**IN THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO CV 2018-01987**

**BETWEEN**

**TREVOR RAMJARRIE**

**AND**

**CHRISTINE RAMJARRIE**

Claimants/Judgment Creditors

**AND**

**NEIL SANKAR**

Defendant/Judgment Debtor

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**Before: Master Alexander**

**Date of delivery:** **08 March 2021**

**Appearances:**

**For the Claimant:** **Mr Anderson Denny Modeste**

**For the Defendant:** **Ms Reeyah Chattergoon**

**DECISION**

**APPLICATION**

1. By application filed on 13 March 2020 ("the application") the defendant sought to set aside a judgment in default of defence entered against him on 03 January 2019. The defendant also sought permission to file and serve a defence to the claim against him. The application was supported by the affidavit and supplemental affidavit of the defendant and an affidavit of his wife, Ms Shacoothala Sooknanan. The affidavits and supplemental affidavit were filed on 13 March 2020 and 22 June

2020, respectively. The substantive claim is for a mandatory order and/or alternatively damages for nuisance/negligence. More specifically, the claimants requested an order mandating the defendant to remove the obstruction to the main roadway drain of the Cunapo Southern Road. Alternatively, they sought damages against the defendant for costs to remove the obstruction/blockage of the said drain, to restore the free flow of water from the drain and their property.[1]

**REQUIREMENTS FOR A DEFAULT JUDGMENT TO BE SET ASIDE**

2. The conditions to be satisfied to have a judgment set aside are set out in Part 13.3 (1) and (2) of the Consolidated Civil Proceedings Rules 2016 (as amended). The defendant is required to show that he has a realistic prospect of success in the claim[2] and that he acted as soon as reasonably practicable when he found out that the judgment was obtained against him. The crux of the latter condition being when he found out about the judgment, and not the date it was entered. Further, it must be noted that the conditions are conjunctive so both conditions must be met for the defendant to succeed in setting the judgment aside.

**(i) Realistic Prospect of Success**

3. Simply put, a realistic prospect of success refers to a case that has a real conviction of success, not one that is merely arguable[3], nor one that is fanciful.[4] In ***Swain*** v ***Hillman & another***[5] Lord Woolf MR stated that,

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1 The claimants are the owners and occupiers of a house and land at #467 Navet Village, Rio Claro. The Cunapo Sourthern Road runs in front and along the southern boundary of the claimants' land.

2 *Nizamodeen Shah* v *Lenno Barrow* Civil Appeal No 209 of 2008

3 *International Finance Corporation* v *Utexafrica Sprl* [2001] AER (D) 101

4 *Swain* v *Hamilton & another Swain* v *Hillman & another* [2001] 1 AER 91

5 Ibid

"the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, they direct the court to the need to see whether there is a 'realistic' as opposed to a fanciful prospect of success." A case may have a realistic prospect of success even if it is improbable.[6] In light of this, a court is not required to conduct a mini trial or meticulous assessment of the evidence, however, it is permitted to analyse the facts and consider connected documents in determining the substance of the defendant's case.

**Response to Claimants' Case**

4. The claimants' pleaded case was that the defendant wrongfully filled the main road drain and constructed a boundary fence, which obstructed the natural flow of water within the said drain. It prevented the free-flow of water from the claimants' property, thereby causing water accumulation. This eventually resulted in structural damage, health hazards and the prevention of the claimants' full use and enjoyment of their property. In support of their claim, the claimants exhibited *inter alia* photographs of the blocked drain and water accumulation alongside the survey plan of their property.

5. In response, the defendant argued that the claimants had caused the difficulties by filling their interlot drain with concrete and erecting a fence in it. Further, he contended that the Ministry of Works and Transport Highways Division (Nariva/Mayaro) (hereinafter "Ministry") filled the roadside drain to facilitate the repair of a collapsed cylindrical pipe. The defendant maintained that he did not block the roadway drain.

