REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P228/2020
CV2019-05002

BETWEEN

CHINA BUILDING TECHNIQUE GROUP COMPANY LIMITED

YONGGAO PAN

LIJUN WANG

JIANGSU GOLD CIVIL CONSTRUCTION GROUP TRINIDAD AND TOBAGO LIMITED

Appellants

AND

CHINA BUILDING TECHNIQUE GROUP COMPANY TRINIDAD AND TOBAGO LIMITED

HUAIXIN JI

VASHTY ADIMOOLAH

Respondents

PANEL:

P. MOOSAI, JA

J. ABOUD, JA

DATE DELIVERED: 27th May, 2022

APPEARANCES:

Mr. N. Ramnanan for the Appellants.

Mr. J. Jeremie SC leads Dr. T. Affonso and Mr. R. Keller instructed by Ms. L. Peña for the Respondents.

I have read the judgment of Moosai JA and agree with it.

J. Aboud

Justice of Appeal

REASONS

I. Background/Procedural History

1) The first claimant/respondent, China Building Technique Group Trinidad and Tobago Limited ('China Building Trinidad') is a locally incorporated company in the business of architecture and construction. The second and third claimants/respondents, Huaixin Ji ('Ji') and Vashty Adimoolah ('Adimoolah') (collectively called 'the respondents') are the directors of China Building Trinidad. The respondents sued the defendants/appellants in the circumstances set out below. The first defendant/appellant is China Building Technique Group Company Limited, a company incorporated in Trinidad and Tobago ('China Building' or 'the first appellant'). The second defendant/appellant is Yonggao Pan ('Pan'), a Chinese national and a Director of the first and fourth named appellants.[1] Lijun Wang ('Wang'), who at the material time was residing abroad, and Jiangsu Gold Civil Construction Group Trinidad and Tobago Limited ('Jiangsu Trinidad') are the other two defendants/appellants, who were also sued in the high court by the respondents.[2] All four defendants/appellants are collectively referred to as 'the appellants'.
2) On 6 December 2019, the respondents applied for a Mareva Injunction against China Building, Pan and Wang. This injunction was granted at an *ex parte* hearing of the application on 9

[1] It is accepted that Pan was, for some time, also a Director and Company Secretary of China Building Trinidad, the first named respondent: See [79] of Affidavit of Yonggao Pan dated 11 June 2020.
[2] It is alleged by the respondents that Wang is also a Director of the first and fourth named appellants.

December 2019. By amended claim form filed 30 December 2019, the respondents claimed the sum of $9,862,537.84 being the sum payable by cheque number 266631 ('the disputed cheque') or alternatively, damages for conversion, unjust enrichment and money had and received against the appellants. As against Jiangsu Trinidad, the respondents sued for the return of the sum of $1,573,760.94 or the sum transferred to it, being proceeds of the disputed cheque on the ground of knowing receipt. Pan was served with these proceedings in both his personal capacity, and as a servant/agent of the first and fourth named appellants. As Wang was not present in the jurisdiction, an application dated 18 December 2019 was filed for substituted service of the proceedings on him, including via the specified method of WeChat. This application was successful and an order made on 3 January 2020 for Wang to be served via WeChat. Service was purportedly effected on him on 20 January 2020.[3]

3) On 3 February 2020, judgment in default of appearance was entered against the four appellants. Subsequently, the respondents commenced enforcement proceedings and a provisional garnishee order was made on 4 June 2020.
4) On behalf of the other named appellants, Pan, by application dated 12 June 2020, applied to have the judgment in default obtained against them set aside. The provisional garnishee order was stayed pending the determination of this application.
5) The grounds of this set-aside application were two-fold. Firstly, they averred that the judgment had been irregularly obtained, as the conditions for the grant under Part 12.3 of the Civil Proceedings Rules (the 'CPR') had not been met. With respect to Wang, they submitted that there had not been proper service of the amended claim form and statement of case, as the permission of the court was neither sought nor obtained to effect such service outside of the jurisdiction. The appellants further contended that the nature of the claim precluded an "over the counter" default judgment application. There ought to have been personal service of the application for default judgment on the appellants and in its absence the judgment was irregular.
6) Additionally, or alternatively, they sought to have the judge exercise his discretion to set aside the default judgment under Part 13.3 of the CPR. The discretion to set aside a judgment required them to satisfy the judge that they had a realistic prospect of success in defending the claim, and that they acted as soon as reasonably practicable having learnt that a default judgment had been entered against them.
7) By way of further, relevant background information, there exists a company incorporated in China, namely China Building Technique Group Company Limited of Beijing, China ('China

[3] See [31] & [32] of Affidavit of Laurissa Pena filed 25 June 2020.

