THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SAN FERNANDO

Claim No. CV2018-02966

IN THE MATTER OF THE PROPERTY COMPRISED IN A DEED OF MORTGAGE DATED 9TH DAY OF JANUARY 2009 AND REGISTERED AS NO. DE200900290628D001 AND MADE BETWEEN CHRISTOPHER OGUNSALU (HEREINAFTER CALLED "THE BORROWER") OF THE ONE PART AND FIRST CITIZENS BANK LIMITED (HEREINAFTER CALLED "THE LENDER") OF THE OTHER PART

AND

IN THE MATTER OF THE CONVEYANCING AND LAW OF PROPERTY ACT CHAPTER 56:01

BETWEEN

FIRST CITIZENS BANK LIMITED

CLAIMANT

AND

CHRISTOPHER OGUNSALU

DEFENDANT

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Friday 11 December 2020

Appearances:

Ms Susan Moolchan instructed by Ms Leela Rajkumar for the Claimant

Mr Jerome J.K. Herrera instructed by Ms Nalini Bansee for the Defendant

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JUDGMENT ON DEFENDANT'S NOTICE OF APPLICATION TO SET ASIDE JUDGMENT/ORDER DATED 8 APRIL 2019

I. Introduction

[1] The Defendant entered into a Deed of Mortgage with the Claimant dated 9 January 2009 and registered as DE200900290628D001. The Defendant defaulted on the payment of the said mortgage and the Claimant filed the instant matter seeking payment of the sum due and owing, possession of the property secured under the mortgage, costs and any further relief deemed just by the Court.

II. Background

[2] By way of Fixed Date Claim Form and supporting affidavit filed on 15 August 2018, the Claimant brought the instant action seeking the following relief against the Defendant:

(i) The sum of **$1,126,249.51** being the sum due and owing as at the 31 July 2018 together with interest under the said mortgage.

(ii) Vacant possession of the parcel of land for which the mortgage was secured.

(iii) Costs.

[3] By way of Notice of Application filed on 18 September 2018, the Claimant sought the permission of the Court to extend the time for service and permission to serve the Fixed Date Claim Form by specified means/alternative method of service.

[4] On the 26 September 2018, the Court made an Order that the validity of the Claim for the purposes of service be extended for a period of 120 days from 15 August 2018 and that permission be granted to the Claimant to effect service of the relevant documents by advertisement in a daily newspaper once per week for two consecutive weeks and/or by affixing a copy of the relevant documents on a conspicuous part of the property which is the subject of the claim and/or by emailing a scanned PDF copy of the relevant documents and any further notice of rescheduled date of hearing to the Defendant via email address chrisogun@yahoo.com.

[5] The Court also ordered that the time for the filing of an Appearance by the Defendant be extended to 14 days from the date of the last publication of the advertisement in the

daily newspaper and/or service on the property and/or sending an email, and that the time for the filing of an affidavit in response and/or Defence be 42 days from the date of the last date of publication of the advertisement in the daily newspaper and/or service on the property and/or sending an email.

[6] The Claimant served the relevant documents on the Defendant by all 3 methods permitted in the above Order of the Court.

[7] At the hearing of the matter on 12 November 2018, Ms Tishana Abdool held for Mr. Narad Harrikisson for the limited purpose only of informing the Court that Mr Stanley Marcus SC had been approached by the Defendant to appear on his behalf but had not yet been properly retained. Ms Abdool sought an adjournment on behalf of the Defendant. The matter was then adjourned to 21 January 2019 but subsequently re-scheduled to the 8 February 2019.

[8] On the 8 February 2019, the Defendant appeared in person but unrepresented and addressed the Court at length. At the end of the hearing the Court ordered that the time for the Defendant to file and serve a response affidavit to the Fixed Date Claim and supporting affidavit be extended to on or before 22 March 2019. The hearing of the Fixed Date Claim was adjourned to the 8 April 2019 to allow time for the Defendant to put his house in order.

[9] At the hearing of the Fixed Date Claim on 8 April 2019, the Defendant did not appear and was unrepresented. No reason was submitted by him or anyone else on his behalf for his non-appearance.

[10] On the said 8 April 2019, the Court made the following Order ("the 2019 Order"):

> *"**…UPON READING** the Fixed Date Claim Form dated and filed on the 15th August 2018, the Affidavit of Derek Francis sworn to and filed on the 15th August 2018 together with the exhibits thereto attached, the Notice of Date of Hearing and the Notice in Compliance dated and filed*

on the 17th August 2018, the Affidavit of Service of Leela Rajkumar sworn to and filed on the 30th October 2018, the Affidavit of Service of Allyson Deonanan sworn to and filed on the 2nd November 2018, the Affidavit of Service of Shirley Harrington-Fraser sworn to and filed on the 2nd November 2018 and the Certificate of Service dated and filed on the 5th November 2018.

***AND UPON HEARING** Attorney at law for the Claimant, the Defendant not present and unrepresented.*

***IT IS ORDERED** that:*

1. *There be Judgment for the Claimant against the Defendant in the sum of One Million, Forty-Five Thousand, Eight Hundred and Thirty-Six dollars and Ninety-Three cents ($1,045,836.93) being the sum due and owing as at the 8th April 2019 together with interest continuing to accrue at the daily rate of Two Hundred and Twenty-Two dollars and Eleven cents ($222.11) from the 9th April 2019 until full payment being the balance of monies due and owing to the Claimant by the Defendant under the covenants in a Deed of Mortgage dated the 9th January 2009 and registered as Number DE200900290628D001. This is the sum due and owing pursuant to Mortgage Loan Account No. 1724949.*

2. *The Defendant do deliver to the Claimant vacant possession of the mortgaged property known as: **ALL AND SINGULAR** that certain parcel or lot of land situate at Santa Cruz in the Ward of St. Ann's in the Island of Trinidad comprising SEVEN HUNDRED AND FIFTY-TWO POINT FIVE ZERO EIGHT SQUARE METRES (752.508 m²) or EIGHT THOUSAND ONE HUNDRED SQUARE FEET (8,100 ft²) and known as Lot No. 6 Chico Avenue and bounded on the North partly by Chico Avenue 10.058 metres or 33 feet wide and partly by a Drain Reserve 1.829 metres or 6 feet wide on the South partly by No. 4 Chico Avenue and partly by No. 3 Franklyn Street on the East partly by the said Drain Reserve partly by No. 5 Franklyn Street and partly by No. 3*

Franklyn Street and on the West partly by No. 4 Chico Avenue and partly by Chico Avenue 10.058 metres or 33 feet wide which said parcel or lot of land is delineated and shown coloured pink as Lot No. 6 Chico Avenue on the General Plan marked "A" annexed to Deed registered as No. 3476 of 1958 together with the buildings thereon and the appurtenances thereto belonging.

3. Clauses 1 and 2 are not to be enforced concurrently.

4. The Defendant do pay to the Claimant costs in the sum of Fifty Thousand, Eighty-One dollars and Thirty-Three cents ($50,081.33) being forty-five percent (45%) of the prescribed costs."

[11] On 13 May 2019, the Defendant through his attorney-at-law, Mr Kulraj Kamta, filed a Notice of Application seeking to set aside the 2019 Order. On 19 July 2019, the Claimant filed an Application to strike out the Defendant's Notice of Application filed on 13 May 2019. Both Applications were fixed for hearing on 22 July 2019.

