the Claim was amended.

- d. Thereafter, a process server, Mr. Nigel Bascombe, purportedly attempted to serve the amended documents personally on the First Defendant. It is the Claimants' case that this service was effected on 25 June 2017 when Mr. Seebalack and two other boat owners, Mr Damien Snyder and Mr. Jaggernaut Bissoon, observed the process server serve the First Defendant.
- e. An affidavit of service by Mr. Bascombe ["the process server"] was filed on 03 July 2017 outlining efforts to serve the First Defendant. It states that on 21 May 2017, he waited outside the First Defendant's house, knocking and honking his horn but no one came out. It states that thereafter on 04 June 2017 the process server arrived at the First Defendant's home while he was in his yard and had a brief conversation with him. When he informed the First Defendant he was there to serve him, he ended the conversation and went into his home.
- f. The affidavit outlines that, on 25 June 2017, the process server arrived in Icacos Village at 9:42 a.m. and the First Defendant was pointed out by the 14<sup>th</sup> Claimant (Mr. Seebalack) and two other Claimants on the beach in a tractor. The affidavit states that he called out the First Defendant's name but he did not reply. He then informed the First Defendant that he was a process server there to serve court documents, he displayed the Amended Claim and the First Defendant refused to accept it. In response, he states that he repeated that it was a Claim from the courts and laid it on the tractor that the First Defendant was driving.
- g. On 04 September 2017, the Claimants applied for Default Judgement. On 14 September 2017, a supplemental affidavit by Mr. Seebalack was filed attesting to witnessing the service as outlined by the process server on the First Defendant. On 22 December 2017, a supplemental affidavit of service sworn by the process server was filed. It outlined further documents that were served on the First Defendant in the same encounter, including a form for entering an appearance, a

defence form, an application to pay by instalments and the prescribed notes for the Defendant.

- h. Judgement in default of appearance was entered against the First Defendant with an effective date of 22 December 2017.
8. The First Defendant's Affidavit in support of his application and his Affidavits in response to the Claimants' Affidavit both provide evidence in support of his application to set aside the Judgment. He swears that he is a stranger to the alleged service efforts. He states he is not aware that an advertisement was placed in the newspapers with respect to the Claim and he believes that the Icacos area does not receive Newsday newspapers on a consistent basis. Therefore, he says, he does not read newspapers on a daily basis and the advertisement was never brought to his attention.
9. Further, the First Defendant contends that there would have been no difficulty in serving him personally. This is so, he says, because everyone in the Cedros area knows where he lives and the time he leaves home and returns. He avers that he does not know anyone by the name of Nigel Bascombe and that he cannot recall anyone attempting to serve documents on him in June 2017 or having any conversation about such service. He claims the efforts outlined by the process server were fabricated. He says he never would have been on the beach as early as 9:42 a.m. as he would have been fishing at that time and that he does not own or drive a tractor.
10. In his Affidavit, the First Defendant also sets out, in fulsome detail, his Defence against the Claimants in order to substantiate his argument that he has a reasonable prospect of success in defending the matter if the Judgment is set aside.

11. Firstly, the First Defendant argues that he has a complete Defence to the allegations raised against him and/or the Claimant's Claim does not disclose a cause of action against him for the following reasons:

- a. The Claim is erroneously based on the fact that the First Defendant received the sum of \$5,519,100.00.
- b. Neither the First nor the Second Defendant received the sum of \$5,519,100.00. The second defendant received the sum of \$3,900,000.00.
- c. Nowhere in the Statement of Case has it been pleaded by the Claimant that this sum was collected by the First Defendant.
- d. At all times the monies were given to the Second Defendant for distribution.

12. The First Defendant also sets out various contentions that would make up its substantive Defence in the present case. This includes the receipt of the total sum of \$3,900,000.00 from Petrotrin into the accounts of the Second Defendant. Here, a question as to whether he is personal liability for the sums as president of the Second Defendant is raised.

