IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-04004

BETWEEN

TREVOR BENJAMIN

Claimant

AND

SUMINTRA RAMSAROOP

FELLTON EDWARDS

Defendants

****

Before: Master Alexander

Appearances:
For the claimant: **Ms Aaliyah Hosein**
For the defendant: **Ms Sasha Paula Singh**

1. On 9th April, 2009 the claimant obtained judgment in default of appearance against the defendants for the payment of an amount to be decided by the court for damages, interest and costs (hereinafter "the judgment"). On 7th October, 2011 the defendants filed an application seeking permission to set aside the judgment and to enter a defence. The application to set aside the judgment is pursuant to **Part 13.3 (1) Civil Proceedings Rules, 1998 as amended** (hereinafter "**the CPR**"). In order to succeed on such an application, the defendants must satisfy the two conditions prescribed in the rules, namely: (a) that they have a realistic prospect of success and (b) that they acted as soon as reasonably practicable when they found out that judgment had been obtained against them. The claimant asserts that the defendants have failed to satisfy both conditions.

2. The facts in brief are that on or about 12th July, 2006 an accident occurred on the Churchill Roosevelt Highway, Arima in the vicinity of Tumpuna Road between the claimant's servant

and/or agent who was lawfully driving motor vehicle number PBT 8383 and the second defendant, the servant and/or agent of the first defendant. The claimant claims that the collision was caused solely by the negligence of the second defendant and has caused him to suffer damages, expenses, loss and inconvenience.

3. Counsel for the claimant has set out the following timeline which greatly assisted the court:
   - 5th February 2007 - pre-action protocol letters sent to the first and second defendants from claimant's attorney at the address of the second defendant, 8 ¾ mm Guaico, Tamana, Sangre Grande. No response was received and these letters were not returned.
   - 20th December 2007 - claim form and statement of case filed; not served on defendants due to difficulties in locating them.
   - 16th October 2008 - claim form and statement of case re-filed; same difficulties to effect service.
   - 11th February 2009 - claimant's application for substituted service by advertisement.
   - 13th February 2009 - order for substituted service granted.
   - 11th & 18th March 2009 - claim advertised in the Express Newspaper.
   - 9th April 2009 - judgment in default entered against the defendants.
   - 25th February 2010 - the claimant's witness statement filed.
   - 1st July 2010 - assessment set to proceed but adjourned, claimant ill.
   - 12th May 2011 - assessment set to proceed and adjourned.
   - 14th July 2011 - assessment set to proceed but adjourned, for the defendants to retain an attorney at law.
   - 3rd October 2011 - assessment set to proceed but adjourned for the defendants to make application to set aside judgment.
   - 7th October 2011 - application filed to set aside judgment.
   - 30th December 2011 - claimant's affidavit in response to application filed.
   - 28th February 2012 - submissions filed on behalf of the defendants.
   - 2nd April 2010 - submissions filed on behalf of the claimant.

4. The defendants claim that they first became aware of this action by letter dated 18th May 2011, informing them of the adjourned court date. When they attended court on the 14th July 2011, they became aware that default judgment had been entered against them. The defendants were deemed to have been served with notice of the action from the date of the second advertisement in the newspaper, 18th March 2009. Counsel for the defendants does not reject this. In her submissions, counsel for the defendants emphasizes that the test is simply whether there is a realistic prospect of success and whether the defendants' conduct demonstrated that they acted as soon as reasonably practicable after they learnt of the judgment. This is accepted. It is not the conduct **prior** to this that is relevant but **after** they learnt that judgment has been entered against them. See ***Bertin Benny*** **v** ***Brian Benny*** **CV 2008-02475**. I will now examine the two limbs of the application.

Realistic Prospect of Success

5. The term *"realistic prospect of success"* has been construed as meaning something more than "arguable." In the case of ***ED and F Man Liquid Products Limited*** **v** ***Patel*** **[2003] EWCA 472**, Lord Justice Potter quoted Moore-Bick, J in *International Finance Corporation Utexafrica Sprl.* (2001) CLC 1361, "… *to say that the case has a realistic prospect of success suggests something better than that it is merely arguable … 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. In my view … "realistic prospect of success"… means a case which carries a real conviction."* [emphasis mine] See also ***General Earthmovers Limited*** **v** ***Estate Management and Business Development Company*** **CV2006-04052**.

