IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-03821

BETWEEN

JOHN HORSHAM **Claimant**

AND

ROOPNARINE'S LINEN CLOSET AND INTERIOR ACCENTS LIMITED
Trading as
ROOPNARINE'S LINEN CLOSET AND INTERIOR ACCENTS
Otherwise
ROOPNARINE LINEN CLOSET AND INTERIOR ACCEN
Defendant
****

Before: Master Alexander

Appearances:
For the claimant: **Mr Lindsay Holder, instructed by Brian David Hewitt**
For the defendant: **Mr Gerard Raphael**

REASONS

1. These reasons relate to an application to set aside default judgment (hereinafter "the judgment") entered against the defendant for failure to file an appearance and for time to be enlarged for the making of the application. The judgment was obtained on 24th October, 2011 for the payment of the sum of $21,330.99. The application to set aside was made on 4th November, 2011.

2. The facts in brief are that the claimant purchased from the defendant a 3 piece leather living room set for the price of $19,500.00, which he took delivery of on 10th December, 2009. The purchase was based on an advertisement of leather sets for sale by the defendant and on the assurances given by the defendant's employee/agent that the set was indeed of leather. Subsequently, in July, 2010 the material covering the set began peeling and flaking off and it

was discovered that the set was not leather but comprised of 93% poly fiber and 5% textile fiber and the defendant was asked for a refund or to repair it and return it in the form of a leather set to him. The defendant on 18th November, 2010 collected the set of chairs and has kept same as well as the monies paid by the claimant.

PART 13 CPR APPLICATIONS

3. When making an application to set aside a judgment pursuant to **Part 13 of the Civil Proceedings Rules, 1998 as amended** (hereinafter referred to as "**the CPR**"), there are 2 hurdles that a defendant must cross:
   (i) First, he must show that he has a defence with a realistic prospect of success; and
   (ii) Secondly, he must explain any delay in making the application i.e. he acted as soon as reasonably practicable when he found out that judgment had been entered against him. It is not the conduct **prior** to this that is relevant but **after** it is learnt that judgment has been entered. See ***Bertin Benny*** **v** ***Brian Benny***[1] as well as ***Nizamodeen Shah*** **v** ***Lenno Barrow***.[2]

4. In the recent Privy Council decision of ***The Attorney General*** **v** ***Keron Matthews***[3] it was made clear that applications to set aside judgments like the instant one at bar are not subject to an implied sanction imposed by the rules and that a defendant did not have to satisfy the conditions stipulated in **Part 26.7, CPR** in addition to **Part 13.3, CPR**.

Reasonable Prospect of Success

5. A real prospect of success in a claim means that the prospect of success must be real and not false, fanciful or imaginary. This term was defined by Moosai J in ***John*** **v** ***Mahabir***[4] et al as, "*[A] realistic prospect of success means that the defendant has to have a case which is better than merely arguable (International Finance Corporation v Utexafrica Sprl (2001) CLC 1361 and ED&F Man Liquid Products Ltd v Patel (2003) EWCA Civ 472). The 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*

1 *Bertin Benny* v *Brian Benny* CV2008-02475
2 *Nizamodeen Shah* v *Lenno Barrow* Civil Appeal No 209 of 2008 at page 2 paragraph 11
3 *The Attorney General* v *Keron Matthews* [2011] UKPC 38/[2011] AER 174
4 *John* v *Mahabir* HCA No 866 of 2005

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. In Royal Brompton Hospital NHS Trust v Hammond, the Times, May 11, 2011, CA, it was held that, when deciding whether a defence had a real prospect of success, the court should not apply the same standard that would be applicable at trial, namely the balance of probabilities. Instead, the court should also consider the evidence that could reasonably be expected to be available at trial: See O'Hare and Brown, Civil Litigation 12th Edn (2005), para 15.017."

