REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2007-01867

BETWEEN

WILFRED DES VIGNES **CLAIMANT**

AND

JOYCELYN MANNING **1st DEFENDANT**

AND

KEN GORDON **2nd DEFENDANT**

Before the Honorable Mr. Justice V. Kokaram

Appearances:

Mr. L. Phillip for the Claimant
Ms. F. Wilson for the Defendants

JUDGMENT

1. **Introduction:**

1.1 On 8th May 2008 the Claimant obtained judgment, in default of defence, against the first Defendant. The judgment was for damages in trespass to a parcel of land situate in Bagatelle, Tobago ("the said parcel of lands") and possession of a portion of land occupied by the first Defendant comprising 2,500square feet ("the first

Defendant's plot"). On 29th November 2009, the First Defendant filed an application seeking permission to set aside that judgment and to enter a defence and counter claim.

1.2 The application to set aside the judgment is made pursuant to rule 13.3 (1) CPR. It is now trite law that for the first Defendant to succeed on such an application she must satisfy the two conditions prescribed in rule 13.3 (1) CPR namely: (a) that she has a realistic prospect of success in the claim and (b) that she acted as soon as reasonably practicable when she found out that judgment was entered against her.

1.3 It is accepted by both parties that the first Defendant knew that judgment was entered against her on 8th May 2008. She explains that "*strained circumstances and inadvertence*" were the main reasons for her delay in making her application. In my judgment the reasons advanced by the first Defendant in her application, do not demonstrate that she acted as soon as reasonably practicable after 8th May 2008. Therefore, regardless of the merits of her proposed defence, because the first Defendant is unable to satisfy the condition set out in rule 13.3(1) (b) the application must be dismissed.

2. The proceedings:

2.1 The Claimant in his statement of case filed on 1st June 2007 alleged that he was the owner of the said parcel of lands and that the first Defendant was the tenant of the Claimant in possession of the first Defendant's plot as a result of an oral agreement made between the parties. It was an express terms of the said agreement, the Claimant alleged, that the first Defendant would use only timber in the construction of her dwelling house and not make any addition thereto comprising of concrete.

2.2 In breach of the agreement between the parties, the Claimant alleged that the first Defendant added a concrete structure and was in the process of adding a further concrete structure. Accordingly the rental agreement had come to an end and the Claimant was entitled to possession of the first Defendant's plot. The Claimant also contended that the first Defendant committed the following acts of trespass:

entering unto the said parcel of land and cutting down several trees belonging to the Claimant; digging a trench approximately one foot deep and three feet wide on the Claimant's premises and on 13th March 2007 unlawfully entering unto the said parcel of land and conducting a survey.

2.3 The Claimant therefore claimed damages in trespass to the said lands, possession of the said Defendant's plot and injunctive relief against the Defendant restraining her or her servants or agents in excavating or entering or remaining upon the said parcel of land or from otherwise interfering with the claimant's use and enjoyment thereof.

2.4 An appearance was entered by the first Defendant on 4th June 2007. The first Defendant obtained an extension of time to file its Defence to 31st July 2007 by agreement with the Claimant made by letter dated 2nd July 2007. No defence was filed. The Claimant therefore issued an application dated 30th January 2008 for directions to be given for the further conduct of the matter, the first Defendant not having served her defence. This application was made in light of the claim for injunctive relief made by the Claimant.

2.5 On 8th May 2008 the matter came on for hearing before Best J. The first Defendant had not filed any application for an extension of time to file and serve her defence. The Court after hearing both parties made the following Order:

1. Court notes that this matter was not served on Mr. Ken Gordon, the 2nd defendant in these proceedings. Proceedings against him became spent.
2. Judgment for the Claimant in respect of paragraphs 1, 2 and 4 of the Statement of Case.
3. In respect of paragraph 3, the injunction limb.
    (a) Affidavit in support to be filed and served on or before the 23rd day of June, 2008.
    (b) Affidavit in opposition to be filed and served on or before the 2nd day of July, 2008.
    (c) Affidavit in reply to be filed and served on or before the 16th day of July, 2008.

2.6 It is clear that at that moment, 8th May 2008, the first Defendant was aware that judgment had been entered against her for possession of her plot of land.