Building China). As will be later observed, there is significant dispute between the parties as to the role played by this company in these proceedings. Suffice it to say at this juncture, the appellants assert that China Building China was the parent company of China Building Trinidad, the latter being tasked with conducting specific aspects of the former's business here in Trinidad and Tobago. Deteriorating circumstances eventually led to alleged instructions being issued to Pan, through Wang, on behalf of China Building China, to deregister the first named respondent China Building Trinidad and incorporate a new company, the first named appellant China Building, to conduct local business on its behalf.

The respondents in turn acknowledge the existence of a relationship between the companies, but not in the terms described by the appellants. They further suggest that both Pan and Wang colluded to unlawfully deregister China Building Trinidad and incorporate the first named appellant with a strikingly similar name to China Building China in order to misappropriate the monies that are the subject matter of this claim.

II. Trial Judge's Findings

8) With respect to Wang, the judge made the preliminary finding that it had not been established that Pan had been authorised to initiate the application to set aside on his behalf. He found that there was no lawful jurisdiction or authority shown by Pan to act for, in place of, or on behalf of Wang. He therefore dismissed the set-aside application specific to Wang on this basis.

9) Notwithstanding this conclusion, the judge nonetheless proceeded to consider the issue of the service of the proceedings on Wang in summary fashion. Rejecting the appellants' assertion to the contrary, he was of the view that there was no irregularity as the service on Wang was not service outside of the jurisdiction and did not require therefore, an extended period for entry of an appearance as contemplated by Part 7.7. He determined that it was an alternate form of service on a party who may or may not have been within the jurisdiction. The use of this format was therefore likely to bring the proceedings to Wang's attention wherever he was located.

10) On the other aspect of irregularity, the judge determined that the claim was for a liquidated sum of $9,862,537.84. In the alternative, there was a claim for damages for conversion, unjust enrichment and money had and received. Default judgment was entered on 3 February 2020 only in respect of the sum claimed. Although there was another order issued on even date, namely on the respondents' application for a freezing order, that order was not made on a

default of appearance basis. This challenge to the regularity of the order was therefore, in the words of the judge, "a non-starter" and was accordingly dismissed.

11) In determining the application to set aside pursuant to Part 13.3, the judge analysed the affidavit evidence of Pan and the parameters of the proposed defence put forward in respect of the claims for conversion, unjust enrichment, and knowing receipt.

12) From the analysis and conclusions of the judge, it appears that he was of the view that the appellants' defence revolved around an alleged authorisation given to them by China Building China to act as they did. The judge determined that the appellants had misapprehended the case against them as the issue of agency was irrelevant to the claim. This was so because, by virtue of the joint arrangement between China Building China and China Building Trinidad, the cheque, even though made out in the name of China Building China, belonged to China Building Trinidad. The evidence disclosed was insufficient to support the second and third appellants' assertion that China Building Trinidad was merely the agent and local representative of China Building China, and that every action of Pan and Wang, taken on the instruction of China Building China, was authorised.

13) The judge went on to hold that the appellants did not act as soon as reasonably practicable having learnt that judgment had been entered against them. In arriving at this conclusion, the court had regard to several facts and circumstances before concluding that:

> "While the court accepts that there would have been difficultly in the early days of incarceration in relation to legal representation and access to Pan in the early days of the Covid restrictions, the evidence demonstrates form (sic) the time Mr. Ramnanan [the Attorney-at Law] became involved there were several steps that could have and ought to have been taken in an effort to have the judgment set aside which were simply not pursued. There are no reasonable explanations for the failure to take the steps […] and the information provided to the court on the evidence is largely vague in terms of dates and efforts made."

III. Disposition

14) With regard to the preliminary finding concerning Wang, it is our view that the learned trial judge was plainly wrong in concluding that the application could not have been made by Pan on behalf of all of the appellants, including Wang.