6. The defendant has exhibited a draft defence to the instant application in which it denied that the 3 piece sofa set was advertised and/or that it was sold as a leather set, stating that at all times the defendant was aware that the set was a "leathermatch" product i.e. parts that came into contact with the customer's body were leather and the outer portions were vinyl matched to the colour of the leather (45% leather and 55% polyurethane). The defendant has also denied that its servant and/or agents made any representation to the claimant that the sofa set was of leather. In its defence, it is further alleged that the claimant did not properly store or maintain the sofa set resulting in the damage. It is also stated in its defence that the defendant has always been willing and ready to repair the sofa set at its own cost but that the claimant, after representing that it was okay for the defendant to repair the set and following upon the purchase of the materials to do so, has recanted and requested a new set.

7. Counsel for the defendant has submitted that apart from the defence raised above, the claimant who had the use of the set for 7 months before complaining that it was peeling has delayed too long to reject the set and referred the court to **section 36 of the Sale of Goods Act Chapter 82:30** which provides that a buyer is deemed to have accepted the set when it was delivered to him and he used it, which is an act inconsistent with the ownership of the defendant.

8. I accept the submissions of the claimant that the central issue is whether the claimant and defendant entered into a contract to buy and sell a set made of or covered with leather. I also accept that another triable issue is whether the set purchased by the claimant was known or not to him to be made of leather. The defendant seeks to advance poor storage of the furniture by the claimant as well as other arguments cited above. There is nothing advanced

in the defendant's affidavit or documents attached and/or draft defence to bolster its claim of a realistic prospect of success.

9. In my view, the defendant has not shown that it has a defence with a realistic prospect of success or that it has satisfied the test laid down in ***John* v *Mahabir*** (supra). Further, I do not find that there was inordinate delay by the claimant in intimating to the defendant that the set was rejected. I note also that the defence did not raise the issue of the **Sale of Goods Act** and this was only mentioned in the submissions by the defendant. For these reasons alone, this application ought to be dismissed but for the sake of completeness I will look at the second limb of **Part 13, CPR**.

As Soon as is Reasonably Practicable

10. As a rule, a defendant who wishes to apply to set aside a judgment under **Part 13 CPR** must act reasonably promptly, and where there is delay it must be explained in his affidavit of merit. In ***Thorn plc* v *MacDonald***[5] the following principles on delay were outlined:
    i. while the length of any delay by the defendant must be taken into account, any pre action delay is irrelevant;
    ii. any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but it is not always a good reason to refuse to set the judgment aside;
    iii. the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done;
    iv. prejudice (or absence of) to the claimant should also be taken into account.

11. Further, in ***Louise Martin (as widow and executrix of the estate of Alexis Martin, deceased)* v *Antigua Commercial Bank***[6] Thomas J accepted that no specific time period is given in the rules so reasonableness depends on the facts of the case. Thus in ***Rohini Khan* v *Neville Johnston***[7] Rajkumar J in deciding the issue of reasonable delay noted that, "*the delay is explained as resulting from attorney's office administration difficulties. … I consider that occasional glitches in the running of an attorney's practice may occur, falling short of negligence or even inadvertence,*

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5 *Thorn plc* v *MacDonald* (1999) The Times, October 15, 199

6 *Louise Martin (as widow and executrix of the estate of Alexis Martin, deceased)* v *Antigua Commercial Bank* ANUHCV 1997/0115

7 *Rohini Khan* v *Neville Johnston* CV2009-02311 (unreported) at pages 2-3

which may impact on time frames set by the rules. The delay from June 18th to July 5th has been candidly and adequately explained. I consider that the defendant acted as soon as reasonably practical in the circumstances set out above." At appeal, Mendonca JA, dismissing the appeal, reaffirmed this position stating, "*reasonably practicable… acknowledges that there will be, as the judge put it, glitches in attorney's office…. It's a less trying standard than, say, if you have to have an exceptional reason or a very good reason… 'reasonably practicable' seems to me to suggest a more mundane type of standard that you will look at these things and the way things might work.*"[8]

