ST. GEORGE WEST COUNTY
PORT OF SPAIN PETTY CIVIL COURT

<u>RULING: SETTING ASIDE JUDGMENT ENTERED IN DEFAULT OF DEFENCE</u>

CITATION: Imcon Enterprises Limited v. Ross Advertising Limited

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 122 of 2013

DELIVERED ON: 26th August 2013

CORAM: Her Worship Magistrate Nalini Singh
St. George West County
Port of Spain Petty Civil Court Judge

REPRESENTATION:

Mr. Jerome J.K. Herrera appeared for the Applicant/Defendant

Mr. Vinda Dead Maharaj appeared for the Respondent/Plaintiff

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1. THE APPLICATION

1. By Notice of Application dated and filed on the 19th July 2013, the applicant/defendant company Ross Advertising Limited sought an order that the judgment obtained against it on the 18th June 2013 be set aside.

1.2 This Notice was brought under **Section 11 of the Petty Civil Courts Rules** made under **Section 53 of the Petty Civil Courts Act Chap. 4:21** which provides as follows:

> "Where a defendant upon a Default Summons fails to file the affidavit or notice to obtain leave to defend within the time limited for so doing and judgment for the plaintiff upon his claim has been entered accordingly, the Judge may upon application made by the defendant set aside the judgment upon such terms as to costs or otherwise as he may think just, and allow the defendant thereafter to defend the whole or such part of the claim as he may think proper. Any application made in this behalf must be supported by affidavit disclosing a defence upon the merits and explaining the neglect, and notice of the application together with a copy of the affidavit shall be served upon the plaintiff or his Attorney-at-law at least three clear days before the date fixed for the hearing of the same".

1.3 Having regard to the above, the Court's view is that an application to set aside judgment upon a Default Summons, must be supported by an affidavit which does two things. It must:

(a) disclose a defence upon the merits and

(b) explain why an affidavit or notice to obtain leave to defend was not filed within the prescribed time.

2. THE ISSUES

2.1 The issues which therefore arise for consideration in this matter are:

(a) Whether the affidavit discloses a defence upon the merits.

(b) Whether the affidavit explains the reason for the neglect in filing an affidavit or notice to obtain leave to defend within the prescribed time.

3. THE LAW

(a) Whether the affidavit discloses a defence upon the merits.

3.1 A determination of whether the affidavit discloses a defence upon the merits involves the consideration of two matters. One is the meaning of the term "disclosing a defence" and the second is the meaning of the term "a defence upon the merits". I turn now to an examination of the meaning of each of these terms.

Meaning of Disclosing a Defence

3.2 For an affidavit to be considered as "disclosing a defence", the case of **Whiley v. Whiley 140 ER 1248** suggests that the defendant must actually set out the facts which he intends to rely upon, in the affidavit. As Cockburn CJ said in this judgment, at page 1251:

> "I think it is impossible to say that disclosing a defence means no more than stating the fact of the existence of a defence. It clearly means something more: the defendant must shew upon his affidavit what the nature of the defence is. He

> need not set out the whole defence in minute particularity: but he must do something more than nakedly state that he has a defence to the action upon the merits".

So an affidavit which discloses a defence cannot be one that simply states that the defendant has a good defence to the action on the merits. It must actually show the nature of the defence and set out facts which will enable the court to decide whether or not there is a matter which would afford a defence to the action: **<u>Stewart</u> v. <u>McMahon</u> (1908) 1 Sask. L.R. 209, 7 W.L.R. 643 per Wetmore CJ at pg. 646.** As Hamel-Smith JA noted in **<u>Roger Soogrim</u> v. <u>David Brown (trading as David Brown Transport Service)</u> CVA No. 168 of 2000 at pg. 3:**

> "At paragraph 9 of the affidavit, attorney stated that the defendant had a good defence on the merits. Simply saying that takes the issue no further. It really is a conclusion for a Judge or Master to draw and not the defendant or his attorney… This case is a reflection of the lackadaisical approach of some attorneys in dealing with applications to set aside regular judgments. For too long the practice has been simply to be as brief as possible with the concluding declaration that 'the defendant has merit'. Attorneys must understand that in actions of this nature it is imperative… to swear to the facts".

3.3 What then are the facts the applicant/defendant is expected to swear to in his affidavit? The answer is facts which disclose a defence upon the merits; the meaning of which I turn to now.