6. It is to be noted further that the term "realistic prospect of success" was described as being, "*obviously a higher threshold requirement than merely a reasonable prospect of success*" in a claim. See ***Curt Semper*** **v** ***Mandy Sampson and The New India Insurance Company Trinidad and Tobago Limited*** **CV 2010-4557 page 5** per Rajkumar J.

7. The relevant test is the evidence that could reasonably be expected to be available at trial. Moosai J in ***John*** **v** ***Mahabir et al*** **CV 2008-02475** stated that, "*[T]he Defendant is not required to show that his case will probably succeed at trial. A case may be held to have a real prospect of success even if it is improbable: White Book 2007 Vol 1 para 24.2.3. In determining whether the Defendant has a realistic prospect of success, the court is not required to conduct a microscopic assessment of the evidence nor a mini trial. … Instead, the court should also consider the evidence that could reasonably be expected to be available at trial*" [emphasis mine]

8. To be noted also is the reference made in the claimant's submissions to ***Curt Semper*** (supra) that a defendant must now show "a realistic prospect of success", instead of a "substantial ground of defence" and the former imposes a higher burden than the latter.

9. To my mind, a realistic prospect of success refers to a prospect of succeeding that is tangible, and carries a real conviction. It cannot be illusive or fanciful. Further, there must be some direct material from the defendants as to the nature of the defence that they want to raise and/or sufficient evidence to establish that the defence has a **realistic** prospect of success. Whilst the defendants do not have to prove their case at this stage and it is not required that the full strength of their defence be tested, the defendants' affidavits of merit are to be considered. These affidavits sought to introduce a different version of how the accident happened but the evidence does not discredit the version given by the claimant. There is an attempt therein to claim contributory negligence on the part of the claimant. It is to be noted that the defendants did not provide any form of corroborating evidence for their version of the facts e.g. a police report supporting their version or even police coding. In my view, this is not fatal at this stage as the relevant test is the one set out in ***John*** **v** ***Mahabir*** (supra) as to whether the evidence could reasonably be available at trial, so is a lower standard than on a balance of probabilities. To be noted, however, is that their affidavits were silent as to whether they reported the accident, as most wronged parties do, and there is no evidence that they were seeking to recoup compensation from the claimant for this accident, which he or his agent allegedly caused.

10. The defendants have exhibited also a draft defence to the instant application in which they deny that they were negligent and rather alleged that the accident was caused or contributed

to by the negligence of the claimant. Whether or not a defence discloses a realistic prospect of success depends on the facts of the case. The nature of this case is such that the different version of events disclosed in the defendants' draft defence gives them a more than likely chance of success at trial.

11. The defendants are not required to bring evidence at this stage to set out a prima facie case of negligence on the part of the claimant. Bearing in mind that it is not my duty to conduct a mini trial and investigate the merits of the defence, I am satisfied that the defendants have established a **realistic** prospect of success. I will now look at the second limb of **Part 13, CPR**.

As Soon as is Reasonably Practicable

12. In keeping with the overriding objective of **the CPR** to "deal with cases justly", 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. Where there is delay, it must be explained in his affidavit of merit. See ***Thorn plc* v *MacDonald* (1999) The Times, October 15, 199** where the principles on delay were stated to include the length of any delay by the defendant (other than pre action delay which is irrelevant); any failure by the defendant to provide a good explanation for the delay, though it is not always a good reason to refuse to set the judgment aside; if there is a defence with a real prospect of success, and that justice should be done; and prejudice (or absence of) to the claimant.

13. The defendants stated that they were not served personally with the claim form and statement of case and maintained that they only became aware of the judgment against them on 14th July 2011 when they attended the assessment of damages hearing at the High Court. In their affidavits, they admitted that they had received notice of these proceedings via a letter dated 18th May, 2011 sometime after that date. Yet they took no steps to defend the action, choosing to wait another 8 weeks to attend court to find out what was taking place. Of utmost importance is the conduct of the defendants between learning of the judgment and the application to set aside. The application to set aside the judgment came some **85 days** after the defendants became aware of the judgment against them (i.e. 14th July – 7th

October 2011). Did the defendants act as soon as reasonably practicable and/or promptly in the circumstances?

