

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2009-02311

BETWEEN

ROHINI KHAN

Claimant

AND

NEVILLE JOHNSTON

(trading as Johnston Construction)

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER RAJKUMAR

APPEARANCES:

Mr. Gerald Ramdeen for the Claimant

Ms. R. Joseph for the Defendant

Oral judgment

Even on the assumption that this judgment is regular, which I have my doubts about, I consider

- (i) that the defendant has a realistic prospect of success in defending this claim,
- (ii) that the defendant acted as soon as reasonably practicable when he found out that the judgment had been entered against him, and

Accordingly this judgment is set aside. I consider also, in so far as it might be relevant, that the defendant has also surmounted the hurdles set out by the Honourable Justice of Appeal Jamadar in **Trincan Oil Limited v Chris Martin C.A. Civ. 65/2009** for relief from sanctions.

Reasons for decision

The defendant seeks to set aside a judgment entered against him in default of appearance.

Part 13.3 (1)

The court may set aside a judgment entered under Part 12 if

- (a) the defendant has a realistic prospect of success in the claim; and*
- (b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.*

Whether the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him:

- (i) though the claimant obtained default judgment after notice of claim by advertisement on or around March 24th 2010 ,the official order is stamped April 7th 2010.
- (ii) the defendant claims that he first learnt of the matter being filed on **May 24th 2010** when he received a letter dated April 8 2010. He secured an appointment with an attorney in **June 4 2010**. Thereafter he obtained office copies of the Claim Form and Statement of Case on **June 7th 2010**. He instructed his attorneys to apply to set aside the judgment on **June 10th 2010** and provided further instructions as requested on **June 17th 2010**. From

June 17th 2010 to the date of filing the application on **July 5th 2010** the delay is explained as resulting from attorney's office administration difficulties.

I consider that occasional glitches in the running of an attorney's practice may occur, falling short of negligence or even inadvertence, which may impact on time frames set by the rules. The delay from June 18th to July 5th has been candidly and adequately explained.

I consider that the defendant acted as soon as reasonably practicable in the circumstances set out above.

Whether the defendant has a realistic prospect of success in the claim.

I note that the claimant stated at paragraph 4 of his Statement of Case that pursuant to the said agreement, "*the claimant paid the defendant the sum of \$455,000.47 which was acknowledged on the 2nd day of October 2008. See Annex 2.*" In fact Annex 2 comprises photocopies of 4 cheques:

August 18 th 2008	-	\$150,000.00
August 6 th 2008	-	\$9,667.00
September 6 th 2008	-	\$20,000.00
October 2 nd 2008	-	\$150,000.00

Total - \$329,667.00

She claims the difference (\$184,394.89) between the amount allegedly paid and the value of the work done as assessed by a Quantity Surveyor; that *is-the difference between \$455,000.47 and \$270,605.58* as damages for breach of contract.

It is clear that there is an arguable defence as to that amount of \$184,394.89 which is based on an alleged acknowledgement of payment of **\$455,000.47** when in fact the “acknowledgement” is simply 4 cheques which total **\$329,667.00** (that is approximately **\$75,000.00** less than the amount the claimant claims to have paid). The cheques do not support the amount of the alleged payment, and therefore the claimant’s calculation of the difference is not supported. The court was asked to infer that all the payments were not by cheque. Even if the statement of case were to be so read this would be a matter for evidence, as prima facie the defendant has an arguable defence.

Further she claims the further sum of **\$83,281.18** as damages for breach of contract being the additional monies she would have to spend to have the contract performed. This sum is based on a quotation/estimate, on which it is equally not apparent on its face that this calculation is supported.

Whether judgment was even regular

The instant judgment was purportedly entered for a specified amount of money on a claim which was partly for damages– the amount of **\$275,848.27**, which was based on the total of **\$184,394.89**, and the sum of **\$83,281.18 claimed as damages for breach of contract** in the Statement of Case.

It was contended that as the claim was for a specified amount of money the claimant was entitled to enter judgment for the payment of that amount, presumably pursuant to Part 12 (7) (1) (a) and Part 12.3 (3) (c) (iii) of the CPR. It is doubtful whether a claim for damages which would normally have to be assessed under Part 16, can be converted into one for a specified sum of money merely by the claimant's ascribing a figure to it. For example, if the figure ascribed were \$100 million dollars, there would be no opportunity for an objective independent assessment by the court if the rule were interpreted to permit the claimant to ascribe his own value by specifying his own figure, and to enter judgment for that self created figure over the counter.

This would in effect permit a claimant to perform his own assessment and bypass an assessment by the court.

The fact that specific provision is made in parts 12.6 (1), 12.6 (2) (a) and 12.6 (3) (a) and (b) to allow claims for:

(a) interest and

(b) cost of vehicle repairs if receipted bills are attached

to be treated as claims for a specified sum of money demonstrates that it is clearly contemplated that in the absence of such specific provision claims for:

(a) interest; and

(b) damages in running down claims

would otherwise require assessment.

The words “claim for an amount of money which is not specified” in Part 12.7(1) (c) are unfortunate as the word “specified” does not indicate specified by whom or in what manner.

Further, Part 12.7 (3) permits, and in fact requires, the claimant, in the case of a claim partly for a specified sum and partly for an unspecified sum, to abandon the claim for the unspecified sum if he wishes to take up an over the counter default judgment.

Relief from Sanctions

It was further contended by the claimant (page 4 of written submissions dated January 6th 2011) that the provisions of Part 26.7 apply to an application to set aside the judgment despite the specific provisions governing this under Part 13. Even assuming this to be so I found:

- (i) that the application for relief was made promptly in the circumstances set out in the applicant’s affidavit above and in any event the defendant acted as soon as reasonably practicable under Part 13.3 (1) (b).

- (ii) the failure to comply was not intentional
- (iii) there was a good explanation for the breach
- (iv) the defendant had generally complied with all other rules, orders and directions that were applicable.

The interests of the administration of justice required that the defendants, who had established a realistic prospect of success in defending the claim, be allowed to defend it, in light of the matters set out hereinabove, as the amounts for which judgment was entered:

- a. Required further independent quantification and it was probable that the judgment was therefore wrongly entered.
- b. In any event were not supported by exhibits to the statement of case. This supported the defendant's contention that he had a realistic prospect of success.

The defence and counter claim are prepared and ready for filing (see exhibit **NJ 4** to defendant's affidavit filed July 5 2010). No trial date was at risk as none had been set. In any event a trial date before the end of this year will still be possible.

Dated this 12th day of April 2011.

Peter A. Rajkumar

Judge.