15) On the issue of the service of the originating proceeding on Wang, we find that there has not been proper service. For this reason, the default judgment obtained against him should be set aside.

16) We are also of the view that the judge erred in the exercise of his discretion in deciding not to set aside the default judgment ordered pursuant to Part 13.3. In light of this, we do not deem it necessary to address the further alleged irregularities of service raised specific to the first, second and fourth appellants.

17) We would therefore allow the appeal for the reasons set out below.

IV. The Third Named Appellant Lijun Wang

The Issue of Authorisation

18) The application to set aside the default judgment was purported to have been filed by Pan on behalf of all of the named appellants. The trial judge found however, that no such application could have been made on behalf of Wang on the mere say so of Pan, as he had not demonstrated any '*… lawful jurisdiction or authority to act for, on behalf of or in place of the third defendant Wang*.'

19) We are unable to reconcile this conclusion of the judge with the evidence as presented in support of this interlocutory application to set aside the default judgment. The affidavit in support sworn by Pan,[4] in addition to expressly stating that he was authorised to swear the affidavit on behalf of Wang, outlined in detail the circumstances which prevented the filing of an affidavit by Wang in his own right. It was deposed that Wang was absent from the jurisdiction and would have been unable to have an affidavit sworn within the timeframe in which the appellants were seeking to file the set-aside application. Further, due to the Covid-19 travel restrictions, Wang was unable to return to the jurisdiction. There was also annexed to the affidavit of Pan a sworn but un-notarised affidavit of Wang. The procedure for notarising same in China was, according to the evidence of Pan, an involved and time-consuming one which did not correlate with the urgent efforts being made to timeously file the set-aside application.

20) There is nothing on the face of this evidence which could reasonably account for the judge's decision to relegate it to being the "mere say so" of Pan. We can discern no inherent or manifest inconsistencies which could have led the judge to doubt the veracity of its contents to the extent that he was unwilling to recognise Wang as a legitimate applicant. We are unsure as to what more could reasonably have been expected in the circumstances. As such, we are

[4] ROA p 119 at [4].

of the view that, in the circumstances of this case, the judge was plainly wrong to find that that Pan had no lawful jurisdiction or authority to act on behalf of Wang in filing the set-aside application.

The Issue of Service

21) Part 13.2 (1) provides as follows:

> The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because—
>
> (a) in the case of a failure to enter an appearance, any of the conditions in rule 12.3 was not satisfied; …

22) The condition under rule 12.3 relevant to this ground of challenge is that the court office must be satisfied that the claim form and statement of case had been served before judgment in default of appearance could be granted.

23) Part 7.2 is also applicable and states that:

> A claim form may be served out of the jurisdiction only if—
> (a) rule 7.3 allows it to be served out of the jurisdiction; and
> (b) the court gives permission.

Part 7.3 provides that "a claim form may be served out of the jurisdiction if the proceedings are listed in this rule". The Rule then specifies a series of proceedings where service may be effected outside of the jurisdiction, none of which apply to Wang. In that event, the court's permission was necessary.

24) The appellants assert that the judgment obtained in default of appearance against Wang was irregular as there had been no proper service of the proceedings on him. This submission was based on the fact that Wang was not resident in Trinidad and Tobago at the time of the service of the claim, a fact which was known to the respondents at all material times. They therefore ought to have applied to the court for permission to serve the proceedings outside of the jurisdiction as required by Part 7.2, which they failed to do.

25) The respondents' application for substituted service on Wang[5] was to allow for, *inter alia,* service by specified method, namely WeChat (a Chinese social media platform similar to WhatsApp), pursuant to Part 5.12. The grounds for this application recited that Wang was a fugitive from justice who had left the jurisdiction and whose exact address and whereabouts were unknown to the respondents, but who had been in contact with the second respondent, Ji, via WeChat. They believed therefore that service via WeChat would bring the proceedings to his attention. According to the affidavit of Laurissa Pena filed in opposition to the

[5] See [2] above.

application to set aside,[6] Wang communicated to Ji that he had been in receipt of the 'indictment' and had passed same onto "our company's legal department" (referring to China Building China) and other lawyers. Pan in his evidence disclosed that he had been informed by Wang that he (Wang) had received some legal documents via WeChat, but was unable to access the majority of them due to errors when attempting to open them electronically.