[12] On 22 July 2019, the Defendant was again present but unrepresented. The Court was informed that the Defendant's attorney, Mr Kulraj Kamta, had recently passed away. The Court therefore adjourned both Applications to 9 December 2019 and allowed time for the Defendant to retain fresh attorney-at-law.

[13] On the 9 December 2019, the Defendant was represented by his new attorney-at-law, Mr Jerome J.K. Herrera of the firm Bethany Chambers. In acceding to Mr. Herrera's request, permission was granted to the Defendant to file and serve an affidavit in Reply to the affidavit of Derrick Francis filed 19 July 2019 on or before 10 January 2020. The Court also directed the Defendant to file and serve submissions with authorities on or before 10 January 2020 and response submissions with authorities to be filed and served on or before 24 January 2020 by the Claimant.

III. Defendants Notice of Application to set aside the 2019 Order

[14] The Defendant listed as the grounds of his Notice of Application, the following:

a. That the Defendant's attention was brought to the judgment on 5 May, 2019. The Defendant contacted his Attorney at Law but did not reach him. The Defendant then rushed over from overseas to Trinidad where he tried to reach his former Attorney to no avail.

b. That there are accounting discrepancies by the Bank as to the amount owing. For instance, the affidavit upon which the judgment was based was sworn on the 15 August 2018, which stated the Defendant's arrears as $66,876.16. The Defendant has sought to address these and other discrepancies, but the Bank has been unwilling to provide data. However, the Bank in a document not produced to the Court claimed that the sum outstanding as at the end of September 2018 was $35, 634.09, which is shown in the letter from the Bank's representative dated 7 September 2018.

c. By the Defendant's calculation, he owes about $800,000.00 (subject to verification) and not the amount claimed by the Bank in the Claim Form. In fact as pointed out above that figure was not correct at the time of the judgment.

d. The mortgage was done without independent legal advice to the Defendant. No one explained to the Defendant before signing the mortgage that what he signed meant that he agreed to let the Bank have the benefit of any future building to be constructed in the lands.

e. No one explained to the Defendant that he will borrow a large sum of money on the 9 January 2009 and will be required to repay the sum by the 31 January 2009. He was not afforded any opportunity to obtain independent legal advice. That is nonsensical.

f. No one explained to the Defendant the meaning of clause 3 of the mortgage. Neither was the Defendant afforded an opportunity to seek independent legal advice.

g. No one explained to the Defendant before signing that clause 5, which requires monthly instalments, is inconsistent with clause 2, which requires repaying the full borrowed some in a matter of days of signing the mortgage.

h. The Defendant did not have any independent legal advice for having irrevocably appointed the lending bank to be his attorney as stated in clause 5(j) of the deed of mortgage.

i. Neither did the Defendant agree to anyone being appointed to be his attorney in his name and on his behalf and for and as its acts and deed or otherwise execute and complete in favour of the lender or its nominees or any purchaser any document and to do all such acts and things as may be required for the full exercise of all and any of the powers hereby conferred in connection with any lease or sale, disposition, realization or getting in by the lender or any such receiver or Manager.

j. The Defendant was not afforded any independent legal advice. This looks outrageous. The Defendant did not agree to ratify any act by the lender in his name without independent legal advice or without sanction of the court. It is highly prejudicial and oppressive and unconscionable and done without independent legal advice.

k. The Defendant would like to put in a counterclaim to set aside the mortgage deed but in the meantime to set aside the judgment.

l. That the double claim for a money and possession at the same time under the mortgage deed is not only inconsistent but also is bad in law. In any event, on a proper construction of the mortgage deed a claim for money and possession and a judgment on that is bad in law. Further, the claim was not in the alternative and the order as made is bad in law.

[15] In support of the Application, the Defendant's affidavit stated as follows:

a) The loan was disbursed on 30 January 2009 and he opened at the same time Savings Account No. 1695965 with FCBL through which he intended servicing the said loan. He agreed to deposit monies into the Savings Account and the Bank would transfer the mortgage payments to the said mortgage loan account. At the time of purchase of the property, he was resident in Trinidad and living in the house on the property with his family, wife and 3 children.

b) Over the period of the mortgage the loan usually fell into arrears for about a month or two never more as far as he could recall and the Manager of the Tunapuna Branch of

the Bank where he maintained his accounts would telephone him and he would make arrangements to liquidate the arrears. This situation arose largely due to the fact that soon after the purchase of the said property he returned to live in Montego Bay Jamaica and his family remained in Trinidad until 2011-12.

c) Between 2008 and 2011-12 he travelled to Trinidad from Montego Bay Jamaica every fortnight in order to service his dental practice in Trinidad. In 2012-13 his twin sons were enrolled at the University of the West Indies Mona Campus and his wife and daughter returned to Jamaica. His house was left in the care and occupation of their helper until she died. During that period, his family would travel between the two countries to their home whenever they desired.

d) His dental practice in Trinidad was closed sometime in 2014 but he reactivated it in January 2019 by starting his teaching at International Postgraduate Medical College, which enabled him to acquire additional funds to maintain timely servicing of the said loan. At all material times he had informed the Bank and the Bank knew that his address in Jamaica was at 52 Vernons Drive Montego Bay Saint James that is the address from which he wired funds into his Savings Account with the Bank.

e) He first knew of the filing of this Fixed Date Claim Form against him when he was informed by Dr. Barbara John on WhatsApp of the contents of the parcel she had retrieved containing the Court documents, which had been left at the gate of the said premises. Dr. John was informed of the presence of the parcel at the gate by his next door neighbour.

f) On the 7 September 2018 Mr. Marlon Seale the Bank Manager informed him by email that he had received a payment of USD$2K which had been applied directly to the mortgage on August 28 2018 and further informing him that the facility was now 3 months in arrears for the period June, July and August 2018 in the outstanding sum of TTD$35,634.09. Mr. Seale requested him to wire USD$5,500.00 to clear up the arrears as his end of year was the 30 September 2018.

g) On 26 September 2018, the Hope Road Branch of Sagicor Bank Jamaica Ltd wired directly to his said Savings Loan Account No. 1724949 the sum of USD$5,000.00. His monthly payment to service the loan was then TTD$12,000.00.

h) He has been asking the Bank for a Statement of his Account for the longest while and they only sent it to him in January 2019. The Bank did not send him a Notice of any

delinquency prior to filing their Fixed Date Claim Form and chose instead to call in his loan in the sum claimed as being due and owing as of 31 July 2018 of $1,126,249.51 with interest continuing to accrue at the daily rate of $221.11 from 1 August 2018.

i) Therefore, from his calculations his loan account would have been in arrears as at the 31 July 2018 for the months of May, June and July in the sum of around TTD$39,000.00 or USD$6,000.00 so that the payment of USD$2,000.00 to his Loan Account on the 29 August would have liquidated the arrears due for May 2018.

j) The wire transfer by Sagicor of USD$5,000.00 lodged to the Mortgage Loan Account on 29 September 2018 would have liquidated the arrears for June, July and certainly constitute a substantial payment or entirely liquidated the arrears for August 2018.

k) On 2 January 2019 on a visit to Trinidad, he personally made a payment of TTD$35,500.00 to his mortgage loan account and the Manager Marlon Seale personally advised him that that payment would take him up to January 2019 i.e. the end of December 2018.