2.7 On 29th January 2009 the Court made a further Order that:

1. Undertaking by Counsel that everything will remain as it is at this point in time re: the injunction in this matter.
2. The Defendant to file and serve an affidavit in opposition on or before the 19th day of February, 2009.
3. The estimated length of trial is one day.
4. Leave is granted to cross-examine parties on their affidavits.

2.8 On 9th March 2009, the Claimant issued a writ of possession pursuant to the Order of Best J on 8th May 2008, for the first Defendant's plot.

2.9 Eventually on 13th May 2009 approximately 11 months after the judgment had been entered against the first Defendant and one day before the hearing of the Claimant's claim for injunctive relief, the first Defendant filed an application to set aside the judgment and for leave to file and serve a defence and counterclaim. The Claimant also filed a notice withdrawing its claim for injunctive relief. On 29th January 2009 cross undertakings were given for everything to "remain in place" until 17th July 2009. At the hearing on 17th July 2009 before Best J, the first Defendant withdrew its application to set aside the judgment and the Court ordered her to pay the Claimant's costs assessed in the sum of $1,500.00.

2.10 On 19th November, some 18 months after judgment had been entered against her, the first Defendant again filed another application to set aside the judgment and for leave to file its Defence and Counter claim. The application is in terms similar to the application that was previously filed on 13th May 2009.

3. The application to set aside the judgment of Best J dated 8th May 2008

3.1 The grounds in support of the application to set aside the judgment were that:

(a) The Claim Form and Statement of Case have failed to comply with the requirements of Part 8.9 (1) of the Civil Proceedings Rules, 1998.

(b) The First Defendant has a realistic prospect of defending the claim and pursuing a counterclaim.

3.2 The First Defendant set out her defence both in her affidavit and in the draft defence annexed to the application. Briefly she contends that, from shortly after her birth in 1949, the first Defendant had been in occupation of that parcel of land situate at Bagatelle, in the Parish of St. Andrews, Tobago found on a 2007 survey to comprise Two Thousand Two Hundred and Eight Point Eight square metres (2280.8m²)

3.3 The First Defendant's predecessors in title had been in occupation of that subject parcel for approximately 20 years previously. Since about the 1930s, the First Defendant's predecessor in title entered into possession by virtue of an oral agreement for sale between one Meshack Alexander Des Vignes also called Meshack Des Vignes ("Meshack Des Vignes") and the First Defendant's reputed grandfather, David Trim. Between 1965 and 1979 when he died, David Trim continued to make payments to Ethel Des Vignes, widow of Meshack Des Vignes. Save for 1 payment in each of the years 1980 and 1982 to Ethel Des Vignes and her son, George Des Vignes, respectively, no further payments were made with respect to the subject parcel by the First Defendant or anyone acting on her behalf.

3.4 In or about the year 1965 the Claimant commenced occupation of a portion of the subject parcel in a house periodically occupied by Meshack Des Vignes, his father, during his lifetime. Thereafter, in or about the year 1999, the Claimant's daughter commenced construction of a dwelling house on a portion of the subject parcel and which was completed in or about the year 2001.

3.5 The First Defendant contended that she caused her home to be assessed at the Warden's Office, Scarborough and since that date has been paying the land taxes

for the entirety of the subject parcel. She also denies making any landlord/tenant agreement with the Claimant, whether orally or in writing.

3.6 It was from about the year 1998 or thereabouts the First Defendant explains that the Claimant began to conduct a campaign of harassment against the First Defendant and her family with the aim of interfering with her quiet user and occupation of the subject parcel with the intent to dispossess her of same. This culminated in the issuing of the Claim Form and Statement of Case filed herein

3.7 The first Defendant explained that two years before the litigation commenced she had consulted the firm of Lex Caribbean, attorneys at law to bring certain lands on which she resided under the provision of the Real Properties Ordinance. She had not paid the full deposit requested by the firm but was assured that she would be billed periodically for work rather than having to make lump sum payments. About one month after work had commenced on those applications she was served with the Claimant's claim. The first Defendant explained that Ms. Wilson of the firm Lex Caribbean, even though she had not been retained explained the significance of the litigation and the importance of entering an appearance. The appearance was entered and Ms. Wilson sought and obtained an extension of time for the filing of the Defence. The first Defendant states that she was advised by her attorney at law that some preliminary overtures had been made to settle the matter and this also led to her deferring pursuing it with the required vigor.