26) Having already dismissed the application relative to Wang on the basis of Pan's lack of jurisdiction to make such an application on his behalf, the judge nonetheless made the following observations:[7]

> "More importantly, in the court's view the service on Wang was not service outside of the jurisdiction within the meaning contemplated by Part 7.7 but was in fact an alternate form of service on a defendant who may or may not have been outside the jurisdiction on the evidence before the court but who was nevertheless in contact with Ji by an electronic wechat (sic) format similar to that of email or whatsapp (sic), formats which may not have been contemplated by the Rules as drafted. In the court's view the use of such format was likely to bring the proceedings to the attention of Wang whether within Trinidad and Tobago or otherwise."

27) It is common ground that the appellant Wang was outside of the jurisdiction of Trinidad and Tobago at all material times. There can be no dispute that the evidence of both the appellants and the respondents establishes this. We are therefore unable to give credence to the judge's view that the purported service on Wang was not service outside of the jurisdiction, or that Wang 'may or may not have been outside the jurisdiction on the evidence before the court'. The question to be answered therefore is whether the respondents' failure to make a specific application for permission to serve outside of the jurisdiction is fatal in the circumstances of this case.

28) The object of service of an originating process is to notify the defendant of the proceedings so that he or she may have an opportunity to resist the claim and prove his case.[8] In relation to service of proceedings outside of the jurisdiction, *Zuckerman* indicates that these rules and their requirements are to ensure that there is sufficient connection between the claim and the country in which it is being proposed to be tried to justify the assumption of jurisdiction over the dispute.[9] On this latter point specifically, we note that there has been no challenge to the jurisdiction of the courts of Trinidad and Tobago to adjudicate this matter.

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[6] ROA p 716.
[7] See [9] above.
[8] *Zuckerman on Civil Procedure,* 3rd Ed. 2013 at 5.75.
[9] *Ibid* 5.170.

29) Courts should be more focussed on the true and salutary objects of the service of an originating process. Every party sued in our courts is entitled to be heard and that right can only be lost when, service having been properly proved, the defendant defaults. Service of an originating process involves, naturally, the whole of the originating process, and not a portion of it. How else can the defendant know the entirety of the claim being made so as to facilitate his or her filing a proper defence in accordance with the strict definition of that word under the CPR. In this age of mass communication by social media—which is not always reliable without an assurance of proof of receipt of the entire originating process—a too-strict interpretation or application of the rules might run counter to the interests of justice. Where, for example, it is satisfactorily and fully proven that the defendant has been in receipt of the entirety of the proceedings, it may be an unjust and disproportionate outcome in all the circumstances, to deem a minor defect of service fatal to the claim as a whole. Therefore, a critical factor in determining this issue is whether the object of service has been met relative to Wang, notwithstanding the respondents' failure to make an express application for permission to serve outside of the jurisdiction.

30) From the judge's reasoning, it appears that he was satisfied that the service effectively made Wang aware of the proceedings. What is also evident is that little or no consideration was given by him to Wang's assertion that he was unable to access the majority of the electronic files sent to him via WeChat. As already established, the object of service is not simply to make one aware of proceedings, but to allow for the receiving party to fully appreciate the case being made against him so as to make informed decisions going forward.[10] From the evidence, it was put into issue whether or not Wang had received all of the documents relative to the claim. Without a specific determination of this contention, in our view, it ought not to have been assumed that there had been proper service on Wang.

31) Further, the appellants' assertion relative to the inadequacy of the timeframe in which a defendant outside of the jurisdiction can reasonably be expected to enter an appearance has some merit. Part 9.3 of the CPR prescribes that the general rule in respect of entering an appearance is 8 days after the service of the claim form. Part 7.7 however, mandates that where service must be effected outside of the jurisdiction, reference must be had to the relevant practice directions. The judge correctly observed that there was no such governing practice direction. In those circumstances, it would be for the court to set an appropriate timeline. From the record, no such facility was extended to the appellants. We therefore harbour doubt as to whether a sufficient timeframe was provided in which Wang could

[10] See also CA P123/2016 Brent Nunes v Magistrate Gomez.

reasonably have taken the steps necessary to address the claim, especially when questions were raised as to what documents he had actually received.