12. The defendant admits that it was served with the claim form and statement of case on 13th October, 2011 but that due to a miscommunication between its attorney and itself, an appearance was not filed within the stipulated timeframe. The defendant in its affidavit admitted that it was informed of the need to put in an appearance within 8 days of service. It is to be further noted that the defendant stated that its appearance was actually prepared on 25th October, 2011 at which point it was already out of time yet no attempt was made by the defendant or its attorney to secure an extension of time. Attempts were made to file the appearance on 27th October, 2011 and it was at that time that it was discovered that a judgment had been entered against it on 24th October, 2011. It is to be noted that whilst a full 14 days had elapsed between the defendant becoming aware that proceedings had been commenced against it and attempts made to enter an appearance that length of time is an irrelevant consideration. What is relevant, however, is the timeframe between learning of the judgment and the application to set aside. The application to set aside the judgment came some 8 days after the defendant became aware of the judgment against it. Did the defendant act as soon as reasonably practicable and/or promptly in the circumstances?

13. Counsel for the defendant has submitted that having regard to the fact that the defendant had to provide instructions to its attorney on the application as well as on its defence, it acted as soon as reasonably practicable. Further, delay was also occasioned because one of the directors of the defendant was out of the jurisdiction and instructions had to be obtained from her. Counsel also asked that due notice be taken of the fact that in its affidavit evidence in support of the application, each allegation in the statement of case was fully addressed; all relevant documents were attached; the reasons for the delay in making the

[8] *Rohini Khan* v *Neville Johnston trading as Johnston Construction* Civ App No 56 of 2011

application was explicitly stated and a draft defence was exhibited. Further, as there is no prescribed timeline to define the meaning of "as soon as reasonably practicable" it was submitted that the defendant acted as soon as she found out that it was necessary for her to properly retain her attorney and to have the proper documentation necessary to defend this action so had acted as soon as reasonably practicable for her to do so. Counsel for the defendant sought to rely on the case of ***Bertin Benny*** **v** ***Brian Benny*** (supra) where Stollmeyer J (as he then was) stated at pages 3 and 6 respectively that:

The delay is therefore just over one month. Regrettably, there is no good or proper explanation for the delay. The Defendant puts no material before me which enables me to conclude that he acted as soon as is reasonably practicable after judgment had been entered against him, and on that basis alone the application should be dismissed.

In the circumstances, had the Defendant put material before me to explain the possible delay I would have been minded to set aside the existing judgment on one of two bases.

He further sought to rely on the comment of Mendonca JA in ***Nizamodeen Shah*** (supra) at page 12:

This delay does not fall into that category of cases 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. 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 …

14. I accept that the defendant has provided reasons for the delay in making the application. These reasons included the need to provide proper instructions to her attorney and to answer all the allegations in the statement of case as well as to ensure that the proper documentation necessary to defend this case was attached and to have a draft defence. In the submissions of the defendant it is stated that, "*the Defendant acted as soon as she found out that it was necessary for her to properly retain her Attorney-at-Law, and to have the proper documentation necessary to defend this action…"* Are these reasons sufficient to explain away the delay in the circumstances of this case? When was it "found out that it was necessary for her to properly retain her attorney?"

15. I accept that the delay was a mere 8 days from the time when the defendant found out that a judgment was entered against it before it made the application. From the time the statement of case was served on this defendant, however, it would have been aware that it was going to defend this matter or not and so put itself in a position to prepare to do so by getting the necessary documentation together. In my view, the documents attached were not voluminous in nature and/or certainly not out of the possession of the defendant sufficient to warrant the needing of a lengthy time to secure same. The issues in this matter were also not complicated or fraught with difficulties so as to warrant an extended period for the preparation of the defence.

16. A defendant against whom a judgment has been entered because of its 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 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. The defendant has failed on this limb too.

17. It is, therefore, ordered that -
    1. The application to set aside the default judgment is dismissed.
    2. Costs of the application to be paid by the defendant to the claimant in the sum of $1,500.00.

Dated 16th May, 2012

Martha Alexander
Master (Ag)