IN THE SUPREME OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2008/0622

BETWEEN:

WESTERHALL POINT RESIDENTS ASSOCIATION LIMITED

Claimant

AND

ALVIN DABREO

Defendant

Appearances:

Mr. Nigel Stewart for the Claimant/Respondent
Mrs. Winnifred Duncan-Phillip for the Defendant/Applicant

2009: July 14th, 28th, 29th

JUDGMENT

[1] **MICHEL, J. (Ag.):** The Claimant in this case is a Grenada registered company which, by Deed of Assignment dated 24th April 2001, became the assignee of "the rights to enforce, modify, waive or to create new covenants, restrictions and stipulations affecting the development known as Westerhall Point including all covenants relating to fees, assessments and charges."

[2] The Defendant, by an Indenture of Conveyance dated 25th May 1992, became the owner of one of the lots forming part of the Westerhall Point Development.

[3] The Claimant claims that the Defendant, as the owner of a lot in the Westerhall Point Development, became subject to the covenants, restrictions and stipulations existing at the time of the purchase of his lot, or any covenants, restrictions and stipulations created or modified by the Claimant at any time thereafter, and that one such condition or stipulation is that upon approval of the building plans of a lot owner by the Claimant and before the construction of any building, the lot owner

must pay to the Claimant a construction fee of $15,000. They also claim that by letter dated 6th July 2007 they approved the Defendant's building plans whereby the sum of $15,000 became due and payable to them by the Defendant. They claim that on 10th January 2008 the Defendant paid them the sum of $5,000 but, wrongfully and in breach of the said condition or stipulation, has failed and refused to pay to them the remaining $10,000 due and owing to them. Consequently, by Claim Form and Statement of Claim dated 23rd December 2008 they instituted these proceedings against the Defendant claiming the sum of $10,000, together with interest, costs and further or other relief.

[4] The Claim Form and Statement of Claim were served on the Defendant on 4th March 2009 and an Acknowledgement of Service was filed on his behalf by Mr. Ashley Bernadine on 18th March 2009.

[5] No defence having been filed by or on behalf of the Defendant, on 24th April 2009 the Claimant requested and obtained a Judgment in Default of Defence against the Defendant.

[6] According to an Affidavit of Service filed on 3rd June 2009, on 27th May 2009 the Defendant was served with a copy of the Judgment in Default of Defence.

[6] On 3rd June 2009 an application was made by the Claimant to have the Defendant examined under oath consequent on his failure to satisfy the Judgment.

[7] On 10th June 2009 the Defendant applied to the Court, through his new Attorney at Law, to set aside the Judgment in Default of Defence and for leave to file a Defence out of time. The grounds of the Defendant's application are that he relied on his previous Attorney-at-Law whom he thought had filed a Defence on his behalf and that he has a good defence to the claim. His application is supported by an affidavit filed on 10th June 2009 which has exhibited to it a Draft Defence and Counterclaim.

[8] In his Draft Defence and Counterclaim, the Defendant denies that the aforesaid Deed of Assignment is effective in law to assign the right to modify, waive or

create new covenants and stipulations affecting the entire Westerhall Point Development and states that he is only subject to the covenants, restrictions and stipulations contained in a Deed of Conveyance made on 4th September 2003 and that there is no condition or stipulation in relation to him regarding a construction fee of $15,000. The Defendant admits paying the sum of $5,000 to the Claimant, but states that he did so in error and counterclaims for the repayment to him by the Claimant of the aforesaid sum.

[9] On 14th July 2009 both applications to the Court in this matter, namely, the application by the Claimant to have the Defendant examined and the application by the Defendant to have the Default Judgment set aside, came up in Chambers. The Court deferred consideration of the Claimant's application and heard argument on the Defendant's application.

[10] Learned Counsel for the Defendant submitted that the Defendant's application was made pursuant to Part 13 of the CPR and that the Defendant had satisfied all three requirements of Rule 13.3 (1) for the setting aside of a Default Judgment regularly obtained. She stated that the Claimant had conceded on 13.3 (1) (a) and (c) and had only taken issue with 13.3 (1) (b), on which she then proceeded to address the Court.

[11] Learned Counsel submitted that the Defendant has stated in his affidavit in support of his application that, upon receiving the Claim Form and Statement of Claim, he took them to his Attorney-at-Law at the time, Mr. Ashley Bernadine, and gave instructions for defending the matter. Mr. Bernadine proceeded to file an Acknowledgement of Service on his behalf, but for some reason did not proceed to file a Defence. Learned Counsel submits that the Defendant laboured under the mistaken belief that a Defence had been filed on his behalf and it was only when he was served with the Default Judgment that he realized that no Defence had been filed on his behalf. He accordingly retained a new Attorney-at-Law to represent him in the matter. Counsel submits that this is a good explanation for the Defendant's failure to file a Defence; that there is little else that the Defendant

could have done; and that the Defendant should not be penalized for the lack of action of his previous Attorney-at-Law.