32) In fairness to the trial judge, it is clear that he did not fully engage these issues in light of his prior determination on Pan's authority to act on Wang's behalf, the effect of which, in his view, seemingly rendered further consideration somewhat academic. Nevertheless, the questions raised are to our minds sufficient to prescribe that a more careful approach was necessary before any conclusions as to whether there had been proper service could have been reached.

33) We therefore do not agree, in all the circumstances of this case, with the appellants' submission that the lack of an expressly filed application to serve out of the jurisdiction by itself provides a basis upon which the default judgment entered against Wang ought to have been set aside by the trial judge. As already mentioned, the rules with respect to service outside of the jurisdiction in particular, concern themselves largely with ensuring that a court is best placed to assume jurisdiction over the particular dispute. Had such an issue been raised in this case, the failure to make express application would have been, by necessity, cast in a much different light.[11]

We are not however, satisfied that the object of service in general has been met specific to Wang, in light of the issues raised above. The burden placed on the respondents extended beyond simply ensuring that Wang was aware of the proceedings. He was being sued personally and was therefore required to be made fully aware of the case being brought against him. The evidence does not satisfy us in this regard. For these reasons, we would set aside the default judgment entered against him.

V. The Application to Set Aside under Part 13.3

34) Part 13.3 (I) states:

> 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.

[11] See [28] above.

Realistic Prospect of Success

35) The main argument upon which the appellants' defence is mounted is the disputed ownership of the cheque. This, they say, is what the trial judge failed to appreciate and therefore to which he gave undue credence. According to their submissions:

> "The learned judge failed to properly consider the most material issue in the matter namely the issue as to ownership of the disputed cheque and simply adopted the Claimant's position on ownership (see para 61 of the written reasons) without appreciating that ownership of the disputed cheque was being substantially contested."[12]

They assert that had proper consideration been given to this issue, there was no basis upon which the respondents could have founded their claims.

36) The respondents in turn posit that there is no dispute as to the ownership of the cheque. The evidence, they say, unequivocally establishes the ownership of the cheque as vesting in China Building Trinidad. The trial judge was therefore correct to dismiss the appellants' application to set aside as having realised no realistic prospect of success.

37) We are of the view that, notwithstanding the factual mire this case presents, central to its determination is the issue of the cheque's ownership. In proceedings before the appeal court in which a stay of execution was pursued, the full court recognised this as a critical question to be answered. The transcript of those proceedings discloses what appears to have been an acceptance by Senior Counsel for the respondents that in as much as there was some dispute as to the cheque's ownership, the appellants raised a triable issue. In these proceedings before us however, Counsel sought to divorce himself and his clients from this apparent concession. In any event, the submissions of both sides on this issue are diametrically opposed.

38) Both the appellants and respondents present compelling arguments as to what the evidence in this case establishes. It follows therefore that notwithstanding the respondents' suggestions to the contrary, the answer to the question of ownership of the cheque is not easily discernible at an interlocutory stage. That both sides place reliance on the contents of the cooperation agreement between China Building China and China Building Trinidad as clearly establishing the parameters of the shared relationship and from which ownership of the cheque could be inferred, leads to the inescapable inference that there is a significant degree of subjective interpretation present in this case. As an emblematic example, the appellants on the one hand are suggesting that the agreement evidences that China Building

[12] Appellant's Written Submissions dated 14 September 2020 at p 14 paragraph 20.

Trinidad was at all times the local administrative arm of China Building China, responsible for securing work permits and the like. Further, that China Building China was the named party in the respective contracts and that all payments were issued in its name, including the disputed cheque. The respondents in turn assert that the two companies enjoyed a strictly commercial relationship and the agreement was simply the means through which China Building China was able to lend to China Building Trinidad its significant prestige and reputation in, we would imagine, obtaining lucrative contracts in Trinidad and Tobago. This 'big brother' role also secured for China Building Trinidad the technical and logistical expertise and support of China Building China when needed. This, they say, explains why China Building China was named as the contracting party and payments therefore made to them. Additionally, it was known to the contracting parties that China Building Trinidad was actually responsible for the execution of the contracted works. It is against this backdrop that the respondents effectively say that the fact that the disputed cheque was issued in the name of China Building China is of no moment, and the consistent practice of all payments being deposited into and to the accounts of China Building Trinidad and subsequently disbursed by them, further supports this contention.