Meaning of a Defence Upon Its Merits

3.4 The cases have suggested that an affidavit which discloses a defence upon the merits is an affidavit which discloses facts from which a court can determine that:

- The applicant has an arguable or triable case: **Nazir Mohammed v. Ramdassie Changoor HCA No. 3126 of 1974 per Deyalsingh J at pg. 2, Isha Mohammed (dependent of the deceased Hadeed Mohammed) v. Siew Beeka and Bissoon Beeka HCA No 751 of 1977 per Blackman J at pg. 2, Hollis Juteram v. Trinidad and Tobago Electricity Commission HCA No. 3030 of 1982 per Douglin Master at pg. 4, Bank of Commerce of Trinidad and Tobago Limited v. Oswald Gittens HCA No. 4068 of 1983 per Seapaul Master at pg. 3** and **Intercommercial Bank Limited v. Oliver Magnus & Joan Webley HCA S977 of 2002 per Sobion Master at pg. 2.**

- The defence is real and not imaginary and that it is worthy of being entertained and considered: **Watt v. Barrett 3 Q.B.D. 183 per Cockburn CJ at pg. 185,** and **Miller v. Ross (1909) 2 Sask. L.R. 449, 12 W.L.R. 315 per Wetmore CJ at pg. 317 para. 4.**

- There is a *bona-fide* question to try: **Anderson v. Anderson and Boyd Bros. [1934] 2 W.W.R. 128 per Martin JA at para. 10.**

- There is evidence that the applicant has a *prima facie* defence: **Evans v. Bartlam [1937] A.C. 473 per Lord Atkin at pg. 480, Trinidad Transport Enterprise Ltd. & Boysie Nanan v. Desmond Norbert de Souza CA Civ. No. 12 of 1969 per Sir Arthur**

McShine CJ at pgs. 1-2, and **Elegant Sportswear Ltd. v. Futterman Maya Co. Inc. CA Civ. No. 14 of 1969 per CEG Phillips CJ (Ag.) at pgs 1-2.**

- The applicant has a defence that is at least worthy of investigation: **Sales v. Sereda [1952] 5 W.W.R. (N.S.) 470 per Thomson J at para. 4.**

3.5 There is also case law to the effect that a defence upon the merits cannot be likened to a good defence: **Burns v. Kondel (1971) Vol. 1 Ll LR per Lord Denning MR at pg. 555** and **Environmental Specialist Services Limited v. St. George West County Council HCA No. 974 of 1990 per Dolye Master at pg. 7.** From this it is immediately apparent that the test the Petty Civil Court Judge is concerned with, is lower than the "realistic prospect of success" test employed by their lordships under **Part 13.3 of the Civil Proceedings Rules** (hereinafter referred to as the CPR).

3.6 With this in mind, I turn now to a consideration of whether, on the affidavit evidence before me, a defence upon the merits is shown. In so doing, I have found it necessary to examine firstly, the affidavit of Mr. Syeed Mohammed director of the respondent/plaintiff company - Imcon Enterprises Limited, dated the 30th April 2013 and filed on the 1st May 2013 in support of the Default Summons in the substantive matter.

The Affidavit filed on behalf of the Respondent/Plaintiff Company

3.7 On an examination of this document, the respondent/plaintiff company claimed $11, 436.17 TTD plus costs. This is how Mr. Syeed Mohammed said the money became due to the respondent/plaintiff company. According to him on the 10th November 2011 acting in his

capacity as agent for the respondent/plaintiff company, he entered into a contract with the applicant/defendant company through the applicant/defendant company's agent Mr. Jerome Ruiz to provide the applicant/defendant company with the following services:

a. To shampoo, deodorize, extract and bring to dust free 3,684 square feet of carpets;

b. To strip, remove all construction droppings and extract 359 square feet of ceramic tiles;

c. To clear and sanitize 2 bathroom walls, floors, toilets and sinks; and

d. To clean one staircase.

3.8 Upon the commencement of the said work it was discovered that the extent of cleaning which was required was in excess of what was originally contemplated and it was then agreed by both contracting parties that the respondent/plaintiff company would be paid by the applicant/defendant company the excess costs incurred. After the said work was completed the respondent/plaintiff company presented its bill of $ 11, 436.17 TTD to the applicant/defendant company for payment. This sum of money went unpaid and despite several requests for payment, the said sum remains unpaid to date.

The Draft Defence Filed on Behalf of the Applicant/Defendant Company

3.9 According to draft defence filed on behalf of the applicant/defendant company:

"In or about the month of November, 2011 the Defendant avers that an oral agreement was made between the Plaintiff and the Defendant in so far as the Plaintiff would be commissioned to vacuum the office space of the Defendant.