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[6] White Book 2007, Vol 1, para 24.2.3

6. In support of its case, the defendant relied on the affidavit evidence of his wife and himself, both of whom attested to the claimants' contributory negligence as well as a possible counterclaim for injuries caused to the defendant's wife. He also alleged, in his affidavit of merit, that the Ministry might have caused or contributed to the damage. He produced a letter dated 05 March 2020, which supposedly confirmed that the Ministry had solved the "ponding" issue by undertaking works 20m from the claimants' property, which involved the re-direction of "run-off" water to an existing culvert approximately 25m from the claimants' boundary. However, he stated that there was still an issue of the cesspit and soakaway[7] as raw sewage continued to flow onto his land, which the claimants did not repair. Ms Sooknanan's affidavit also contained evidence identifying the alleged contributory negligence of the claimants, which the defendant relied on as his defence.

7. Counsel for the claimants submitted that the defendant's assertions were false. He pointed to evidence such as the contemporaneous photographs, which allegedly showed (i) that the interlot drain was not blocked; and (ii) that the roadway drain was blocked at the boundary of the two properties to facilitate work on the defendant's property. Further, he asserted that the letter dated 05 March 2020 contradicted the defendant's version of events. He stated that no mention was made of the roadside drain filling by the said Ministry, further; reference was made to a collapsed culvert 20m from the claimants' property, which was separate and apart from the blockage created by the defendant on the boundary of the properties. He contended that the photographs clearly showed the actual area of concern. Further, he asserted that even though in the said letter, reference was made to the "ponding" issue being caused by the refusal of the second claimant

[7] Soakaways are designed to drain away excess water caused by heavy rainfall

to grant permission to regrade the drain in their property, this contradicted the actual blockage evident in the photographs. In issue also was a report purportedly prepared by a structural engineer that the defendant argued was not but, more importantly, was irrelevant to the claim and lacked probative value. Counsel for the defendant submitted that this misleading use of the report demonstrated dishonesty and was an issue that ought to be determined at the trial of this matter.

**DISCUSSION**

8. This court was tasked with the responsibility to determine whether a real case was made out or a realistic defence was advanced without conducting a mock or mini trial. It has to consider also the likelihood of the availability of evidence at the trial stage. It was clear that both parties were at loggerheads and were at opposite ends of the versions of the facts presented. However, the court noted that the defence was not an unclothed, unjustifiable one. Further, it was clear that the defendant, on the evidence before this court, at the very least, had raised contributory negligence. The conclusion of attorney for the claimants was that the documentary evidence illustrated the factual inaccuracies by the defendant thus failing to show that his defence has a realistic prospect of success. This argument was rejected. Clearly, there were competing versions of events put forward by the parties. Bearing in mind that this court should not pre-judge or make preliminary conclusions about the evidence, it formed the view that further investigations into the facts were necessary, which might modify the evidence and so affect the results of the trial. The defendant has raised issues of contributory negligence, mitigation and authenticity and admissibility of documents relied on by the claimants in support of their claim. Thus, the defence was not a bare denial; therefore, the court could not conclude that the defendant has no

realistic prospect of success. The defendant has provided some documentary evidence, and it was contemplated that more could be available at trial. In summation, this court was of the view that the affidavits raised litigable issues that should be given the opportunity to be fully ventilated in court. Consequently, the defendant has crossed the threshold for a realistic prospect of success in this matter.

**(ii) Acting as soon as is Reasonably Practicable**

9. The court bore in mind the following principles set out in the case of ***Caribbean New Media Group Limited***[8]:

> *[38] The terminology of the second limb of Rule 13.3 (1) permits the consideration of a spectrum of conduct in determining whether the steps taken were executed as soon as was reasonably practicable. Inherent in this test is a necessary level of flexibility. Such flexibility is necessary for the fair and efficient operation of the CPR, in particular, to mitigate the risk of default due to unforeseen occurrences.*
>
> *[39] …While the court must be mindful to ensure that the procedural ideology of timeliness under the CPR is adhered to, too narrow an approach…can be inimical to the due progression of civil litigation.*
>
> *[40] … the wording of the second limb, Rule 13.3 (1)(b) reveals an in-built level of elasticity, sufficient to encompass a range of divergent circumstances.*