[12] Learned Counsel for the Claimant in his submission emphasized that all three conditions in Rule 13.3 (1) must be satisfied before the Court can set aside a Default Judgment and Counsel referred to the Eastern Caribbean Court of Appeal case of **Kenrick Thomas v RBTT Bank Caribbean Limited**[1] in that regard. Learned Counsel then submitted that it is well settled by a string of authorities that acts or omissions on the part of Solicitors or Attorneys are not considered good explanations for a party's failure to comply with the Rules and reference was made in that regard to the Eastern Caribbean Court of Appeal case of **John Cecil Rose v Anne Marie Uralis Rose**[2] and to the case of **Maggie Perez v Lionel Banner**[3] decided by the Supreme Court of Belize. Learned Counsel concluded that to set aside the Default Judgment in this case and to allow the Defendant to file a Defence would be going back to the old days. Counsel also referred to the cases of **Dominica Agricultural And Industrial Development Bank v Mavis Williams**[4], **Kelton Dalso v Jerome Elvin**[5] and **Casimir v Shillingford and Pinard**[6].

[13] Having heard the submissions of both Counsel and their references to cases not presented to the Court, the Court gave liberty to both parties to submit any authorities on which they wished to rely no later than Tuesday 21st July 2009 and the matter was adjourned to 28th July 2009 for decision.

[14] Both sides submitted List of Authorities and copies of the actual cases by the said 21st July 2009.

[15] Having considered the submissions made by Counsel on behalf of the parties and read the authorities presented by them, this Court has come to the conclusion that

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[1] Civil Appeal No. 3 of 2005 (St. Vincent & the Grenadines)
[2] Civil Appeal No. 19 of 2003 (St. Lucia)
[3] Claim No. 262/2008 (Supreme Court of Belize)
[4] Civil Appeal No. 20 of 2005 (Commonwealth of Dominica)
[5] High Court Claim No. 0634/2005 (Antigua & Barbuda)
[6] (1967) 10 WIR 269

the Default Judgment rendered in this matter on 24th April 2009 should be set aside because the Defendant has given a good explanation for the failure to file a defence within the time allowed. Inasmuch as the Courts have stated that the lack of diligence of an attorney is not a good reason for delay, the fact is that if a party to a suit has done what ought reasonably to have been expected of him in a given circumstance and his lawyer has, unknown to him, simply failed to act, and upon discovering the failure of his lawyer to act, he moves with relative expedition to have action initiated for him by alternative Counsel, it would be plainly unreasonable to effectively penalize the litigant for the failure of his lawyer. This is not a situation akin to that of **Rose v Rose** where enough time had elapsed to have alerted the litigant to the fact that action was not being taken on his matter and where no evidence was adduced as to the reason for a delay of over three months in taking the step that had to be taken, which in that case was filing an appeal. This is also not a situation akin to that of **Perez v Baker** where the Defendant chose not to file a Defence when it was due and then later sought leave to do out of time exactly what he chose not to do at the appropriate time. This is also not akin to the situation in the case of **Casimir v Shillingford** where Counsel for the applicant stated that the reason for the delay in taking the necessary step was due to pressure of work which Counsel conceded was not a good and substantial reason as required under the relevant court rules but that he was merely seeking the court's indulgence. The situation here is also not akin to that in **Dalso v Elvin** where the Learned Master found that "no explanation has been proffered as to why no defence was filed," this in a situation where application was being made on 7th September 2006 to set aside a Default Judgment obtained on 3rd February 2006 – a full seven months after. The situation here is also not akin to the situation in **Dominica Agricultural And Industrial Development Bank v Williams** where the Applicant's lawyers made a deliberate determination not to appeal within the time allowed and then afterwards came to the Court to request an extension of time within which to appeal several months after the time for appealing had elapsed. And, in terms of the one other case cited by Learned Counsel for the Claimant, this Court unreservedly accepts the authority of **Thomas**

v RBTT Bank Caribbean Limited in terms of its elucidation of the principles to be followed by the court in the application of Rule 13.3 (1) of the CPR, but this in no way detracts from the decision herein to set aside the Default Judgment in this case.

[16] In the circumstances, the Judgment in Default of Defence rendered in this matter on 24th April 2009 is hereby set aside and the Defendant is granted an extension of time until 7th August 2009 to file his Defence and Counterclaim as per the draft exhibited with his application to set aside the judgment. The Defendant is however ordered to pay to the Claimant costs in the sum of $1,000 for the Claimant's expenses in filing a Request for Judgment, filing and serving Default Judgment and application for oral examination and as well for attending this application to set aside the Default Judgment.

Mario Michel
High Court Judge