

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA S 427 of 2005

BETWEEN

**JANET BRATHWAITE GUEVARA
STAFFORD BRATHWAITHE**

Plaintiffs

AND

**THE INCORPORATED TRUSTEES FOR
THE PRESBYTERIAN CHURCH IN TRINIDAD AND TOBAGO**

Defendant

BEFORE MASTER MARGARET Y MOHAMMED

Appearances:

Mr Alvin Ramroop instructed by Ms A Orié for the Plaintiffs

Mr Shastri VC Parsad for the Defendant

DECISION

INTRODUCTION

1. On July 17, 2009 the defendant filed an application (“the instant application”) under Order 13 rule 8 of the Rules of the Supreme Court 1975 (“the RSC”) to set aside the judgment obtained in default of defence by the plaintiffs on May 18, 2005 and for leave

to defend the action. The basis of the defendant's application is that it has a defence on its merits. In support of the instant application was the affidavit of Frederick Lakan filed on July 17, 2009 and a supplemental affidavit of Frederick Lakan filed on April 27, 2010. The plaintiffs filed 2 affidavits in opposition namely an affidavit of Neela Ramyard on April 23, 2010 and an affidavit of Janet Brathwaite Guevara filed on September 30, 2010. On May 11, 2011 when the application first came up for hearing before me the parties agreed to file their submissions which were done on June 7, 2011 by the defendant and on July 8, 2011 by the plaintiffs. In order to fully appreciate the nature of the instant application I will set out the background of the substantive claim.

BACKGROUND

2. On March 16, 2005 the plaintiffs instituted proceedings against the defendant claiming damages for trespass of certain premises situate in Los Iros ("the subject premises"), interest and costs. The defendant entered an appearance on March 24, 2005 and on May 18, 2005 the plaintiff applied for judgment in default of defence against the defendant. On August 22, 2005 the Assistant Registrar entered judgment in default of defence against the defendant and ordered that the defendant pay the plaintiffs damages to be assessed by a Master in Chambers.
3. On January 16, 2006 the plaintiffs requested the Registrar to fix a date for the assessment of damages ("the AD") before the Master. This request was duly complied with and the first hearing of the AD came up before Master Doyle on May 12, 2006. The hearing of the AD was adjourned on 4 occasions for various reasons during the period October 5, 2006 to October 17, 2007. On November 21, 2007 Master Paray-Durity gave the parties directions to file and serve their respective list of agreed and un-agreed statement of issues on or before January 24, 2008, witness statements to be filed and exchanged on or before March 7, 2008 and for the defendant to file and serve its list of documents on or before December 21, 2007 with inspection to take place on or before

January 10, 2008. On April 23, 2008 the Master extended time for the parties to comply with these directions.

4. On March 6, 2008 the defendant filed its 2 witness statements namely of Clyde Lala and Samuel Sinanan and on April 28, 2008 the plaintiffs filed their 2 witness statements namely of the first plaintiff and Kelton Kenny Louison. On January 7, 2009 when the AD came up for hearing before the Master, attorney for the plaintiff indicated to the court that the parties were attempting to settle the matter. On the next hearing on July 21, 2009 it was brought to the court's attention that the defendant had filed the instant application. Subsequently, directions were given for the plaintiffs to file and serve an affidavit in reply to the instant application and it was adjourned for various reasons until the hearing on May 11, 2011. Against this backdrop I will now briefly set out the parties respective positions as gleaned from their affidavits and written submissions.

THE DEFENDANT

5. The defendant claims that it always intended to defend this action since it has a good defence to the claim. It also submits that the plaintiffs' title to the subject premises is in dispute. It had instructed its former attorney to file its defence however based on a misguided premise that the plaintiff had a certificate of title, the former attorney did not file a defence contrary to the defendant's instructions.
6. The merits of the defendant's defence is primarily based on a letter dated July 30, 2003 ("the July 2003 letter") from the Director of Surveys who advised that the subject premises already belonged to the defendant by virtue of Real Property Ordinance Volume 1800 Folio 31. The reasons by the defendant for the delay in making the instant application are also grounded on the misguided premise of the defendant's former attorney, the previous erroneous advice of the former attorney and the second opinion and retention of services of its present more senior attorney at law. The defendant has

also denied that it consented to the judgment on liability since it did not have full knowledge of the result of such action. Further, the defendant has questioned the authority of the plaintiffs to institute and maintain this action on the basis of the endorsements on the Certificate of Title which the plaintiffs rely on and has raised the regularity of the writ of summons which instituted this action.

THE PLAINTIFFS

7. The plaintiffs' contend that the defendant's defence is unsubstantiated. They are of the view that apart from the July 2003 letter, the defendant has failed to produce a Certificate of Title identifying it as the owner of the subject premises neither has it produced sworn evidence from the Director of Surveys explaining the conclusions arrived therein. Further, on the issue of the propriety of the plaintiffs' ownership of the subject lands, the plaintiffs contend that their proof of ownership is grounded in Certificate of Title Volume 1800 Folio 33 dated November 10, 1966. The plaintiffs also deny any fraud on their part and that the defendant has failed to establish any fraud since there was no dishonest act of omission by them.