> The Plaintiff agreed to execute the task; however, the Plaintiff assured that a job order would be sent prior to execution of the works.
>
> ...the Plaintiff independently did more than what it was contracted to do. The Defendant admits the contents of... the Particulars of Claim, only to the extent that the description of the job order was consistent with the oral agreement to vacuum the Defendant's premises. At this time the price of the work was neither provided nor agreed upon. The invoice (which) was subsequently sent stands opposite to the previous job order and what was agreed.
>
> The extra services performed by the Plaintiff were done without the knowledge, consent and/or acquiescence of the Defendant. Accordingly the price of which is sue(d) for in this action, was not ordered in writing or subsequently agreed upon in unison by both parties."

3.10 In summary, the applicant/defendant company alleges that the respondent/plaintiff company went outside the scope of works which was originally contemplated and as such the sum claimed was never agreed to by both parties as consideration for work done by the respondent/plaintiff company. Whether there was an agreement to the extent that the respondent/plaintiff company alleges or, whether what happened is as the applicant/defendant avers is at the end of the day a question of fact which ought properly to be determined at trial.

3.11 In light of the foregoing, I am of the view that the applicant/defendant raises a defence upon the merits.

(b) Whether the affidavit explains the reason for the neglect in filing an affidavit or notice to obtain leave to defend within the prescribed time.

4.1 The Default Summons was filed on the 1st May 2013. This document was served on the applicant/defendant company on the 5th June 2013. The applicant/defendant had 10 clear days from the date of service to obtain leave to defend the matter. This meant that the applicant/defendant had until the 15th June 2013 (inclusive) to obtain leave to defend the matter. This was not done and on the 18th June 2013, an application was made to obtain judgment in the circumstances. This was granted on the 18th June 2013.

4.2 According to the affidavit by Ms. Natalie Barker dated the 17th July 2013 and filed on the 18th July 2013, which was filed in support of the application to set aside judgment entered in default on the 18th June 2013, the applicant/defendant company explained the neglect in filing an affidavit or notice to obtain leave to defend the matter within the prescribed time in this way:

> "When the default summons came to the Defendant's office it was uncertain as to the date of which the document was received as there was no endorsement on the document. To add further the Defendant does not have a front desk on the premises, which means that there is not an efficient internal mail system to pass such matters forward to the relevant personnel; and in regard to personnel the Defendant does not have an in-house attorney to deal with legal claims or correspondence. Therefore the Defendant does not have the appropriate means of

> handling and dealing with the collection and distribution of such documents to relevant management.
>
> The summonses came to the attention of the management team of the Defendant on Friday 12th July 2013".

Then, by affidavit dated and filed by Ms. Natalie Barker on the 19th July 2013, the neglect in filing an affidavit or notice to obtain leave to defend the matter within the prescribed time was further explained in this way:

> "The Defendant was unable to appear or defend the current action... because (it) does not have the appropriate means of handling and dealing with the collection and distribution of legal and court documents to the relevant personnel".

4.3 **Section 11 of the Petty Civil Courts Rules** made under **Section 53 of the Petty Civil Courts Act Chap. 4:21** provides that the Petty Civil Court Judge may set aside judgment and an application made in this behalf must be supported by an affidavit which explains the neglect. Additionally, **Section 32 of the Petty Civil Courts Act Chap. 4:21** provides that:

> "The Judge shall have power, on application made on notice, in his discretion to set aside any judgment pronounced by him and grant a new trial of any action tried by him on any of the grounds on which the High Court may grant a new trial of any action tried in such Court...".

One of the grounds upon which a High Court may grant a new trial of any action tried in such court is, according to **Part 40.3 of the CPR,** once there is a "good reason" for non appearance when default judgment was previously granted. If **section 11 and section 32 of the Petty Civil**

Courts Act Chap. 4:21 are read in this light, it would seem that the Petty Civil Court Judge should be satisfied that the explanation for the neglect in filing the affidavit or notice to obtain leave to defend within the time limited for so doing is a "good reason". It follows -and logically so, that not just any explanation would suffice to move the Court to set aside judgment as per **section 11 of the Petty Civil Courts Rules** made under **Section 53 of the Petty Civil Courts Act Chap. 4:21**

4.4 From the contents of the affidavit of the applicant/defendant company, it is evident that the application to set aside judgment is predicated upon the lack of internal systems to of handle and deal with the collection and distribution of legal and court documents so that it may be brought to the attention of the relevant personnel. The issue which therefore arises for determination is simply, whether this is a "good reason" to move the Court to set aside judgment.

4.5. In light of the fact that the applicant/defendant company alleges that it "was uncertain as to the date of which the document was received as there was no endorsement on the document... further the Defendant does not have a front desk on the premises, which means that there is not an efficient internal mail system to pass such matters forward to the relevant personnel", in my view the first step must be to ascertain whether the Default Summons was properly served on the defendant.