l) In early February 2019 two (2) Manager's cheques each in the sum of TTD$66,000.00 were lodged to his Mortgage Loan Account by a third party. The Manager told him on his cell phone that the lodgement of one of those TTD$66,000.00 cheques would cover mortgage payments up to July 2019. The Manager also wanted to hold on to the other cheque for TTD$66,000.00 to which he vehemently objected since he had other urgent professional uses for that particular sum of money. The Manager promised to wire same to him.

m) On the 8 February 2019 when he attended Court in San Fernando in this matter he retained the services of a lawyer who he paid a deposit and made the full payment which he requested. He learnt that he did not file any documents. Neither did he attend court on 8 April 2019.

n) The Bank has supplied him with a document titled Payment History recording his payments on his Mortgage Loan Account i.e. Account No. 1724949 from the 30 January 2009 to the 1 February 2019.

o) The Bank has also supplied him with a copy Statement of Accounts Customer CIF 675239 Statement Date 8 February 2019 for the period 22 October 2008 to the 8 February 2019. The Statement is in respect of Account No. 1695964 and Account No. 1695965 USD. At all material times he was of the view that he had one Savings

Account viz. Account No. 1695965. He was not aware that he also had a Savings Account No. 1695964 and he would like the Bank to explain to him the reason for maintaining two savings accounts in his name and their failure to inform him accordingly.

p) The Bank not having given him a Statement of Arrears nor a Notice of Intention to call in his mortgage acted unlawfully in the premises so that he was not even aware of his indebtedness to the Bank when the loan was called in on the 31 July 2018 and the Fixed Date Claim Form filed herein on the 17 August 2018. The Manager in his email to him dated the 7 September 2018 did not advise him that the Bank had instructed their Attorneys at Law to institute these proceedings against him in addition to informing him of the arrears position of his said loan.

q) By his calculation, he owes only about $800,000.00 (subject to verification) and not the amount claimed by the bank in the Claim Form.

r) The mortgage has since been explained to him by his present Attorney at Law. No one explained to him before signing the mortgage that what he signed meant that he agreed to let the Bank have the benefit of any future building to be constructed in the lands; that he will borrow a large sum of moneys on the 9 of January 2009 and will be required to repay the sum by the 3 January 2009 as is spelt out and now explained to him to be the meaning of clause 3 of the mortgage; that clause 5 which requires monthly instalments is inconsistent with clause 2 which requires repaying the full borrowed sum in a matter of days.

s) He did not have any independent legal advice for having irrevocably appointed the lender to be his attorney as stated in clause 5(j) of the deed of mortgage. Neither did he agree to anyone being appointed to be his attorney in his name and on his behalf and for and as its acts and deed or otherwise execute and complete in favour of the lender or its nominees or any purchaser any document and to do all such acts and things as may be required for the full exercise of all and any of the powers hereby conferred in connection with any lease or sale, disposition, realization or getting in by the lender or any such receiver or Manager. He was not given/afforded any independent legal advice. This looks outrageous. He did not agree to ratify any act by the lender in his name without independent legal advice or without sanction of the court. This is highly prejudicial and oppressive and unconscionable and done without independent legal

advice. He would like to put in a counterclaim to set aside the mortgage deed which is the only document relevant to the mortgage arrangement.

t) He has been advised by his Attorney at Law that the claim for money and possession at the same time is bad in law.

u) He has always been willing to pay the bank its money but like so many debtors he finds it difficult to understand why a bank will put up his property for arrears for such a paltry sum.

IV. Claimant's Notice of Application to strike out Defendant's Notice of Application to set aside the 2019 Order

[16] In opposition to the Defendant's Application, the Claimant filed an Application to have the Defendant's Application struck out pursuant to **Part 40.3**, **Part 11.11(4) and Part 26 of the Civil Proceedings Rules 1998 (as amended)** and/or under the inherent jurisdiction of the Court.

[17] The grounds in support of the Application are as follows:

a. The Defendant's Notice of Application filed on the 13 May 2019 against the Claimant should be struck out pursuant to **Part 40.3 and Part 11.17 CPR** as the reliefs sought by the Defendant are not supported by sufficient evidence as to why the Court Order ought to be set aside.

b. From a review of the history of the matter and the previous hearings of the matter, the Defendant was granted sufficient opportunity to respond to the Claimant's Claim.

c. The matter first came up for hearing on 12 November 2018 before the Honourable Mr Justice Robin Mohammed. At the said hearing, Attorney at law Ms Tishana Abdool holding for Mr Narad Harrikissoon who is led by Senior Counsel Mr Stanley Marcus appeared for the Defendant. The Claimant's Attorneys informed the Court that Senior Counsel via telephone discussion indicated that he had not been officially retained and would like the opportunity to obtain formal instructions from the Defendant. Based on Senior Counsel's request the Claimant's Attorneys sought an adjournment to allow the Defendant an opportunity to do so. The Court was also

informed that Attorney at Law for the Defendant undertook to inform the Defendant of the adjourned date of hearing. The matter was adjourned to the 21 January 2019 at 9:30 am in Court Room SF09. By letter dated 9 January 2019, same being emailed, the Claimant informed Senior Counsel of the adjourned date of hearing.

d. The Judicial Support Officer of the Honourable Judge informed the Claimant's Attorneys that the hearing previously fixed for on the 21 January 2019 was rescheduled to 8 February 2019 at 9:30am in Courtroom SF07. The Claimant via letter dated 14 January 2019 notified Senior Counsel of the rescheduled date of hearing.

e. The matter came up for a second hearing on the 8 February 2019, the Defendant was present and unrepresented and requested an adjournment to properly retain Senior Counsel. The Defendant indicated that he only became aware of these proceedings in November 2018 and did not have the opportunity to retain Senior as he flew in the night before the hearing. The Claimant's Attorneys informed the Court that two (2) cheques in the sum of $66,000.00 were presented to the Bank by a messenger with instructions for one (l) of the cheques to be applied to the mortgage account and the second cheque to be utilized for foreign exchange. The Claimant's Attorney informed that the first cheque was applied to the mortgage account however despite same, arrears in the sum of approximately $6,000.00 was still owed on the account. The Claimant's Attorneys informed that the Bank is unable to entertain the Defendant with regard to maintaining his account and clearing the arrears, however the Defendant had the option to seek refinancing from another institution. During the said hearing, the Defendant made certain allegations against the Claimant in relation to the mortgaged account and indicated that to his knowledge, the mortgage account was allegedly prepaid for a period of six (6) months. The Claimant's Attorneys averred that the Defendant is making serious allegations to the Court and would have had an opportunity to put in a Defence as the Defendant was served via substituted service which was approved by the Court and further an Attorney-at-Law appeared on the first hearing who undertook to notify the Defendant accordingly. The Claimant also indicated that in the absence of a Defence and no Application to extend time for

it the Claimant would be seeking its order for judgment and possession. Further, the Defendant requested that the second cheque be returned to him, and same was personally handed to the Defendant in the presence of the Honourable Judge, and the Defendant signed letter dated the 6 February 2019 to confirm receipt of same.