3.8 Counsel for the First Defendant submitted that the evidence setting out the reasons for the delay in making the application or why this application was made some 18 months after judgment was entered was reasonable in the circumstances is found in the following paragraphs of the first Defendant's affidavit:

"I am advised by my Attorney-at-Law and verily believe that some preliminary overtures had been made to settle the matter and this also led me to defer pursuing it with the required vigour.

In inadvertence I was unable to pursue this action. I am self-employed shopkeeper of very modest addition to the foregoing, owing to my straitened circumstances and to means and earn my livelihood by running a parlour which was located at the front of my home. In it I sold soft drinks, biscuits, flour, rice, sugar and sundry items for household use to persons in the immediate neighbourghood. I have been doing this since about 1991 and prior to constructing the shop, I conducted sales from the kitchen of my home.

I am the principal breadwinner in my family and usually I paid the light bill and my brother who was born and has always resided in our then family home, assists with the water rates and land taxes. Other household bills such as telephone and food were shared generally between my daughter and me.

It is in these circumstances that I have been unable to pursue this matter in a more proper and timely manner, a situation aggravated by a number of actions spawned by the conduct of the Claimant whether acting by himself his agents and/or servants which are now pending at the Scarborough Magistrate's Court and have also led to even more demands being made on my slender financial resources.

Since the date of the judgment referred to in paragraph 9 herein, the Claimant whether acting by himself his agents and/or servants has conducted what I can only describe as a campaign of harassment against me and my family. At present there are approximately several engaging the attention of the Magistrate's Court in Scarborough."

3.9 To complete the chronology of events in these proceedings, the first Defendant explained that the writ of execution was eventually executed on 7th October 2009 and her home has been destroyed. Since then she and her family has been forced to seek refuge at the homes of various neighbours and well wishers and are undergoing tremendous hardship.

4. Setting aside judgments:

4.1 Rule 13.3 (1) CPR gives the Court the discretion to set aside a judgment entered under Part 12 if two conditions are satisfied:

- That she has a realistic prospect of success in the claim; and
- That she acted as soon as reasonably practicable when she found out that judgment had been entered against her.

4.2 Although, the overriding objective of the CPR is to deal with cases justly, it is now well accepted that the exercise of the discretion to deal with cases justly under rule 13.3 (1) CPR is limited to considering only those two factors[1]. Accordingly our rule 13.3 (1) CPR lies in stark contrast to the English CPR equivalent[2] in which the discretion is wider and the fact that the defendants have given no reason for a delay is, not always and in itself sufficient to justify the court in refusing to exercise its discretion and refusing relief.[3]

4.3 Barrow JA in ***Kenrick Thomas v RBTT Bank Caribbean ltd***[4]. made the following useful observations in reconciling the stricter approach advocated in our rules with the overriding objective:

> *"The overriding objective, contained in Part 1 of CPR 2000, which requires the court to apply the rules so as to deal with cases justly, is often invoked to relieve against the hardship that a strict application of the rules may cause. This court has clarified that the overriding objective does not allow the court to ignore clear rules.*[4] *The language that the rule makers chose to frame Part 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must*

[1] See ***Nizamodeen Shah V Lennox Barrow CA 209 of 2008*** per Mendonca JA at paragraph 12.

[2] "(1) In any other case the court may set aside or vary a judgment entered under Part 12 if (a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason why a judgment should be set aside or varied.
"(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether 2
the person seeking to set aside the judgment made an application to do so promptly"

[3] See **Thorn Plc v Macdonald** [1999] WL 809060 (CA (Civ Div)),

[4] Civil Appeal 3 of 2005 Bartoo v Bartoo

now accept that CPR 2000 has gone significantly further that the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified[2] abuse that the new rules were intended to correct. The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that."