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[8] *Caribbean New Media Group Limited* v *Ingrid Isaac* Civil Appeal No S-209 of 2013

10. The defendant deposed[9] that he became aware that judgment was entered against him when he attended court on 19 November 2019. He stated further that he followed the advice of the court and sought Legal Aid on 20 November 2019. He stated that prior to 19 November 2019, neither his then attorney had informed him of the judgment entered against him nor was he served with it. On 03 December 2019, the defendant attended court and informed the court that he had applied for assistance from Legal Aid. Subsequently, an attorney was appointed to him on 11 February 2020, and she attended court on 12 February 2020 to inform the court of her appointment and applied for office copies of the entire proceedings. By 14 February 2020, she explained to the defendant that judgment in default of defence had been entered against him and of the urgency to take steps to set it aside. The defendant was asked to provide certain documents of evidence to make the application. Attorney for the defendant later received office copies of the proceedings on 19 February 2020 and thereafter took full and complete instructions to file the application. It took him a further month, on 13 March 2020, to file the application to set aside the judgment. It now falls to be determined whether this filing date would satisfy the requirement of as soon as reasonably practicable.

11. Attorney for the claimant submitted that the defendant's assertion conflicted with the evidence. He contended that on the 08 April 2019, Mr Eddison Baptiste, office manager, served an order for a provisional attachment of debt dated 18 March 2019, on the attorney on record for the judgment debtor, Ms Melissa Ramdial. The affidavit of service was filed on April 08, 2019, and formed part of the court's record. For these reasons, the attorney for the claimant argued that the then

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[9] Defendant's supplemental affidavit dated 22 June 2020

attorney for the defendant ought to have been aware of the judgment and the consequential position of the defendant at the time the order was served. Conversely, the defendant gave evidence that his attorney/client relationship with his second attorney, Ms Ramdial, ended sometime in October 2018 when he signed a "cease to act" form. He deposed that he could not read the form and did not know what date was placed on it.

**DISCUSSION**

12. It is now trite that knowledge of the default judgment must be brought to the attention of the defendant in trying to determine whether he acted as soon as practicably or not. It is not knowledge of the claim against him or any other thing or application that is relevant at this stage. What is required is that it is brought to his knowledge that a judgment was entered against him.

13. In the present case, the claimants' attorney relied on the fact that he had served the defendant's attorney with a provisional order in the garnishee application. Based on this, he sought to refute the defendant's explanation that he never got knowledge of the judgment in default. The court noted the insistence by attorney for the claimants that on 08 April 2019, the defendant's then attorney, Ms Ramdial, was served with the provisional order and that the defendant's claim that, purportedly, the relationship had ended was baseless. The court was not impressed with this argument nor was it prepared to impute knowledge to the defendant based on service of a provisional order on his attorney. Also noted was the argument that Ms Ramdial had filed a notice of change of attorney approximately 11 months after on 17 September 2019. By this attorney for the claimants sought to suggest that Ms Ramdial ought to have inform the defendant of the judgment. Thus, the claimants' attorney adopted the position that the defendant

ought to be deemed to have become aware that judgment was entered against him on the 08 April 2019, and 11 months later filed an application to set it aside on 13 March 2020 without providing reasons for the delay.

14. In the view of the court, the relationship between the defendant and his attorney ended at some point between the entry of the default judgment and the notice of change. The lapse of time between these two events was not always pre-determined or fixed as occurring with any degree of immediacy. The defendant maintained that he came to understand or only became fully aware on 14 February 2020 what it meant by judgment having been entered against him. His attorney submitted that a period of 28-31 days[10] was a more than reasonably practical time to file an application to set aside a judgment in default. However, the court was of the view that 19 November 2019 was the date that the defendant was made aware of the judgment and that he was unrepresented at the time. The court also considered the argument that the defendant was illiterate and could not read the change of attorney form, which might explain his failure to understand documents provided to him.