f. Despite the Defendant's time to file and serve his Affidavit in Response, same had elapsed, and no Application for an extension of time to file and serve his Affidavit in Response being filed, the Honourable Judge was minded to allow the Defendant an opportunity to put in a Defence and advised the Defendant to meet with his Attorney at law while he was in Trinidad and Tobago so that his Attorney at law could take conduct of the matter. The Honourable Court thereafter ordered that time be extended for the Defendant to file and serve an Affidavit in Response on or before the 22 March 2019 and adjourned the Fixed Date Claim to the 8 April 2019 at 9:30am in Court Room SF10. The Defendant was present at the said hearing and aware of the directions granted by the Court and despite same failed to file his Affidavit in Response on or before 22 March 2019.

g. The matter again came up for hearing on the 8 April 2019. During the said hearing, the Honourable Judge noted that on the last occasion, the Defendant was given a chance to file an Affidavit in Response on or before 22 March 2019, however, to date no Affidavit was filed. The Claimant's Attorney also informed the Court that Senior Counsel did contact the Claimant's Office on 14 March 2019 and was reminded of the time lines and date of hearing and despite same no Response was filed. Upon hearing the Claimant's Attorneys and in the absence of a Response Affidavit the Court granted Court Order dated the 8 April 2019 for judgment and possession together with costs.

h. The Defendant's Application has failed to provide adequate evidence that would suffice as a good and sufficient reason for failing to attend the court hearing and the Defendant's Application has failed to prove that had the Defendant/Applicant and/or

his Attorney at law attended Court on the date of hearing that some other Order might have been entered by the Honourable Court. Despite the Defendant stating that an Attorney at law had been formally retained, evidence of same being Exhibit Item 3 was not annexed in the Defendant's Application to prove that an Attorney at law was formally retained to take conduct of and fully briefed on the matter or alternatively the relief for an Attorney not attending Court should be a matter between that of the Attorney and client and not affect the rights of the Claimant. Further, any damages sought would be a position between the Defendant and the Attorney he allegedly retained.

i. Further by letter dated the 21 May 2019 the Claimant's Attorneys requested a copy of Exhibit Item 3 from the Defendant's Attorney for review. However to date, a copy of same has not been provided.

j. The Defendant's Application ought to be struck out as the Claimant's legal action for judgment and possession was done in accordance with the Civil Proceedings Rules 1998 and the Laws of Trinidad and Tobago. From a review of the reliefs sought by the Defendant/Applicant, the Defendant/Applicant is seeking to prejudice the Claimant’s rights as mortgagee.

k. The Claimant's reliefs sought in its Fixed Date Claim for judgment and possession is not inconsistent with the Law and the Claimant at all material times during the course of the matter complied with the Civil Proceedings Rules 1998 (as amended) and the Laws of Trinidad and Tobago and avers that the Court Order granted is not "bad in law".

l. The Defendant's Notice of Application filed on the 13 May 2019 ought to be struck out as same is filed outside the stipulated time as provided for by the Civil

Proceedings Rules 1998 (CPR) being seven (7) days after the date on which the judgment or order was served on the applicant.

m. By the Claimant's letter dated the 25 April 2019, the Defendant was made aware of the outcome of the Court hearing and the terms of the Court Order entered on the 8 April 2019, same being emailed to the Defendant via email address ***chrisogun@yahoo.com***. The Defendant however avers in his Application that the judgment was only brought to his attention on the 5 May 2019.

n. The Defendant's allegation of lack of independent legal advice forms no basis in his Notice of Application as same is for setting aside the Court Order dated the 8 April, 2019.

o. The contents of the Defendant's Notice of Application are frivolous and vexatious and same ought to be struck out to avoid further litigation costs to be incurred and avoid the unnecessary waste of resources in the Court's system.

[18] In support of this Application, the Claimant filed two (2) affidavits, one from Mr Marlon Seale, Branch Manager of the Claimant where the mortgage is held, and the other from Mr Derek Francis, Manager of the Claimant, Consumer Collections Management Unit (CCMU).

[19] The affidavit of Mr Seale states as follows:

a) The Defendant's mortgage account on several occasions fell into arrears for a period of more than two (2) months. The Defendant was notified on numerous occasions via a series of emails, telephone calls and letters of the default in the mortgage repayments, and called upon to regularize same.

b) The Tunapuna Branch was aware that the Defendant worked out of Jamaica. However, the Branch never received any formal documentation or statement from the Defendant informing that his Trinidad's legal and mailing address had changed.

c) The Defendant did request a Statement of Account. By the Claimant's records by email dated the 1 May 2018 the Defendant was informed that the sum of $350.00 was required for the preparation of same and it was reiterated that the mortgage account was currently being handled by the Claimant's Collections Unit. The requested statement fee however was not remitted by the Defendant to the Claimant.

d) Despite the Claimant's email dated the 1 May, 2018, the Defendant thereafter, by email dated the 17 May 2018, enquired with the Tunapuna Branch as to whether certain payments were received from his Bank and requested a Statement of Account once again. By email dated, the 17 May 2018 Mr Seale confirmed receipt of certain payments, which were applied to the mortgage account. Further, he once again informed the Defendant that in light of his failure to respond in a timely manner to numerous reminders to update the account, the said account was now being managed by the Claimant's Collections Unit with Ms Beverly Capiatha being the new point of contact. Ms Capiatha was also copied on the said email. He further re-forwarded the Claimant's email dated the 1 May 2018 as it related to his request for a statement of account and the required fee. Subsequently, by email dated the 22 May 2019 the Defendant wrote to Mr Seale and informed that a friend, whom was copied on the said email, would remit on his behalf the sum of $28,000.00 and confirmed that the $350.00 statement fee could be deducted from the Defendant's account. Mr Seale forwarded the Defendant's email to the Collections Unit on the 23 May 2018 and by email of even date, the Claimant's Collections Unit provided the Defendant with a breakdown of the mortgage arrears, fees and charges.

e) At no time did he, Mr Seale notify and/or advise the Defendant that the payment of $35,000.00 made on the 2 January 2019 would update his mortgage account until January 2019 and/or the end of December 2018.

f) There were two (2) cheques in the sum of TT $66,000.00 each were left with the Tunapuna Branch by a third party. The Defendant was informed by him that the cheques were to be processed by the Claimant's Consumer Collections Management Unit and not at the branch level. Of the two (2) cheques, only one was negotiated to be applied to the mortgage account and the other was requested to be utilized for foreign exchange. He denies informing the Defendant that the applied cheque would cover mortgage payments up until July 2019. It is further denied that he promised to wire transfer funds to the Defendant.

g) At all material times the Defendant was notified by various emails but despite the numerous reminders to update the mortgage account, the Defendant continuously responded in an untimely manner and on those circumstances the account was presently managed by the Claimant's Collections Units and provided with the name of the relevant contact personnel. In the said email, the relevant contact person was copied on same.

h) The Defendant's Notice of Application filed on the 13 May 2019 fails to prove a realistic prospect of success for the reasons aforementioned, and same ought to be struck out as any further litigation will only increase legal costs.