13. An outline of sums paid out is set out in the First Defendant's affidavit in addition to a list of persons who did not attend to collect payment. The First Defendant contends that there was agreement by the membership that the sum of \$6000.00 per registered boat would be paid out as follows:

- a. \$3,000.00 per boat owner and \$1,000.00 per sailor. Each boat would carry three sailors.
- b. The sum of \$600.00 per boat would be deducted from the above sums as legal fees, administrative fees of the Second Defendant as well as for miscellaneous expenses inclusive of meetings, t-shirts, banners and advertisements.
- c. At the end of the 5-month period of payments, any remaining and/or unclaimed monies would be for the benefit of the Second Defendant.

- d. In the event that any of the 130 registered boats were sold, the sum of \$2,700.00 would be returned to Petrotrin.
14. The First Defendant attached a document to his Affidavit which he says represents minutes of a meeting in which this agreement was made. Further, there is an account of how the remainder sum was expended – payments to boat owners, sailors, Family Day activities, legal and administrative expenses.
15. Finally, the First Defendant raises the issue that disputes concerning members ought to have been referred to arbitration for resolution in accordance with an amendment to the constitution of the association.
16. The Claimants’ response to these contentions in defence to the Claim is essentially that there was no agreement among the membership for distribution of the monies received from Petrotrin in the manner set out above. They claim that a dispute arose upon such a proposal being made and much of the membership therefore refused to sign for the cheques made out to them in the sums proposed.

**B. Law and Analysis**

17. **CPR Part 13.1** provides that the court must set aside a Judgement entered under Part 12 if :

*“In the case of a failure to enter an appearance, any of the conditions in rule 12.3 was not satisfied”*

18. **CPR Part 12.3** provides the criteria for entering a Judgement in default of appearance and provides as follows in relation to service:

*“At the request of the claimant the court office must enter judgment for failure to enter appearance if-*

*(a) the court office is satisfied that the claim form and statement of case have been served”*

19. **CPR 13.3 (1)** identifies the circumstances in which a Court is empowered to exercise its discretion to set aside a default Judgement. Part 13.3(1) provides as follows:

*“The court may set aside a judgment entered under Part 12 if— (a) the defendant has a realistic prospect of success in the claim; and (b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.”*

20. In the circumstances of this case, the default Judgement cannot be considered to have been irregularly entered under part 13.2. The Court accepted the Claimant’s evidence that personal service on the First Defendant had proven challenging due to the lack of response on several occasions to calls at his house when it appeared that persons were inside. Accordingly, substituted service by advertisement, a method customarily utilised by the Court, was permitted.

21. It is clear that the Registrar, in granting a default Judgement, was satisfied with the evidence of the Claimants at the time that the First Defendant was served by advertisement and subsequent personal service.

22. The First Defendant accepts in its submissions that the onus falls on the Defendant to show that they had not been served - **Republic Bank Ltd. v. Homad Maharaj Civ. Appeal 136 of 2006**. Though the method of personal service is challenged and some issues in relation to identification were highlighted, the First Defendant has not brought sufficient proof that service of the initial Claim via advertisement in the Newsday would have been ineffective in the Icacos area.

23. However, it remains within the discretion of the court to determine, having been provided with evidence of the First Defendant, whether the Judgement ought to be set aside under Part 13.3(1).

*Acting as soon as reasonably practicable*

24. A defendant who seeks to have a default Judgement set aside under Part 13.3(1) CPR is required to act as quickly as possible after finding out a Judgement was entered against him in filing his application to set aside Judgement.

25. The defendant is also required to provide an explanation as to any delay, which separated his discovery of the default Judgement and his eventual filing of an application to set aside Judgement.

26. In **Nizamodeen Shah v. Lennox Barrow C.A. Civ. 209 of 2008**, 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 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 practicable. At paragraph 12 of his Judgement, 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 the Court*

*can come to the conclusion that he has acted as soon as reasonably practicable.”*  
[emphasis added]

27. The Claimants have not demonstrated that there was service of the Judgement at any time between the entering of the Judgement in December 2017 and 6 June 2019 when the Claimant claims he received service of the Judgement. Even if the Claim and amended Claim were properly served on the First Defendant, the relevant question under Part 13.3 as to whether the Judgement should be set aside is at what point the Defendant became aware of entry of Judgement.