8. The plaintiffs have submitted that the defendant has not submitted any good explanation for the delay of 4 years in filing the instant explanation since the reason of "erroneous legal advice" has not been accepted by the courts and that the defendant has not offered any further explanation. The conduct by the defendant in allowing a default judgment to be obtained must also be considered by the court since the defendant has not offered any reason to account for its failure to disclose the letter dated April 29, 2005 by its former attorney to the plaintiffs' attorney. There is no evidence from the former attorney to indicate whether he provided erroneous guidance to the defendant and when he had written this letter if it was based on the defendant's instructions. The issues of fraud and the correct plaintiffs to the action do not affect the defendant and are not relevant to the merits of the defendant's defence.

LAW AND ANALYSIS

9. Order 19 rule 9 gives a court the power to set aside or vary any judgment entered in default of defence on such terms as it thinks just. The factors which a court must consider in setting aside a default judgment were set out in the leading case of **Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc**¹. In the UK the primary consideration is whether the defendant has a defence on its merits. The court must also consider as a matter of common sense the explanation by the defendant of how the default occurred and in assessing the justice of the case the court must consider the conduct of the defendant when it has allowed a judgment to be entered against it.
10. In the local decision of **Scotiabank Trinidad and Tobago Ltd v Trinidad Dental Health Ltd (in Receivership) & Anil Maharaj and ors**² Jamadar J (as he then was) adopted the Canadian approach to the weighting of the principles set out in **The Saudi Eagle**. Jamadar J departed from applying the English approach where the primary consideration is whether the defendant has a defence on its merits and instead applied the Canadian approach which placed more emphasis on the conduct of the defendant which allowed a regular judgment to be obtained. The basis of the said judge's departure from the English approach was "the increasing burden of litigation in Trinidad and Tobago and the consequent demands on the administration of justice"³. This approach seemed not to find favour with the Court of Appeal which reversed the decision not to set aside the default judgment.
11. Before I examine the factors addressed by the parties I pause at this juncture to register my disagreement with the submission by the attorney for the defendant that there is no substantial difference between the requirements for setting aside a default judgment under the RSC and the Civil Proceedings Rules ("the CPR") and therefore the case law

¹ 1986 2 Lloyds Rep.221 CA

² HCA 3625 of 2001

³ HCA 3625 of 2001 at page 7

under the CPR is also relevant to the RSC. Under the CPR the court must be satisfied of 2 conditions namely the defendant has a realistic prospect of success and he has acted as soon as practicably when he found out that the judgment was entered against him. In my view the test under the CPR is much higher than that under the RSC to set aside a judgment obtained in default. Under the RSC once the court is of the view that the defence has merit it can set aside the default judgment whereas under the CPR the court must not only be satisfied that there is merit in the defence but that the defendant has a good chance of succeeding. In addition under the CPR the court is also mandated to examine the conduct by the defendant in making the application to set aside.

DEFENCE ON THE MERITS

12. It is settled law that the effect of sections 37, 38 and 142 of the Real Property Act Chapter 56:02 (“the RPO”) that a Certificate of Title and the endorsements made thereon under the hand and seal of the Registrar General, once they have not been cancelled, remains conclusive evidence that the person named thereon as the owner is seised and possessed of the estate or interest specified therein. This position has been confirmed by the local courts in the decisions of Jones J in **Parasar Parray and ors. V Oudhu Chablal**⁴ and in **Clive Graham and anor. v Otis Sammy**⁵ The exceptions to this general rule as set out in section 45 of the RPO are fraud, a person claiming under a grant or Certificate of Title registered under the RPO, rights subsisting under adverse possession, or where such possession is not adverse, a tenant holding for a term of years not exceeding 3 years and an omission or misdescription of an easement or parcels or boundaries .

⁴ CV 2008-01443

⁵ CV 2006-00428

13. The defendant did not file a proposed draft defence. The defendant has not submitted any evidence of a Certificate of Title which shows that its name is endorsed as the owner but rather has referred to the July 2003 letter which refers to such certificate. There is no affidavit from the Director of Surveys to indicate the basis for this conclusion. There is no evidence from the Registrar General to confirm the Director of Survey's position.
14. On the other hand, before me is the evidence of the plaintiffs' ownership of the subject premises in the form of Certificate of Title Volume 1800 Folio 33 .To me the evidence which the defendant is seeking to rely on has failed to convince me that there is a triable issue or any serious allegation to set aside the judgment or impeach the plaintiffs' title. The defendant had ample time to obtain copies of the Certificate of Title referred to by the Director of Surveys to put before me since the instant application was made some 6 years after the July 2003 letter was obtained.
15. The defendant has also failed to meet the factors of what constitutes a fraud under the registration of land system which was set out succinctly by Moosai J in **Orville Babcome v Ruben Hills and Ors**⁶. In that case Moosai J stated that fraud for the purposes of the RPO must be actual and not constructive or equitable fraud, it must involve some element of dishonesty or moral turpitude, notice of existence of a trust or unregistered instrument does not of itself constitute a fraud but it may be an element in establishing the existence of a fraud, abstaining from inquiry when suspicions have been aroused may constitute a fraud and the presentation for registration of a forged or fraudulently obtained document does not constitute fraud if the person presently it honestly believes it to a genuine document.