[20] The affidavit of Mr Francis states as follows:

a) The loan was disbursed on 30 January 2009 in the sum of $1,530,000.00. However, the Saving Account No. 1695965 was opened on 22 October 2008 prior to the loan disbursement.

b) The mortgage account on numerous occasion fell into arrears for more than two (2) months and the Defendant was notified on numerous occasions via a series of emails and letters of the default and was called upon to regularise same.

c) The Claimant was aware that the Defendant worked out of Jamaica, but no formal documentation was received from the Defendant informing the Claimant that his legal or mailing address in Trinidad had changed.

d) The process server attempted to serve the Defendant, however was unable to and compiled a report on attempts made. Thereafter, the Claimant obtained an Order from the Court to serve the Claim via substituted means and the Claimant complied with the said Order.

e) The Claimant avers that on 27 September 2018, the sum of USD$5000.00 was applied directly to the mortgage account 1724949 and not to the Savings Account 1724949. The Defendant's monthly instalment was $12,170.10 and not $12,000.00.

f) The Defendant requested a Statement of Account. By email, dated 1 May 2018 the Claimant's representative informed the Defendant that the sum of $350.00 was required for the preparation of same and it was reiterated that the mortgage account was being handled by the Claimant's Collection's Unit. The requested statement fee was not remitted by the Defendant to the Claimant.

g) Pre-action protocol letter dated 30 April 2018 was emailed to the Defendant on 30 April 2018.

h) Thereafter, by email dated 17 May 2020 to the Tunapuna Branch Manager, the Defendant enquired as to whether certain payments were received from his Bank and requested a Statement of Account once again. By email dated 17 May 2018, the Claimant's representative Branch Manager Mr Marlon Seale confirmed receipt of certain deposits which were applied to the mortgage account and re-forwarded the Claimant's email dated 1 May 2018 as it related to his request for a Statement of Account and the required fee. The Claimant's representative further reiterated that in light of the Defendant's failure to respond in a timely manner to numerous reminders to update the account, the said account was now being managed by the Claimant's Collections Unit and Ms Beverly Capiatha being the new point of contact.

i) Subsequently, by email dated 22 May 2018 the Defendant wrote Mr Seale informing that a friend, whom was copied on the said email, would remit on his behalf the sum of $28,000.00 and confirmed that the $350.00 statement fee could be deducted from

the Defendant's account. By email dated 23 May 2018, the Defendant was provided by the Collections Unit with a breakdown of the mortgage arrears, fees and charges, which at that time amounted to the sum of $44,282.89.

j) The Claimant avers that the cheque payment in the sum of $28,000.00 received from the Defendant's friend was credited to the mortgage account on 28 May 2018. Thereafter, on 5 June 2018, the said cheque payment was returned with the notation "Stopped Payment" and the Claimant reversed the payment of same on even date. By email dated 5 June 2018 the Claimant's representative notified the Defendant of the reversal of the payment and informed that the arrears on the mortgage account increased to the sum of $40,335.59 excluding other fees and charges as outlined in the Claimant's previous email dated 23 May 2018.

k) The Claimant avers that at all material times the Defendant was informed of the delinquency owed on the mortgage account prior to the Claimant's Attorney issuing the Pre-Action Protocol Letter and filing its Claim. The Claimant via a series of emails, demand letters and notice to advertise letters ranging between the period of January 2012 - April 2018, notified the Defendant of the arrears on the mortgage, however, despite same the Defendant failed to fully update the mortgage facility which continued to operate in significant arrears.

l) A payment of USD$5000.00 was received on 27 September 2018 and applied to the mortgage account but the account continued to operate in arrears. A payment of TTD$35,000.00 was also made towards the mortgage account and the Claimant's records reflect such a payment, however it is denied that Mr Seale informed the Defendant that such payment would take him to January 2019.

m) Two cheques in the sum of TTD$66,000.00 were each left at the Tunapuna Branch of the Claimant. However, only one of the cheques was negotiated to be applied to the mortgage account. All fees and charges as accrued on the mortgage account were liquidated and the remainder was applied to the mortgage arrears, however, despite same the account still operated in arrears of approximately $6,000.00.

n) During the hearing of the Fixed Date Claim on 8 February 2019, the Defendant requested that the second cheque of TTD$66,000.00 be returned to him and same was personally handed to the Defendant in the presence of the Honourable Judge. The Defendant also signed letter dated 6 February 2019 confirming receipt of same.

o) As per the Defendant's request, by letter dated 25 February 2019 the Claimant provided the Defendant with a breakdown of the allocation of the TTD$66,000.00 cheque towards the mortgage account.

p) A payment history was provided to the Defendant covering the period between 30 January 2009- 2 January 2019 and not until 1 February 2019 as stated by the Defendant.

q) The Claimant denies allegations of acting unlawfully and states that at all material times the Defendant was provided with sufficient and reasonable notice of mortgage arrears. A thread of email and letters to the Defendant between October 2009 and April 2019 calling upon him to liquidate the arrears owing on the mortgage account shows this. Despite this, the Defendant failed to fully update the arrears and from the inception, the mortgage account operated in a delinquent position.

r) The mortgage facility went into arrears within the same year the facility was disbursed, that is, 2009. Despite payments being made, said payments were sporadic and delayed during the life of the facility, which continued to operate in arrears.

s) The Defendant's Notice of Application is frivolous and vexatious and same fails to prove a realistic prospect of success.

V. Issues

[21] The issues to be determined by the Court are as follows:

Issue 1- Whether the Defendant is deemed to have been sufficiently served with the terms of the Judgment or Order dated 8 April 2019?

Issue 2- Was the Defendant's Notice of Application filed on the 13 May 2019 filed within the seven (7) day statutory period pursuant to **Part 40.3(2) CPR**?

Issue 3- Whether the Defendant has satisfied the requirements of the Rules of Court to justify the Court exercising its discretion to grant an extension of time to file an Application to set aside the Judgment or Order dated the 8 April 2019? and

Issue 4- Whether the Defendant who is seeking to set aside Judgment dated 8 April has satisfied the legal thresholds required pursuant to **Part 40.3 and Part 11.17 CPR** to allow the Court to set aside the Judgment or Order dated 8 April 2019?

VI. Law and Analysis

The **Rules of the CPR** relevant to the instant matter are:

[22] Personal service as defined in **Part 5.3** which states:

(a) A document is served personally on an individual by handing it to or leaving it with the person to be served.

(b) A document is served personally on a company or other corporation by handing it to and leaving it with a director, officer, receiver, receiver-manager or liquidator of the company or other corporation.

[23] **Rule 6.1** relating to who is to serve documents outlines that-

(1) Any order which requires service must be served by the court, unless—

(a) a rule provides that a party must serve the document in question; or

(b) the court orders otherwise.

(2) Any other document must be served by a party, unless—

(a) these Rules provide otherwise; or

(b) the court orders otherwise.

Part 6.2 provides for methods of service and reads:

Where these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods:

(a) personal service in accordance with rule 5.3;

(b) prepaid post;

(c) delivery; or

(d) facsimile transmission or other means of electronic communication if permitted by a relevant practice direction unless the court orders otherwise.

[24] **Part 11.17**, provides for an application to set aside an order made in the absence of a party:

(1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made within 7 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence showing—

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made.

[25] **Part 40.3**, the basis of which is to set aside a judgment in a party's absence. The rule reads as follows:

(1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.

(2) The application must be made within 7 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence showing—

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made.

[26] **Part 43.2** which states:

Parties present when order made or notified of terms to be bound

43.2 A party is bound by the terms of the order or judgment whether or not the judgment or order is served where—

(a) he is present whether in person or by attorney at law when the judgment given or order was made; or

(b) he is notified of the terms of the judgment or order by facsimile transmission, or otherwise.

Issue 1- Whether the Defendant is deemed to have been sufficiently served with the terms of the Judgment or Order dated 8 April 2019?