28. In this regard, there is no basis for arguing as to any delay. The application was filed promptly some twenty days after the First Defendant found out about the Judgement. The filing of the present application on 27 June 2019 shows quick action on his part in retaining his attorneys and preparing his application to the court, especially in a matter of some vintage. The Claimant has succeeded in proving this limb of the requirements for setting aside the Judgement.

*A Realistic Prospect of Success*

29. The second limb of Part 13.3(1) of the CPR concerns whether the First Defendant has a realistic prospect of success in the Claim. 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 must make this assessment by an examination of the case and evidence of both sides, short of conducting a mini trial in the matter. This has been repeatedly underscored in cases such as **Civ App 103 of 2006 Western Union Credit Union Co-operative Society Ltd v Ammon; Civ App No S 163 of 2013 Anthony Ramkissoo v Mohanlal Bhagwansingh; Three Rivers District Council v Bank of England No. 3 [2001] 2 All ER 513 HL.**



30. The First Defendant has set out a plausible defence. He admits that some sums were received by the Second Defendant and are owed to certain Claimants but the First Defendant's case is that the money was not claimed/collected by them. The First Defendant provides an account of monies received from Petrotrin and it is clear the dispute lies in whether or not there was agreement as to how the monies were to be utilized. Further issues raised as potential arguable defences include:

- a. Whether the First Defendant can be treated as personal liability in this matter since the money was received by the Second Defendant and,
- b. Whether the alternative dispute resolution procedure provided for in the constitution of the Second Defendant should have been accessed.

31. In their written submissions, the Claimants dispute the validity of the Minutes tendered by the First Defendant showing a record of the agreement alleged by the First Defendant. They highlight evidence of disagreement among the membership in notations made when certain members refused to collect their cheques. They further contend that the document entitled "Payment Made" attached to the First Defendant's application was not shown to the Claimants when they were asked to sign. They submit, therefore, that they signed without knowledge of the contents of the document/the terms of the alleged agreement.

32. The Claimants, in submissions, also highlight what they consider to be inconsistencies in the First Defendant's affidavits in this application. However, all the issues raised by the Claimants in fact serve to highlight that there is a real dispute as to the facts and the implications from the facts. These issues ought properly to be ventilated by way of a filed Defence, a Reply if necessary, disclosure of documents, witness statements and cross-examination followed by a decision on the merits of the case. Alternately, the parties may consider at any stage hereafter a mediated settlement of the Claim.

33. On the evidence for and against the application to set aside the Judgement, the question remains unresolved as to whether there was any agreement or arrangement by the membership as to how the monies received ought to be expended, despite indications of dissatisfaction by the present Claimants. These issues can be addressed upon full ventilation of the evidence and analysis of law on both sides.
34. The First Defendant has therefore shown sufficient promptitude in filing this application and real prospect of success in its defence for the court to exercise its discretion under Part 13.3(1) in setting aside the default Judgement.

**C. Conclusion**

35. Although the First Defendant has shown that he acted as soon as reasonably practicable after finding out that Judgement had been entered, he has not sufficiently proven his contention that the service by advertisement would have been ineffective in the Icacos area. As a result, the Claimants' actions in executing service by advertisement cannot be faulted and the First Defendant has not shown that he acted with due diligence in defending a Claim which he should have been aware was before the court. Accordingly, the First Defendant will be required to pay the costs of this application to set aside Judgement.
36. As issues of accounting and the possibility of resolution by way of arbitration have been raised in this case, there appears to be scope for settlement out of court of this dispute. Parties are encouraged to engage in alternate dispute resolution procedures which may facilitate a transparent accounting process as it relates to the monies received by the Second Defendant. This may provide an opportunity for the Claimants to understand how the Defendants managed the money received on their behalf or for the First Defendant to make amends if his management is found wanting. Alternative dispute resolution may generate a timely, inexpensive conclusion of this matter which has been pending for over

four years but is now poised to be restarted from the beginning with the setting aside of default Judgement.

**37. It is hereby ordered that:**

- i. The Default Judgement entered on 22 December 2017 is set aside.
- ii. Costs of this Application dated 27 June 2019 are to be paid by the First Defendant to the Claimants in an amount to be assessed, if not agreed.

*EJD.Honeywell*

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Eleanor Joye Donaldson-Honeywell

Judge