15. As to the plea of *non est factum*[11] whereby the defendant claimed that he could not read the "change of attorney" form and was unaware of the date affixed to it, the court was invited to take note of the three-pronged test set out in ***Saunders***[12]:

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[10] February 14, 2020 (date defendant was made aware) to March 13, 2020 (date notice to set aside was filed)

[11] *Non est factum* is a plea that a written agreement is invalid because the defendant was mistaken about its character when signing it

[12] *Saunders* v *Anglia Building Society* [1971] AC 1004 at 1034:

"for a successful plea of *non est factum*, a party must establish: (i) that he or she suffers from some sort of disability; (ii) that there was a radical or fundamental difference between what the party signed and what the party thought he or she was signing; and (iii) that in signing the document he or she was not careless in the sense of failing to take adequate precautions against falling into error, or failing to take adequate steps to inform himself or herself about the nature and contents of the document in question."

16. The court noted the defendant's claim as to being unable to read and that other legal, documentary evidence before this court, such as a mortgage bill of sale and a memorandum of transfer, did not contain a jurat suggesting that the defendant required the contents of the documents to be re-read to him before execution. The court reflected on the defendant's current affirmation of illiteracy and that this was not determinative as to whether he had passed this limb. At this stage, there was no sufficiency of evidence to enable the court to give an accurate pronouncement on whether the defendant had failed or passed the ***Saunder's*** test. Therefore, it was not prepared to engage in any speculative exercise, as it was invited to do by counsel for the claimants. In any event, issues surrounding the defendant's illiteracy can be fully ventilated and resolved in a trial court, if they arise.

17. The exercise before this court was a simpler one as to whether the defendant had crossed the two hurdles to have the judgment set aside. In the view of the court, the claimants served the then attorney for the defendant with a provisional order in garnishee proceedings. They provided no evidence as to when actual service of the default judgment was conducted, independently, save to suggest that that document might have been attached to the provisional order served on his

attorney. Claimants are required to serve on the defendant the judgment in default, from which point time will be counted. It was not implausible that the defendant might have parted ways from his attorney by the time that provisional order/judgment was served. There was a great deal of speculation surrounding when *actually* the defendant was made aware of the judgment. Even if the court chose to agree with the claimants' timeline of 11 months (service in November 2019) that is not seen as an inordinate delay when taken in context. If the court was to apply a degree of flexibility and elasticity as judicially pronounced in ***Caribbean New Media Group Limited***[13], it must consider that the defendant faced issues regarding legal retention. For instance, the change of attorneys, on more than one occasion and the subsequent need for Legal Aid support, which corroborated his indigence.[14] Further, the court would not hold the defendant accountable for his then attorney's alleged shortcomings, should they be true. In arriving at its decision, the court bore in mind the Privy Council's guidance on the need for flexibility in dealing with judgments not decided on the merits[15]. In any event, the court formed the view that the defendant came to know about the judgment on 19 November 2019 and that in March 2020 the application was filed to set it aside. In the context of this case that delay was not deemed inordinate and he has crossed this hurdle.

18. In summation, the court was not required to conduct a mock trial of all issues. The defendant was deemed to have acted as soon as reasonably practicable when he found out that the judgment was obtained against him. On the evidence before it, the court was satisfied also that there was no prejudice to the claimants to have their evidence

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13 *Caribbean New Media Group Limited*, Supra

14 See para 2 of the defendant's affidavit in support filed March 13, 2020

15 *Strachan* v *The Gleaner Co Ltd* [2005] UKPC 33

tested. The defendant has satisfied the court that both limbs have been crossed to set aside the judgment, which was obtained without a meritorious basis.

**ORDER**

19. It is ordered that:

a) The judgment in default of defence entered on 03 January 2019 is hereby set aside;

b) The defendant do file and serve his defence on/or before 07 April 2021;

c) There is no order as to the costs of the application filed on 13 March 2020, as the defendant is legally aided; and

d) The matter is referred to the Registrar to fix a date for a case management conference.

**Martha Alexander**

**Master**