[27] The Defendant placed heavy reliance on the fact that he was not personally served by the Claimant, and submitted that **Part 40.3 CPR** only comes alive when personal service is effected.

[28] To determine whether the Defendant was sufficiently served with the terms of the Order dated 8 April 2019, the Court must have due regard to the circumstances of the case at bar.

[29] From the outset, the Claimant was unable to serve its Fixed Date Claim Form on the Defendant personally and brought an application before the Court for alternative service. This Court granted an Order on 26 September 2018, that service be effected via three (3) alternative methods once of which included service via email address *chrisogun@yahoo.com*. Evidence was put before the Court by the Claimant to show why alternative service was necessary and why service by the requested methods would amount to effective service of the documents on the Defendant.

[30] Next, this Court must determine whether the Defendant ought to have been served with the Order itself or whether a letter outlining the terms of the Order was sufficient.

[31] Pursuant to **Part 43.2(b) CPR**, a party is deemed to be bound by the terms of an Order where he is notified of the terms of the judgment or order by facsimile transmission, or otherwise.

[32] The Claimant's attorney at law emailed a letter with the terms of the said Order on 25 April 2019 to the Defendant. **Rule 43.2(b) CPR** does not state that the Order itself ought to have been served on the Defendant nor does it state that the Order itself ought

to have been personally served on the Defendant. Further, **Part 6.2(d) CPR**, allows for any document other than a claim form to be served by electronic means.

[33] The Defendant in his Application avers that he only became aware of the said Order on 5 May 2019. This information however directly contradicts the Defendant's submissions wherein at paragraph 16 the Defendant admits that after eighteen (18) days from the discovery of the Order [being the 25 April 2019], counsel was retained to file an Application to set aside on the 13 May 2019. By this mere admission, the Defendant affirms that he was notified of the terms of the Order on the 25 April 2019.

[34] In **Thomas Simon and Ramesh Persad Maharaj v First Citizens Bank, Taurus Services Limited, Harry Ramadhar**[1] Rampersad J held that a letter containing the terms of an Order amounted to sufficient notice of the terms of the said Order. The Claimant in that case averred that time ought to run for the purposes of **Part 11.17 CPR,** from the date when a copy of the Order was obtained from the Court. The Court held that failure by the Claimant's attorney at law to read the letter did not prevent time from running against him and that was the chance he took when he decided not to open the envelope.

[35] The same analysis can be applied to the instant case. The Defendant by email dated 25 April 2019, would have received the terms of the Order. Failure by him to open said email or read the attached letter cannot prevent time from running against him, particularly as email communication was the status quo of communication between himself and the Claimant.

[36] Further, in the case of **British American Insurance Company v Lawrence Duprey**[2] , the Defendant received an order, which set a trial date via email. The Defendant sent no acknowledgment of service and he indicated that no further efforts were made by the Court or the Claimant to ensure that he had received the contents of the said email. The Defendant submitted that although on occasion he received and/or replied to court

[1] CV2009-04386
[2] CV2017-03494

correspondence by email, same without more cannot be taken to be an outright acceptance by him having email be deemed service.

[37] Rahim J consequently held at paragraph 40 that-

"The court finds that the defendant's claims of being unaware of the email was disingenuous. That upon filing the motion to continue the pre-trial conference, it was incumbent upon the Defendant to find out whether same was granted or denied since he had knowledge of the Florida proceedings. As such, the court finds that the Defendant's defence of not having knowledge of the date set... and that service of the order dated 11th May 2017 via his email was inappropriate, has no reasonable prospect of success in proving that final judgment of Florida bankruptcy proceedings was obtained in contravention of the principle of natural justice."

[38] The Claimant also referred the Court to the case of **Goodwin v Swindon Borough Council**[3] where Rimer J at paragraph 55 in establishing the deemed date of service of documents opined as follows:

"*…In a case, however, in which he [a party] adopts any other of the tabled methods of service, he will or may be in some uncertainty as to whether the document has actually arrived. Whilst such cases may be exceptional, letters can go astray in the post or document exchange, and may either not arrive at all or may only arrive seriously late; and technological failures may result in faxes or emails not arriving. In these cases, in the absence of a response from the defendant, the serving party will be unable to prove that the document has actually arrived; he will be able to do no more than prove it was duly transmitted.* ***In my view, however, the scheme of r6.7(1) is that a party who duly posts or otherwise transmits his document to the other party in accordance with the rules will be regarded as having 'served' it within the meaning of the first five words of r6.7(1) and will then be given the benefit of the presumptions in that rule as to when it was 'deemed' to be served on the other party so as to complete the service exercise.*** *"* [Emphasis mine]

[3] [2001] EWCA Civ 1498

[39] Based on the circumstances of the instant case, the CPR and case law in this jurisdiction, I rule that the Defendant was sufficiently served with the terms of the Order dated 8 April 2019 by way of email dated 25 April 2019.

Issue 2- Whether the Defendant's Notice of Application filed on the 13 May 2019 was filed within the 7-day stipulated period pursuant to Part 40.3(2)?

[40] Having ruled that the Defendant was sufficiently served with the Order dated 8 April 2019 by way of email dated 25 April 2019, it follows that his Notice of Application dated 13 May 2019 was not filed within the stipulated 7-day stipulated period pursuant to **Part 40.3(2).**

[41] Further, the Defendant at all times had notice of the date of hearing, as he was present when the date was set. It was incumbent upon him to contact either the Court Office or the other side to enquire what transpired on the 8 April 2019. His application was made more than a month after the date of hearing and almost three (3) weeks after the email of the Claimant's attorney at law.

[42] Therefore, I have no hesitation in ruling that the Defendant's Notice of Application was filed outside of the stipulated 7-day period.

Issue 3- Whether the Defendant has satisfied the requirements of the Rules of Court to justify the Court exercising its discretion to grant an extension of time to file an Application to set aside the Judgment or Order dated the 8 April 2019.

[43] Within the Defendant's Notice of Application, the Defendant seeks to briefly request an extension of time if necessary to bring its Notice of Application.

[44] In **Margaret Ottley (trading as Sanko-Fa HP) v The Attorney General of Trinidad and Tobago**[4], Kokaram J (as he then was) ruled on a matter where similarly the

[4] CV2016-03800

Defendant's Notice of Application was not filed within the seven (7) day period after the date the order was served on the applicant. The learned Judge (at para 8) decided that although the Rule stipulated that an application should be made within seven (7) days after the date the order was served on the applicant, the Court still retains a discretion to extend the time to comply. The learned Judge stated that the Defendant in that matter should satisfy the Court that the time to make a **Rule 11.17** application should be extended considering the **"Roland James factors".** It was further noted that the Court is guided by the factors set out pursuant to **CPR Rule 26.7** without the mandatory threshold requirements, which would have been applicable in an application for relief from sanctions.