39) It is clear to us that the unravelling of the intricacies of the relationship shared between these two companies would involve the resolution of significant disputes of fact, a task better suited to the processes of a full trial. It seems to us that the trial judge, without addressing his mind to this question, satisfied himself, on untested evidence, that the cheque belonged to China Building Trinidad. This obviously coloured his approach to the application to set aside, restricting it to the perspective of Pan and Wang's actions as being inconsistent with China Building Trinidad's already established legal ownership of the cheque. It is in this light that he was able to conclude that this was not a case in which agency was a live issue, as it was irrelevant if China Building China had purportedly lost confidence in China Building Trinidad and had tasked Pan and Wang with addressing the situation. Pan and Wang's actions were contrary to China Building Trinidad's legal ownership of the cheque and the foundation was therefore laid for a successful claim in conversion, as well as the other reliefs claimed.

40) We agree with the judge that, at this stage, the question of Pan and Wang's agency was irrelevant. The question of agency was however, relevant to the assessment of the relationship between China Building China and China Building Trinidad. Again, at this stage, the assessment is a global one for the purposes of determining if a triable issue specific to the ownership of the cheque was raised by the appellants. With respect, the judge ought properly to have more fully explored the relationship between the two companies, not for the purposes

of providing a definitive answer to this question, but to determine whether the appellants' prospective case was sufficient to effectively challenge China Building Trinidad's claim of ownership.

41) In light of this, we are of the considered view that the judge failed to properly address his mind to the question of the cheque's ownership. We agree with the submission of the appellants that it appears from the trial judge's judgment that he simply accepted the respondents' assertion of ownership in proceeding to dismiss the application to set aside. Had he fully considered this question, we have no doubt that he would have concluded that the resolution of this issue, and the proceedings as a whole, was particularly unsuited to a summary determination.

42) We therefore find that the trial judge was plainly wrong in concluding that the appellants did not have a realistic prospect of success in defending the claim as brought against them.

Acting as soon as Reasonably Practicable

43) As previously mentioned, the judge considered several facts and circumstances before finding that the appellants had not acted as soon as was reasonably practicable to apply to set aside the judgment. A brief summary of his findings are as follows.

44) He accepted Pan's evidence that he had only learned of the 3 February 2020 judgment in default on 13 March 2020. The application to set aside was made some three months later on 12 June 2020. During this period Pan was incarcerated in this jurisdiction. The judge nonetheless found that there was nothing that would have prevented Pan from giving instructions to his attorney through his wife, as the evidence disclosed that she was able to communicate with both Pan and his then-attorney, Mr Brooks, essentially a criminal law practitioner.

In dealing with the cited challenges faced in settling and filing the application, including obtaining copies of the claim and other documents, the judge accepted that due to the restrictions imposed at the prisons, it would have been difficult for the copies in Pan's possession to be given over to a newly retained civil law counsel. He was not satisfied however that there were sufficiently proactive steps taken to obtain same, noting the unexplained one-month delay before a request was made to opposing counsel, as well as the absence of evidence of any application having been made requesting office copies from the court office. The judge did not consider that the operation of the relevant Covid Pandemic Practice Directions would have precluded the appellants from filing the application as all that was required was a concurrent application to deem the matter fit for urgent hearing.

Finally, in light of the numerous lawyers available within the jurisdiction, the judge did not consider that being engaged in negotiations with foreign counsel accorded with any reasonably practicable step. He also noted that upon Pan's release on 30 May 2020, he gave immediate attention to the filing of judicial review proceedings,[13] electing to file the application to set aside thereafter on 12 June 2020.

45) The appellants in both their written and oral submissions, sought to place the facts and circumstances relied upon by the judge into what they suggest is a proper perspective. Having learnt of the judgment from his wife on 13 March 2020, Pan proceeded to dismiss his previously retained criminal law attorney on 15 March 2020. He was able to communicate with Mr Pariagsingh within a week and made available to him a copy of the judgment, but not all of the relevant documentation. Mr Ramnanan, of Counsel, was engaged by Mr Pariagsingh to assist, and to this end visited the High Court on 19 March 2020 to request office copies of the associated documents. Mr Ramnanan was able to obtain a copy of the statement of case, but without the exhibits as he was not on record as legal representative. The then-operational Covid-19 Practice Directions restricted the filing of certain applications, including applications to come on record, unless the matter was deemed urgent by a judge upon an application. Counsel submitted that because he did not think this matter fell within the ambit of what could be considered urgent for the purposes of the Practice Directions, he undertook to write to the Registrar requesting authorisation to access the documents. This correspondence was dated 16 April 2020. The Registrar, in response, affirmed amongst other things that the request could only be facilitated if he was the attorney on record.