4.6 There is no dispute that the No. 11 Gray Street, St. Clair, Port of Spain is the registered business address of the applicant/defendant company. **Section 7 of the Petty Civil Court Rules** states that a default summons must be personally served. Since the applicant/defendant is a

company service is governed by **Section 491 of the Companies Act Chap. 81:01** which provides *inter alia* that:

> " A notice or document may be served on a company—
>
> *(a)* by leaving it at, or sending it by telex or telefax or by prepaid post or cable addressed to, the registered office of the company; or
>
> *(b)* by personally serving any director, officer, receiver, receiver-manager or liquidator of the company".

As to the meaning of the term "officer" this is defined in **Section 4 of the Companies Act Chap. 81:01** as follows:

> " *(a)* the chairman, deputy chairman, president or vice-president of the board of directors;
>
> *(b)* the managing director, general manager, comptroller, secretary or treasurer; or
>
> *(c)* any other person who performs for the body corporate functions similar to those normally performed by the holder of any office specified in paragraph *(a)* or *(b)* and who is duly appointed to perform such functions".

The endorsement of service on the default summons document reads as follows:

"**ENDORSEMENT AFTER SERVICE**

This summons was served by me The Undersigned on the above-named Defendant Ms. Stacey Ryan Executive Director to the CEO personally at Gray Street St. Clair (Ross Advertising) on Wednesday the 05th day of June, 2013.

At 9.00 o'clock of the fore noon.

Cecilia Felix

....

BAILIFF

PCC

POS

5/6/13".

It follows that the default summons was served personally on an officer of the company as per **section 491 (b) of the Companies Act Chap. 81:01** i.e. on the executive director to the CEO of Ross Advertising Limited on the 5th June 2013. As such there can be no valid criticism of the respondent/plaintiff company's conduct. In my view, once it is evident that the default summons was properly served on the applicant/defendant company, the respondent/plaintiff was entitled to enter default judgment against the applicant/defendant company.

4.7 In the case of **Brazil v. Brazil [2003] E.W.C.A. Civ. 1135** the approach to deciding whether the existence of a good reason for not attending the trial had been made out, was set out at paragraph 12. This is what was said:

> "I agree... 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 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". (emphasis mine).

4.8 The importance of looking at all the circumstances of the case was emphasized in the matter of **Ayela & Kalley v. The Mayor and Burgesses of the London Borough of Newham [2010] E.W.H.C. 309 (QB)** at paragraph 34 where Mr. Justice Sweeney made the point that:

"when considering whether a party had a good reason for not attending a trial, the court has to consider the case in the light of all the relevant factors for non-attendance and then, looking at the matter in the round, to determine whether the reason is sufficient for the court to exercise its discretion in favour of the defaulting party".

4.9 What then are the relevant factors of the case at hand?

Not brought to the attention of the "relevant personnel" or "management team"

4.10 The reason advanced for the failure of the company to deal with the default summons once it was served, is set out in the affidavit which supports the application of the applicant/defendant company to set aside the judgment. This affidavit is under the hand of Natalie Barker; an accountant. According to her the applicant/defendant company did not have

notice of the default summons when it was served because it was never brought to the attention of "relevant personnel" or the "management team" of the applicant/defendant company. This Court is hard pressed to imagine who could be considered a more "relevant personnel" or a critical member of the "management team" than the company's managing director and CEO and the affidavit is bereft of this information.

Means to handle and deal with the collection and distribution of legal and court documents

4.11 Another reason advanced for the failure of the company to deal with the default summons once it was served was -according to the affidavit under the hand of Natalie Barker, the applicant/defendant company did "not have the appropriate means of handling and dealing with the collection and distribution of legal and court documents". Developing on this point it was stated that the applicant/defendant company did not have a front desk on the premises and this meant that there wasn't an efficient internal mail system to pass such matters forward. As such the default summon only came to the attention of the management team on the 12th July 2013.

4.12 In my view the affidavit could have at least indicated what happens to mail once it is delivered to the company. There is no written indication of whether incoming mail is entered in a diary nor is there an indication of what is done with incoming mail upon receipt such as say the generation of an internal office memo to accompany incoming mail through the various channels in the company. Further there was no explanation of the company's usual procedure once legal documents are served on it. Without this background information the Court is deprived of any contextual framework within which to assess this application and is therefore left with what can only be categorized as a particularly sparse reason for why the default summons was in the

possession of the executive director to the CEO for 6 clear days before it reached the "management team" -assuming in the first place that the executive director to the CEO did not form part of this team.