⁶ HCA 2431 of 1994

16. In any event, the issue of fraud as it relates to section 143 of the RPO can only be raised in actions of ejectment or recovery of land and not in actions for trespass which is the plaintiffs' cause of action⁷.

17. In the circumstances, on a balance of probabilities I am constrained to find that the defendant's evidence has not convinced me that it has a defence on the merits. In my view it serves no useful purpose to set aside this judgment which has been regularly obtained. I can stop here but I will address the issues of delay, conduct of the defendant and the demerits of the plaintiffs' case which both parties made submissions.

DELAY

18. The Court of Appeal in this jurisdiction in **IMH Investments Ltd v Wilfred Sydney Knox and ors.**⁸ has settled the test which the court must consider in assessing the delay by a party in making an application. The test is once it is accepted that the reasons advanced for the delay are not good and substantial the applicant would have to demonstrate that there is a real risk of miscarriage of justice if he is allowed to proceed.

19. In **Mahabir v Phillips**⁹ the Court of Appeal was clear that where the reason for the delay was solely a matter of dealing with competence, inadvertence or otherwise of the party's legal representative the matter would not be allowed to proceed. In the instant case the sole reason advanced by the defendant for the 4 years delay in making the application was the receipt of erroneous legal advice. While delay is not a primary factor I find that the delay in the instant case of 4 years is substantial and inordinate.

⁷ Ibrahim J in HCA 970 of 1984 *Stewart Fortune v Clifford Gomez and anor.*

⁸ Civ Appeal No 12 of 2003 *Kangaloo JA*

⁹ Civ Appeal 30 of 2002

CONDUCT OF THE DEFENDANT

20. The defendant's conduct in this matter has me puzzled. After it was served with the proceedings sometime in March 2005, its' then attorney at law entered an appearance on its behalf on March 24, 2005. The defendant was then granted an extension by the plaintiffs to file its defence by 28 days from April 7, 2005¹⁰. I note that this extension was not referred to in any of the affidavits filed by the defendant in support of the instant application and no explanation was advanced by the defendant for this omission.
21. Just before the deadline for the extension on April 29, 2005 the then defendant's attorney indicated in writing to the plaintiffs' attorney that he had instructions to "allow judgment to go by default and to contest the quantum of damages at the assessment stage". Again this correspondence was not drawn to the court's attention by the defendant but by the plaintiff¹¹ and no explanation has been advanced why the defendant's former attorney would take such a position. I find it difficult to believe that the former attorney would articulate such a position in writing if he was not certain that this was his client's instructions especially given the nature of his client's purpose.
22. The July 2003 letter is the main information which prompted the defendant to change its position. Yet the instant application was made some 6 years after receipt of this letter and 5 months after its present attorney at law came on record. At the time there were there were 8 hearings of the AD in which the defendant's attorney had always attended and participated. Further the defendant had even gone as far as to file its witness statements in the AD on March 6, 2008 some 16 months before the instant application. If it was always the defendant's intention to defend this action then why was the defendant actively participating in the conduct of the AD and what did the defendant think was the purpose of the 2 witness statements it filed in the AD. Apart from the blaming of its former attorney, the defendant's affidavit in support of the

¹⁰Exhibit NR 1 of Affidavit of Neela Ramyard filed on April 23, 2010

¹¹ Exhibit NR 2 of Affidavit of Neela Ramyard filed on April 23, 2010

instant explanation does not adequately address these concerns. If the defendant was not satisfied with the conduct of its former attorney why did it take some 4 years after the default judgment had been obtained to seek a second legal opinion? The comment by Kangaloo JA in **Deryck Mahabir v Courtney Phillips**¹² is apt in this situation “ gone are the days when a litigant is allowed to pursue litigation dilatory and use the incompetence of his attorneys as the excuse”.

23. In my view the defendant’s overall conduct in this matter must be taken into account in assessing the justice of the case. In **Harley v Samson**¹³ it was held that if delay is coupled with prejudice occasioned to the plaintiff the court may refuse to set aside the judgment. I find that the defendant’s conduct in this matter to be unsatisfactory thus far.

DEMERITS OF THE PLAINTIFFS’ CASE

24. Both parties made submissions on this issue. However, this is not a factor set out by **The Saudi** for the court to consider in determining whether to set aside the default judgment against the defendant. As such I will not expend any further effort on this point.

CONCLUSION

25. I find that there is no evidence to support the defendant’s claim of having a defence on its merits. The delay by the defendant to make the instant application is inordinate and the conduct of the defendant in this matter has been unsatisfactory.

¹² Civ Appaeal No 30 of 2002 at para 21

¹³ 1914 30 TLR 450

ORDER

26. The defendant's application to set aside the default judgment obtained by the defendant on May 18, 2009 is dismissed with costs to be paid by the defendant to the plaintiffs to be taxed in default of agreement.

Dated this 20th day of July, 2011.

Margaret Y Mohammed
Master (Ag.)