Prior to this letter to the Registrar, by letter dated 27 March 2020, Mr Pariagsingh wrote to counsel for the respondents, alerting them to his intention to apply to have the default judgment set aside and requesting copies of all relevant documents. It is Pan's evidence that no reply was ever received to this letter. We find this surprising. Mr Ramnanan also wrote to the other side in similar terms on 17 April 2020, and was informed in response that copies would be furnished on 30 April 2020. Unusually, no documents were ever received. Three attempts were made to visit the prisons to take further instructions and to obtain the copies of the documents in Pan's possession, but according to the evidence before the judge, these attempts to confer with their client were unsuccessful.

Mr Ramnanan advised Pan to consider retaining foreign counsel in light of the value of the claim and, pursuant to these discussions and negotiations, they received in May 2020 the

[13] Pan filed an urgent application for Judicial Review on 8 May 2020 in CV 2020-01269 Yonggao Pan v The Minister of National Security. See also [47] below.

prospective fees. However, the freezing order that was in place rendered such a course out of reach of Pan's now limited resources.

46) Counsel for the appellants rounded out the submission by highlighting that, in light of the several challenges, not least of which was the lack of co-operation by the respondents, the decision was taken to await the expiration of the then-operational Practice Direction on 15 June 2020 before making the application to set aside. By doing this, there would have been no need to apply for an emergency hearing which, if they did, would have infringed upon the policy behind the emergency allowance. This is where, they say, the trial judge got it wrong. The purpose of the facility to have the matter deemed fit for urgent hearing and to file emergency applications, was to allow access of parties to the courts with still operational timelines and resultant sanctions. It was also to allow for persons facing imminent prejudice, as in cases where injunctions were the only viable solution, to access the courts. All other persons were required, in Mr Ramnanan's submission, to act reasonably in utilising the facility, especially in light of the fact that the courts were in a transitionary phase, endeavouring to find its feet and adjust to the challenges of operating in the midst of the global pandemic.

47) Counsel for the respondents endorsed the conclusions of the trial judge with respect to each of the highlighted aspects above. Further emphasis was placed on the appellants' sustained decision to not apply to the court under the emergency provisions in circumstances where it was clear that this would have been the proper course if they genuinely sought to act as soon as was reasonably practicable. They posited that the judge was correct to reference Pan's conduct with respect to his judicial review application being made on the heels of his release, before seeking to address this pending matter. This, they say, was further evidence of the diminished priority given to pursuing the set-aside application. In response to this specific point, counsel for the appellants submitted that given the truncated and strictly imposed timelines associated with judicial review applications, it follows that Pan would have naturally and properly acted in the manner that he did. We would take the time to immediately indicate that there is some force in this response given by counsel, considering further that these judicial review proceedings were tied to his immigration status, which, if unchallenged, could have seen him made the subject of deportation orders.

48) The standard to be applied under Part 13.3 (1) (b) is not a high one. It is not required that the appellants evidence exceptional circumstances, or provide a very good reason, but to show that how things unfolded are in fact how things could have been expected to unfold in the

circumstances.[14] In other words, the question to be answered when assessing the conduct of counsel is whether or not the course adopted was a reasonable one.[15]

49) From a perusal of the judge's analysis, we are minded to agree with the appellants that in some relevant aspects the standard imposed by the judge was inordinately stringent in light of the circumstances taken as a whole on the written record before us. The judge also appears to have overlooked certain aspects of the affidavit evidence in forming specific conclusions. For example, he found that there had been no application to the court to obtain office copies and that there was an additional one-month delay before the request for copies was put to counsel on the other side. It is however clear from the evidence that attempts were made to obtain office copies, which were stymied by Mr Ramanan having not come on record for the appellants. At the time, the operation of the relevant Practice Directions made what would ordinarily have been a simple matter of filing a set-aside application, a more challenging prospect. A dual application to come on record and deem fit for urgent hearing a set-aside application would have had to have been filed. For the reasons already given above, Mr Ramnanan was reluctant to pursue this course. He nonetheless communicated with the Registrar, requesting authorisation to access the relevant documents. He was unsuccessful. The judge did not express any clear views as to the merit of counsel's approach to filing for an urgent hearing under the then-current Covid Practice Direction, save to note that no such application was made. This nonetheless justifies a criticism of this finding of the judge.