4.4 Therefore, if the Defendant fails to satisfy the Court of any one of the conditions set out in 13.3(1) the CPR his application fails. Accordingly, a Defendant can have a realistic prospect of success in defending the claim but because he failed to act as soon as reasonably practicable after he found out that judgment had been entered against him the judgment cannot be set aside. Similarly the Defendant can act promptly, immediately after he found out that judgment had been entered, but if he has no realistic prospect of success in defending the claim the judgment remains. Both conditions are critical to the success of any application under Part 13.3 CPR. See ***Nizamodeen Shah V Lennox Barrow***[5] and ***Bertin Benny v Brian Benny***[6]

4.5 The obligation however is on the Defendant to put some material before the Court to satisfy both of these pre conditions before the Court can exercise its discretion to set aside the judgment. In ***Nizamodeen Shah*** (ibid) the Court of Appeal considered the case where the Defendant's application to set aside a default judgment was made at least two months after the date when the Defendant found out that judgment was against him. Mendonca JA made the observation that the length of delay in that case "*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 on the*

[5] CA 209 of 2008 (extempore judgment)
[6] CV2008-02475 (unreported)

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 reasonable practicable." As to the requirement of putting some material before the Court on which the Court can exercise its discretion, Mendonca JA referred to the opinion of Lord Guest in ***Ratnam v Cumarasamy and anor:***

> *"The rules of court must, prima facie to be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time to defeat the purpose of the rules which is to provide a time table for the conduct of litigation."*

4.6 In this case the immediate issue before the Court is whether this Defendant accounted for her delay in filing this application. The challenge for this Defendant is to put some material before this Court to demonstrate that she acted as soon as reasonably practicable in filing her application some 18 months after she knew that judgment was entered against her. If the first Defendant fails on this limb there is no need to determine whether she has a realistic prospect of success on the claim.

5. Whether the Defendant acted as soon as reasonably practicable

5.1 A requirement that a Defendant who seeks to have a judgment set aside must apply as soon as reasonably practicable after becoming aware that default judgment has been entered is in keeping with the overriding objective of the CPR that cases are to be dealt with expeditiously and justly. There can be no firm category of factors that will define what is "as soon as reasonably practicable." This will vary depending on the facts of each case. In **Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v Antigua Commercial Bank**, Thomas J. [as he then was], accepted that no specific time period is given in the rules and stated that reasonableness, therefore, depends on the facts of the case.

5.2 Can a delay of 18 months be described as "acting as soon as reasonably practicable" within the meaning of rule 13.3(1) (b) CPR? The plight of this Defendant is unfortunate. She has now been dispossesed of her home as a result of the judgment of Best J made on 8th May 2008 ordering her to give up possession of her property to the Claimant. Such an order has serious consequences. However instead of immediately moving the Court to set aside this judgment the Defendant allowed the proceedings to meander along without taking this elementary procedural step to preserve her rights.

5.3 Attorney for the first Defendant submitted the following reasons to account for the delay:

(a) Preliminary overtures were made to settle the matter.

(b) The first Defendant was of limited means and acted under "strained circumstances."

(c) The first Defendant endured a campaign of harassment by the Claimant which spawned a number of actions in the Scarborough Magistrate's Court. This hampered the first Defendant and prevented her from taking action at an earlier stage in the proceedings.

5.4 I am not satisfied that any of these reasons taken singly or cumulatively can characterize her filing of an application 18 months after the order was made as acting as soon as reasonably practicable within the meaning of r 13.3(1) (b) CPR. I say this for the following reasons:

(a) There are no details of the"preliminary overtures" made to settle the matter whether there were oral or written exchanges or between whom they were made. The statement "preliminary overtures" is itself vague and unhelpful. It suggests on its face that there were no serious negotiations at all and it is not enough for a Defendant to sit idly by on the faith of some preliminary discussion. In any event these "preliminary overtures" explained why the first Defendant did not initially file a defence. It does not explain why she failed to act after the judgment was entered against her. It is noted that a period of some 10 months had elapsed after the time for

filing the defence had expired and the order of Best J giving judgment for the Claimant. Her explanation for this delay is that "preliminary overtures had been made to settle the matter and this led me to defer pursuing it with the required vigor."

(b) The evidence of "strained circumstances" is also lacking in detail. She explains that she is a self employed shop keeper of very modest means and earns a livelihood by running a parlor located to the front of her home. In it she sells soft drinks, biscuits, and flour, rice, sugar and sundry items for household use to persons in the immediate neighborhood. She is the principal breadwinner of the family and usually pays light bills and assists with water rates and taxes. The household bills, food expenses and telephone bills are shared between herself and her daughter.