4.13 On the matter of reconciling good service with the fact that the default summons was not brought to the attention of the "relevant personnel" or the "management team", I have found the case of **Black Gold Leasing Ltd. v. S&W Holdings Ltd. 1982 Carswell Alta 475; 42 AR 219** to be instructive. This was a case where the plaintiff obtained a default judgment against a corporate defendant. The corporate defendant thereafter brought an application to set aside the default judgment. One of the grounds relied upon was that the default summons was not brought to the attention of the relevant person in the company. In holding that this was not a legal basis for setting aside the default judgment, Master Funduk said this at paragraph 9 to 12:

> "9 The first position taken be counsel for the Defendant is that there was not proper service of the statement of claim because it was not given to the principals of the Defendant. That position has no merit.
>
> 10 One of the methods of service of legal process on a company is in a manner provided by statute: Rule 15 (2) (a). Section 289 of the applicable Companies Act provides that a document can be served on a company by, inter alia, sending it by registered post to the registered office of the company. The Plaintiff did that. There is no dispute the statement of claim was received at the registered office of the Defendant. The Plaintiff had good service.

> 11 The fact the persons who physically occupy the registered office do not bring the statement of claim to the attention of someone in a position of authority in the company, if such be the case, is irrelevant. If service is effected in accordance with section 289 that is good service. The Companies Act does not impose an obligation on a plaintiff to ensure that a statement of claim comes to the attention of someone high up the company ladder. If whoever was in the registered office did not pass the document up the ladder, so to speak, the company must address its complaint to that person, no one else.
>
> 12 If a statement of claim is served on a company by leaving a copy of it with a cashier, for example, as allowed by Rule 15(2) (b), the company cannot suggest it was not served if the cashier failed to pass the statement of claim up the ladder (emphasis mine)".

4.14 I adopt these sentiments expressed by the learned Master and hold that it is the very humble and respectful view of this Court that to set aside the judgment on such feeble evidence seems to be an extraordinary position to adopt and so, I conclude that on the evidence before me I am of the view that it fails to satisfy the Court that the applicant/defendant company had a good reason for the neglect in filing the affidavit or notice to obtain leave to defend within the time limited for so doing.

4.15 In arriving at this conclusion I have given due consideration to the fact that the interests of justice in general dictate that litigation between parties should be decided on the merits of the

case and not upon technicalities. Indeed this is the approach that is commended by the cases of **Ramnarine Seenath v. Seenath & Another CA Civ. No. 22 of 1965** and **The American Foreign Insurance Co. (a firm) and the Quaker Oats Co. v. Allan Lumsden and Lumsden & Co. Ltd. CA Civil No. 11 of 1967.** Certainly, from a policy standpoint it is crucial to any system of justice that litigants are afforded a fair opportunity to present their cases to the court. At the same time, surely it must be the case that judges should as a matter of case management, act robustly to bring cases to closure within of course, the necessary parameters of fairness. Looked at from this perspective, I am inclined to agree with the findings in the case of **R v. London Quarter Sessions Appeals Committee Ex. p. Rossi [1956] 1 QB 682 CA.** where it was held that no person can be made liable under court order unless he has been given fair notice of the proceedings to enable him to appear and defend them. On the facts of this case I find as a fact that the applicant/defendant company was duly served with process and was therefore given fair notice of the proceedings to enable it to appear and defend them. This is not the type of case where -as was the case in **White v. Weston [1968] 2 Q.B. 647,** a county court summons was served on the defendant's previous address and he did not receive it so when judgment was given against him without his having actual and real knowledge of the proceedings, he was entitled to have the judgment set aside as of right, *ex debito justitiae.*

5. THE CONCLUSION

5.1 Having duly considered the all of the material and submissions advanced to this Court in this application, I am, with respect, wholly unable to find that there is anything disclosed which allows me to conclude that Ross Advertising Limited had a good reason for its neglect in filing an affidavit or notice to obtain leave to defend within the prescribed time. Since the conditions

set out in **section 11 of the Petty Civil Courts Rules** made under **Section 53 of the Petty Civil Courts Act Chap. 4:21** are conjunctive and not disjunctive in that it is a duo of hurdles the applicant/defendant company is required to overcome, its failure to demonstrate "good reason" for its neglect to file an affidavit or notice to obtain leave to defend within the prescribed time - notwithstanding the fact that I have previously found that a defence is disclosed upon the merits, leaves the Court with little choice but to conclude with hesitation that the applicant/defendant company is not entitled to invoke the discretion of the Court to set aside the judgment which was entered against it.

5.2 For these reasons I refuse the application to set aside default judgment.

……………………………………………

Her Worship Magistrate Nalini Singh

Petty Civil Court Judge