    As it relates to the delay in requesting copies of the relevant documents from the other side, we presume that the trial judge was referring to the request made by Mr Ramnanan on 17 April 2020. The judge appears to have approached this one-month period in isolation, overlooking the fact that not only had other steps been taken toward securing the documents in the intervening period, but a request of 27 March 2020 to the respondents' counsel had already been made, to which, sadly, there had been no reply.

50) The manner in which the judge treated with the appellants' bid to retain foreign counsel is also telling. It was not, in our view, unreasonable that in a claim involving such exorbitant sums, the option of foreign counsel would have been explored, unless of course the impression created was that the pursuit of counsel was being deliberately employed as a time-wasting initiative. Nothing in the reasoning of the judge suggests that this was his suspicion, nor that the time spent exploring the possibility was disproportionate. We find it difficult

[14] CA 56/2011 Rohini Khan v Neville Johnson
[15] CA P117/2018 CEPEP v Tora Bora.

therefore to otherwise justify his summary criticism of this course of conduct in the circumstances.

51) We admit however to finding some difficulty reconciling the appellants' decision to forego an application to deem the matter fit for urgent hearing, with the undoubted seriousness of the matter. We have already set out the appellants' rationale. We cannot fault counsel's astute analysis of the policy behind the Practice Direction specific to the hearing of urgent matters, but we do question his decision to not include his clients' case within the category of matters to which it applied. The dire reality of the appellants' situation at the time cannot be understated. Judgment had been entered against them. A freezing order was in place, the existence of which, by their own evidence, hampered their ability to defend the claim in the manner they were advised was necessary. Furthermore, the continued effluxion of time served to undermine the effectiveness of any application to set aside on this very limb of the Rule. We cannot conclusively say therefore, that an objective consideration of these factors would have seen a court reject the application had it been made.

52) As a final observation, counsel for the appellants submitted in effect that no steps to have the set-aside application deemed fit for urgent hearing would have been forthcoming until at least 15 June 2020, the date on which the then-operational Practice Direction was due to expire. The logical conclusion to be drawn in the premises would be that, even had they received the relevant documents, the outcome would have been no different. They would have bided their time until they thought it prudent to approach the court. The fact that the application was only made after the matter was deemed fit for urgent hearing on the application of the respondents supports this inference. Laudable consideration for the court's processes aside, this court is unlikely to endorse any approach which undermines the proactive attitude in litigants that the Rules seek to engender. But for the additional features of this case already canvassed, our determination on this issue may have very well been different.

53) Nevertheless, we are of the view that the judge was plainly wrong to find that the appellants failed to act as soon as was reasonably practicable after learning that judgment in default had been entered against them. We believe that the judge failed to take into consideration and/or overlooked material aspects of the evidence in formulating his conclusions. It is apparent also that too robust a standard was imposed by him, especially in view of what the dismissal of the application would ultimately have meant for the parties involved. Serious allegations were levelled against the second and third appellants with all of the attendant negative reputational and financial ramifications. Its stands to reason that judgment being entered against them would have served to exacerbate these negative connotations, including the injury already

sustained to their characters. To occasion such, especially against the backdrop of claims untested by cross-examination within the crucible of the trial process, is too disproportionate an outcome in all the circumstances.

54) Additionally, the product of an uncontested outcome in favour of the respondents is to see them lay claim to the full value of the disputed cheque in circumstances where the proposed defence has, in our view on the written record, good prospects of success at a trial. This would, to our minds, be an unjust result.

VI. Conclusion

55) The appeal is allowed and the order of the trial judge is set aside.

56) We will now hear the parties on the issue of costs.

P. Moosai

Justice of Appeal