While the Court understands that the first Defendant may be a person with modest means it is no explanation for her failure in taking steps sooner to set aside this judgment. The firm of Lex Caribbean represented that it was the first Defendant's attorneys on record by letter dated 2nd July 2007. Since that time Ms Wilson of that firm represented the first Defendant at every court hearing. What was the difference in the state of the first Defendant's finances from May 2008 when judgment was entered against her to November 1999 when she eventually filed this instant application? There simply is no evidence. The fact that she was able to keep an attorney at law on record, who appeared for her in these proceedings, filed comprehensive affidavits in February 2009 and made a former application to set aside the judgment in May 2009 can only mean that she had the means to pursue this matter but simply elected not to set aside the judgment and was prepared to abide the Court's ruling until filing this application in November 1999. In fact what is indeed telling in this case is the evidence of the first Defendant that it was "*owing to her strained circumstances and to inadvertence I was unable to pursue this action.*" This Defendant has admitted that she did not pay enough attention to her own matter than she should have. This is certainly borne out by the evidence. This litigant cannot cross the hurdle of 13.3 1(b) CPR on this admission.

(c) The first Defendant deposes to a campaign of harassment by the Claimant. She says there are "*approximately several engaging the attention of the Magistrates Court in Scarborough*". She deposes that these placed more demands on her "slender resources". This explanation is also unsatisfactory. If there was a campaign of harassment, all the more reason for the first Defendant to boldly assert and preserve her rights in this matter. If she has slender resources she must certainly prioritise. There are no particulars supplied to this Court as to the nature of the magisterial proceedings. In the absence of any such details the main priority of this Defendant since May 2008 should have been to set aside an order which gave the Claimant possession of her property.

5.5 There is another aspect of these proceedings which was not dealt with fully by attorney for the fist Defendant. Attorney at law alluded to the fact that undertakings were given by the Claimant in these proceedings to "preserve the status quo". After judgment was entered by Best J on 8th May 2008 the Court gave directions to determine the issue as to whether an injunction should be granted retraining the Defendants, their savants or agents from excavating or entering or remaining upon the Claimant's lands or from interfering with the Claimant's use and enjoyment thereof. This injunction had absolutely nothing to do with the fact that possession had already been granted to the Claimant to the first Defendant's plot.

5.6 On 14th May 2009 a significant event occured. The first Defendant filed its application to set aside the judgment and the Claimant filed a notice of discontinuance to discontinue its claim for injunctive relief. At that hearing a cross undertaking was given "*that everything will remain as it is until 17th July 2009 or until further order."* On 17th July 2009 the first Defendant withdrew its application to set aside the judgment with costs. No further order was made in the proceedings for injunctive relief. It would appear that the notice to discontinue this claim rendered any further directions unnecessary. In any event the first Defendant, having withdrawn her application to set aide the judgment, with no orders in place nor undertaking simply left the matter to once again drift until November 1999 when she filed this application.

5.7 Between the period July 1999 and November 1999 there is absolutely no evidence as to why this Defendant did not act sooner to set aside the judgment. Certainly she was "in funds" to make the first application in May 1999, therefore financial constraints are not an excuse. There were no overtures for settlement. Whatever campaign of harassment existed, it did not present her from moving to set aside the judgment in May 1999. There is an unexplained lull in the proceedings between May 1999 to November 1999. Such an unexplained level of inactivity cannot be condoned by the Court and she has failed to demonstrate that she acted as soon as reasonably practicable after judgment was entered against her.[7]

6. Realistic prospect of success

6.1 In this application the first Defendant raised a number of triable issues: whether the relationship of landlord and tenant existed between the parties, whether the Claimant's claim for possession is extinguished not having taken any action within 16 years as prescribed in section 3 of the Real Property Limitation Ordinance and whether the Defendant and her predecessors in title were in exclusive possession for a period exceeding 70 years of a parcel of land which she had cause to be surveyed in 2007.

6.2 It is unfortunate that these issues will not be ventilated in this action. The overriding objective however cannot be called upon to the assistance of the first Defendant. As Barrow JA observed the rule makers have ordained a policy regarding default judgments. It is as simple as that. The question of whether she has a realistic prospect of success is rendered moot by her failure on the evidence to satisfy the condition of rule 13.3(1) (b) CPR.

7. Order

[7] See ***Jolene Murray v Laura Issac*** HC 183 of 2008

7.1 The Defendant's application for permission to set aside the judgment of Best J dated 8th May 2008 is therefore dismissed. The costs of that application are to be paid by the first Defendant to the Claimant assessed in the sum of $2,500.00.

Dated: February 12, 2010

Vasheist Kokaram
Judge