[45] The **Roland James** factors as stated by Mendonça JA to be considered in determining whether to grant an extension of time include:

"In my judgment on an application for an extension of time, the factors outlined in rule 26.7 (1), (3) and (4) would generally be of relevance to the application and should be considered. ***So that the promptness of the application is to be considered, so too whether or not failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions.*** *The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not.*

The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case... apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application. However, the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all the relevant factors... the Court must take into account the respective disadvantages to both sides in granting or refusing their application. I think the focus should be on prejudice caused by failure to serve the defence on time." [Emphasis mine]

[46] These principles were further highlighted in the Court of Appeal decision in **Jimdar Caterers Limited v The Board of Inland Revenue**[5] where Mendonça JA made the following observation at paragraph 34:

"..***although the Rowley and Roland James cases were concerned with applications for an extension of time for a defence and a witness statement, the principles developed by them are not applicable to only those applications but are of wider application and apply, with possibly few exceptions only, to cases where the Court has a general discretion to extend time under the CPR.*** *The principles have been developed applying the relevant rules in the CPR. Therefore in exercising its discretion, the Court takes into account the circumstances of the relevant case and considers the features of promptitude, intentionality, good explanations, compliance, administration of justice; blameworthiness, remedying the breach, trial date certainty and prejudice."*[Emphasis mine]

[47] This Court is no stranger to the **Roland James** factors, as in **Violet Roselyn Banmally v Richard Radhay**[6] I considered in detail **Rule 26.7** and the **Roland James** factors to determine whether the Court should exercise its discretion to extend time to file an Application to set aside Judgment.

[48] The Court will examine the factors relevant to the circumstances of the case at bar.

Promptness

[49] As it relates to promptness of the application, the Court has already noted above that the said application was made more than a month after the date of the hearing and 18 days after the email of the Claimant's attorney at law. Although the Defendant sought in his application to say that he only had notice of the Order on 5 May 2019, his submissions proved otherwise as he clearly stated at paragraph 16 that Counsel was retained 18 days from the discovery of the order to file an application on the 13 May 2019.

[5] Civil Appeal No. P256 of 2016
[6] CV2016-04203

[50] Further, the Defendant has failed to provide any reasons for the delay in filing the application despite knowledge of the matter being heard on 8 April 2019. As stated by the Claimant in its written submissions, the Defendant even after the date of hearing elapsed continued to send email correspondence to the Claimant's representative's concerning the mortgage, however at no time did the Defendant enquire into the outcome of the Court matter. The Defendant has also not provided any excuse for failing to contact the Court Office to ascertain the outcome of the matter heard on 8 April 2019.

Good explanation

[51] In **Violet** (supra) this Court agreed with the learning of Lord Dyson and Jamadar JA as follows:

Lord Dyson at paragraph 23 in ***The Attorney General v Universal Projects Limited***[7] *said as follows:*

"To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.„

In ***Dr. Keith Rowley v Anand Ramlogan***[8]*, Jamadar JA stated at paragraph 24 as follows:*

"An explanation that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. Further, good explanation does not mean the complete absence of fault: see Mendonça JA. in Rawti Roopnarine and another v Harripersad Kissoo and others Civil Appeal No. 52 of 2012, paragraph 33. What is required is a good explanation not an infallible one. Mendonça JA went on to observe that when considering the explanation for the breach, it must not be subjected to such scrutiny as to require a standard of perfection."

[7] [2011] UKPC 37
[8] Civil Appeal No P215 of 2014

[52] The Defendant submitted that he had obligations in Jamaica, and that either he briefed Counsel who did not attend or Counsel was not properly briefed by him to attend Court and that he had a misconception. Further, the Court already found the Defendant's assertion that he only knew of the Order on 5 May 2019 to be untrue.

[53] The Court finds it difficult to accept the Defendant's excuse as a good explanation for the delay. The Defendant, irrespective of where he resided, ought to have followed up with his retained attorney to ensure his representation and to ascertain the outcome of the hearing as the Court on prior occasions urged him to retain legal representation to secure his interests.

Intentionality

[54] There is no dispute that the Defendant was duly served and notified of the Claimant's Claim. During the history of this matter, there has not been general compliance by the Defendant to any of the Court's directions, rules and/or orders. The Defendant despite becoming allegedly aware of the Claim since November 2018 has failed to file an Appearance and/or affidavit in response.

[55] The Court of Appeal stated in **Trincan Oil Limited v Keith Schnake** [9] and in **The Attorney General of Trinidad and Tobago v Universal Projects Limited** (supra) that *"to establish intentionality a deliberate positive intention not to comply with a rule, practice direction, court order or direction must be demonstrated. This intention can be inferred from the circumstances surrounding the non-compliance."*

[56] From the outset of this matter, the Defendant has not acted with any sense of urgency or seriousness. Even this Court urged the Defendant to retain Counsel to represent his interest. The Defendant in submissions seemed uncertain whether he had in fact even briefed Counsel. After being served the Fixed Date Claim Form, the Defendant failed to file an Appearance or Defence. He has not shown compliance with Orders of the Court or the processes of the Court. The Defendant's continuous failure to effectively

[9] Civil Appeal No. 91 of 2009

move this matter forward, leaves this Court to believe that he has shown a deliberate positive intention not to comply with the Court's processes.

Overriding Objective and prejudice

[57] I also agree with the Claimant's submission that the Defendant has failed to provide any good reasons as to why the Court should grant an extension of time and it would be unfair to the Claimant, who has complied with all pre action protocols, prior court orders, the CPR, directions of the Court and who is now in possession of a final Court Order to have same set aside due to the Defendant's own failure to comply with the Court's directions. The Defendant's Application shows no reasonable prospect of success and prejudices the Claimant's rights as mortgagee. To grant an order to set aside on the basis of such weak application would run counter to the principles enunciated in the Overriding Objective of the CPR as such an order would place the Claimant in a position to have to prove its case again which would result in more costs and expenses being incurred when the Defendant has not established any reasonable prospect of success. This course would effectively amount to punishing the party who has been diligent in pursuing its rights and rewarding another who has been negligent in defending his rights.

Administration of Justice

[58] In **Violet** (supra), this Court stated that in order to determine if the interests of the administration of justice have been satisfied, the Court has to consider the needs and interests of the parties as well as other Court users.

[59] Based on the circumstances of this case, especially the *laissez-faire* attitude of the Defendant put against the diligence of the Claimant, it would not be in the interests of justice to grant the Defendant an extension. In fact, it would be an injustice to the Claimant and an abuse of the Court's time should any extension be granted to the Defendant.

[60] As stated by the Court of Appeal in **The Attorney General v Universal Projects Limited**[10], *"…in the context of compliance with rules, orders and directions, the 'laissez–faire' approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated."*

[61] Having considered the factors above, I rule that the Defendant has not satisfied the relevant criteria for this Court to exercise its discretion in his favour.

Issue 4- Whether the Defendant who is seeking to set aside Judgment dated the 8 April 2019 has satisfied the legal thresholds required pursuant to Part 40.3 and Part 11.17 of the Civil Proceedings Rules 1998 to allow the Court to set aside the Judgment/Order dated 8 April 2019?

[62] By **CPR Rule 40.3(3)(a)** the Defendant must satisfy that he has a good reason for failing to attend the hearing on the 8 April 2019.

[63] In **Anthony Harricharan v Wilston Campbell** [11] Rampersad J at para. 9 referred to the case of **Brazil v Brazil [2002] EWCA Civ. 1135** where Mummery LJ in the Court of Appeal encapsulated what might constitute a good reason:

> "*There has been some debate before us, as there was before the judge, about what is or is not capable of being a "good reason." In my opinion, the search for a definition or description of "good reason" or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree with Hart J that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a "good reason." The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true "reason" for non-attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over*

[10] Civil Appeal No. 104 of 2009
[11] CV 2008-02024

analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase "good reason" as used in CPR 39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non- attendance."