14. Counsel for the claimant has submitted that there was a 2 ½ years lapse between the deemed date of service of the claim form and statement of case by the second advertisement on 18th March, 2009 and the application to set aside. This argument is without merit since, as stated above, the relevant date would be when they became aware of the judgment having been entered against them. Thus, conduct **prior** to this date is not relevant but only **after** they learnt that judgment has been entered against them as set out in ***Bertin Benny*** **v** ***Brian Benny*** (supra). These defendants took **85 days** before filing the application to set aside.

15. In ***Martin Rogers*** **v** ***The Attorney General of Trinidad and Tobago*** **CV2009-00279** the defendant who filed its application to set aside judgment some 4 months after judgment was entered was held not to have acted as soon as reasonably practicable. Also in the case of ***Baptiste*** **v** ***Alexander*** **CV2008-04227** the defendant who filed his application to set aside 2 months after judgment was entered was held not to have acted as soon as reasonably practicable. Further, in ***Anna Debideen and Betty Debideen*** **v** ***Michael Ramroop*** **CV2009-04036** Boodoosingh J expressed the view that an application to set aside a default judgment filed 7 weeks after the defendant learnt of the judgment could not be construed as acting as soon as reasonably practicable. He stated that the delay must be seen in the context of the history of the claim, where an alternative mode of service was permitted and the court was satisfied that there was service by pre-paid registered post.

16. The plight of these defendants is unfortunate. The first defendant is unemployed and the second defendant is a gardener. It was submitted that the defendants acted as soon as they found out about the judgment and made numerous attempts to properly retain an attorney. They claim that the delay was due to difficulties in retaining an attorney at law and to financial constraints. They were only able to pool their resources and make further financial arrangements to retain their present attorney on 30th September 2011. It was on this day when the phrase "default judgment" was explained to them that they fully understood what it meant and its import. Counsel for the defendants submitted that this is the date from which the period of delay should run and that as the application was filed on 7th October, 2011 the

delay was not unduly long and they had acted as soon as reasonably practicable. This submission of counsel for the defendants is rejected as erroneous and holding no weight and I reiterate that the learning is clear. The test is not when a full understanding of the term was gleaned by a defendant against whom a default judgment has been entered nor is it impecuniousness. The relevant date would be when they became aware and/or were informed that judgment was entered against them. It is the defendants' evidence that on 14th July, 2011 when they attended court for the first time they were told that judgment in default was entered against them. This is clear and cogent evidence that they became aware of a judgment on that date. They would have had such knowledge for **85 days** before taking steps to set aside this judgment.

17. Although there is no prescribed timeline to define the meaning of "as soon as reasonably practicable", this does not open the floodgates to exorbitant periods of delay, such as in the case at bar. In ***Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased)*** **v** ***Antigua Commercial Bank*** **ANUHCV 1997/0115** Thomas J (as he then was) stated that as no specific timeframe is given in the rules, reasonableness depends on the facts of each case. See ***Des Vignes*** **v** ***Manning and Gordon*** **CV 2007-01867** per Kokaram J.

18. I accept the claimant's submissions that it was not sufficient for the defendants to simply state that they could not afford an attorney; rather they needed to show that they acted with alacrity in seeking to defend the claim. Defendants against whom a judgment has been entered because of their failure to comply with the timelines set in the rules must act swiftly to set aside that judgment and do so in as reasonably practicable a way as possible. In my view, the reasons advanced for the delay in acting to set aside the judgment were neither good nor proper explanations for the delay in the circumstances of this case. Further, it is my view that this claimant took all the necessary steps to bring these proceedings to the attention of the defendants, and expended considerable time and monies to bring his matter to the assessment stage and will suffer prejudice. The defendants were always aware that the accident had occurred and in the face of ample opportunity to act have not done so in as soon as reasonably practicable a manner. The defendants have therefore failed on this limb.

19. This court emphasizes that the conditions to be satisfied to succeed in this application are conjunctive. Both conditions are critical to the success of any application under the Rule. See ***Nizamodeen Shah*** **v** ***Lennox Barrow*** **Civil Appeal No 209 of 2008 at page 3, paragraph 11**. Although the defendants in the instant matter have shown a defence with a realistic prospect of success, they have not satisfied the second limb of acting as soon as reasonably practicable. In these circumstances, I am constrained to dismiss the application to set aside the default judgment with costs to be paid by the defendants to the claimant in the sum of $1,500.00.

Dated 29th June, 2012

Martha Alexander

Master (Ag)

Judicial Research Assistant: Ms Kimberly Romany