[64] It is to be noted that **CPR 39.3(5) of the English CPR** is similar in terms and effect to our **CPR Part 40.3(3)**.

[65] Defendant submits that the reason he failed to attend the Court hearing on the 8 April 2019 was due to him working and residing in Jamaica. He further submits that he retained Counsel who did not appear on the 8 April 2019. The Defendant further submits at paragraph 27 of his submissions that either the Defendant briefed Counsel who did not attend or Counsel was not properly briefed by the Defendant to attend Court and the Defendant had a misconception. The Defendant is therefore uncertain as to whether Attorney at law was indeed properly briefed by the Defendant to attend Court.

[66] Despite the Defendant indicating that an Attorney at law had been formally retained, evidence of same being Exhibit Item 3 was not annexed in the Defendant's Application to prove that an Attorney at law had been formally retained to take conduct of and fully briefed on the matter. The Claimant's Attorneys submitted that they wrote to the Defendant's then Attorney to obtain a copy of the said exhibit to review, however, no response was forthcoming and no further clarification/evidence was provided in this regard.

[67] The Fixed Date Claim came up for hearing on 3 occasions and the Defendant was given sufficient opportunity to be heard. On the last hearing on 8 February 2019, the Court granted an extension of time to file his Affidavit in Response by the 22 March 2019 and also urged the Defendant to formally retain his Attorney at law while in

Trinidad so that the Attorney may take conduct of the matter. The Defendant was also present in Court when the hearing of 8 April 2019 was set.

[68] Accordingly, I cannot agree that the excuses of the Defendant constitute any good reason for his failure to attend.

[69] Further, by **CPR Rule 40.3(3)(b)** the Defendant must show that had he attended Court some other order might have been given or made. The Defendant in his Application and Submissions has failed to set out how some other Order might have been given or made had the Defendant and/or his Attorney attended Court at the date of hearing.

[70] The Claimant further avers that no different Order would have been made if the Defendant was present, as the Claimant's claim for judgment and possession was rightfully before the Court. The Claimant therefore in exercising its rights as mortgagee and seeking remedies under same in compliance with **Part 69 CPR** acted in accordance with the law.

[71] In **Hackney London Borough Council v Driscoll**[12] same states that *"once a Defendant knew about the proceedings the Court had the necessary jurisdiction to make an order affecting them. It also gave the party in whose favour the judgment was given the chance of not having to prove its case all over again with all the attendant expense that would involve".*

[72] The Defendant sought to rely on the case of **Stock v Stock**[13]. The Claimant, however, submitted that the facts in **Stock** materially differ from the case at bar. In **Stock** the notice of the hearing was sent to the Appellant's home address who indicated that he had not received same which was the reason for his non-attendance. The Appellant's Application was supported by a letter of the Appellant's wife who stated that she found the document from the Court and thinking it was in relation to divorce proceedings tore it up. The Court, in delivering its judgment, indicated that in light of the fact that

[12] [2003] EWCA Civ 1037
[13] [2000] All ER (D) 1599

the Appellant had timeously filed a defence and completed the allocation questionnaire and put before the Court documentation which threw doubt on the Respondent's claim shows that there was a real issue to be tried between both parties and that it would be wrong to deprive the Appellant a hearing on the merits. But more importantly the Court placed weight on the Appellant's wife's affidavit deposing to the truth of the explanation for non-attendance. The Court also upheld that the Appellant's defence was not devoid of merit and in those circumstances, the judgment, which was entered, was set aside.

[73] The case at bar can be distinguished from **Stock** in that the Defendant was duly notified of the date of hearing as he was present when the date for the hearing was fixed. In addition, the Defendant's Application fails to put forward substantive evidence as to the reason for his and/or his Attorney's non-attendance. Further, in **Stock** the Defendant had filed a Defence whereas in the case at bar no Affidavit in Response or Defence was filed and the Fixed Date Claim was before the Court for determination.

[74] The Defendant has provided no evidence to rebut the Claimant's Claim, which would show that there is a real issue to be tried. The Defendant had numerous opportunities to put before this Court a Defence and/or Affidavit in Response challenging the Claim of the Claimant but failed to do so.

[75] The Defendant in his Application, sought to challenge the terms of the mortgage agreement with the Claimant, by claiming ignorance of what the terms meant. While this Court cannot make a determination on whether he understood every term of the mortgage agreement, it is more probable that he knew the contract he was entering into and that failure to honour its terms must have had consequences- that is, money was being loaned for which it must have been repaid. This is evident from his affidavit in support of his Application where he stated that he agreed to repay the loan.

[76] The Defendant also stated that the Claim for money judgment and vacant possession was bad in law. However, while both were granted, the 2019 Order specifically stated that they were not to be enforced concurrently. In fact, properly construed, they are in

the alternative, that is, in the event the money is not paid then the Claimant was empowered to take possession of the mortgaged property.

[77] Further, had the Defendant taken an interest in the matter at any point in time prior to the 2019 Order, he could have challenged the Claimant on the mortgage agreement itself, whether by filing a Defence or a Defence and Counterclaim. This simply was not done, and he cannot now claim ignorance.

[78] The evidence before this Court is clear and convincing. The Claimant and Defendant entered into a mortgage facility, which the Defendant failed to satisfy. The Claimant therefore filed all necessary evidence to support its Claim, and has succeeded in convincing the Court of monies due and owing to it.

[79] The Defendant has failed to satisfy the Court that some other Order would have been made had he and/or his attorney at law attended.

[80] Accordingly, the Court finds that the Defendant has not satisfied the requirements of the **CPR** to set aside the Order of 8 April 2019, and that it was justified in granting said Order.

VII. Conclusion

[81] The Defendant had notice of the 2019 Order by the 25 April 2019 when the terms of the said order were emailed to him by the Claimant's attorney at law. Such email being sufficient notice of the terms of the 2019 Order. His application filed on the 13 May 2019 was therefore well outside the 7-day limitation period specified by CPR Part 40.3(2) and CPR Part 11.17(2). Further, the Defendant has failed to satisfy the requirements of the CPR Part 40.3(3) and CPR 11.17(3) for setting aside the 2019 Order.

[82] The Claimant therefore succeeds in its Application filed on 19 July 2019 to strike out the Defendant's Application to set aside the 2019 Order filed on 13 May 2019. The Defendant's Application shall therefore be dismissed.

[83] On the issue of costs of the two Applications, I can find no justification for departing from the general rule that costs follow the event, that is, the unsuccessful party shall pay the costs of the successful party: **CPR Part 66.6(1)**. The Claimant shall be entitled to its costs of the Applications. Since such Applications are by their nature procedural, quantification of costs shall be on the basis of assessment in accordance with **CPR Part 67.11**, in default of agreement.

VIII. Disposition

[84] Given the analyses and findings above, the Order of the Court is as follows:

ORDER

1. **Judgment be and is hereby granted to the Claimant on its Notice of Application filed on 19 July 2019 to strike out the Defendant's Notice of Application filed on 13 May 2019.**

2. **The Defendant's Notice of Application filed 13 May 2019 seeking to set aside the Order of the Court dated 8 April 2019 be and is hereby dismissed.**

3. **The Defendant shall pay to the Claimant costs of the two Applications to be assessed in accordance with CPR Part 67.11, in default of agreement.**

Robin N. Mohammed
Judge