

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0067/2009

BETWEEN:

LINDA (LINDY) TAMN
(dba Lindy Tamn Realty Listing)

Claimant/Respondent

And

THE FOUNTAIN BEACH AND TENNIS CLUB LIMITED

Applicant/Defendant

Appearances:

Mrs. Cora Richardson-Hodge for the Applicant/Defendant
Ms. Eustella Fontaine for the Claimant/Respondent

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2010: October 28
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DECISION

[1] **BLENMAN, J:** This is an application by the Fountain Beach and Tennis Club Limited to set aside a Default Judgment obtained against it by Ms. Linda (Lindy) Tamn.

Background

[2] Ms. Tamn is a Real Estate Agent doing business of listing high end properties in Anguilla.

[3] Fountain Beach is a company incorporated under the Laws of Anguilla, with its registered office at Fountain Beach and Tennis Club, Shoal Bay, Anguilla.

- [4] Ms. Tamn alleges that on 20th December 2006, she entered into an Open Listing Agreement with Mr. Mark Amantangel, a director and major shareholder of Fountain Beach, on behalf of Fountain Beach, to list the property for sale.
- [5] The terms of the Open Listing Agreement are:
- (a) the minimum sale price of the property would be US\$6,500,000.00;
 - (b) the commission payable to the Claimant from the minimum sale price would be 5% of the sale price;
 - (c) a negotiation factor of US\$250,000.00 would be added to the minimum sale price;
 - (d) the negotiation factor (if realized) would be shared equally between the Claimant and the Defendant;
 - (e) that the 5% commission payable to the Claimant would be paid at the time the Defendant received any payment from the buyer that was non-refundable;
 - (f) that the Claimant's half of the negotiation factor would be paid to the Claimant, upon the Defendant receiving a non-refundable payment that included the negotiation factor.
- [6] Ms. Tamn says that the following were, inter alia, implied terms of the Open Listing Agreement:
- (a) the 5% commission on the sale price would be paid to the Claimant in a timely manner upon the Defendant receiving non-refundable payment(s).
- [7] In or about December 2006, Ms. Tamn introduced Fountain Beach to Phil McFillin, the representative for Fran Marincola, a potential buyer interested in purchasing the property. She says that as a result of her successfully listing the property and finding a buyer to purchase same, on 22nd December 2006, an Agreement of Sale

for the property was entered into between Fran Marincola or his assignee as the buyer, and Mark Amatangel on behalf of Fountain Beach, for a total purchase price of US\$6,750,000.00 which included a negotiation factor of US\$250,000.00.

[8] The closing on the 22nd December 2006 Agreement would take place within 9 months and 45 days of the signing of the said Agreement. By an assignment dated 26th December 2006, Fran Marincola assigned his rights under the Agreement dated 22nd December 2006 and introduced one Stephen J. Labov and/or his corporate designate ("buyer").

[9] Ms. Tamn alleges that as a result of successfully listing the property, she was owed the following sum by the Defendant namely:

(a) US\$125,000.00 for the negotiation factor;

(b) US\$325,000.00 being 5% sales commission for the sale of the property.

[10] She was paid a portion of the money. However, Ms. Tamn says that she made several requests of Mr. Mark Amantangel for the remainder of the sales commission due and owing, to no avail.

[11] As a result, she has filed the Claim Form and the Statement of Claim seeking compensation from Fountain Beach, the sum of US\$275,000.00, together with interests and costs.

[12] She caused the Claim Form and the Statement of Claim to be served on Fountain Beach, at its registered place of business, on 29th July 2009. Neither Acknowledgment of Service nor Defence was filed by Fountain Beach. As a consequence, Ms. Tamn applied for a Default Judgment on the 13th July 2009.

[13] On the 16th day July 2009, the Judgment in Default was obtained. It was served on Fountain Beach, at its registered office, on 17th July 2009.

[14] On the 22nd September 2009, Fountain Beach filed a Notice of Application to set aside the Default Judgment. The Notice is accompanied by an Affidavit in Support

deposed to Mr. Mark Amantangel, who is the Managing Director and Shareholder of Fountain Beach. The Affidavit has attached to it a Draft Defence and Counterclaim.

- [15] Mr. Amantangel said that since the company was incorporated its registered office was situated at the hotel site at Registration Section North Block 59018 B Parcel 32. He says that he has not been at the hotel for 2009; it is non-operational. He does not reside in Anguilla and neither does his siblings. He says that he only became aware of the Default Judgment on the 19th August 2009. He says that no one was at the hotel at the time of the service of the Default Judgment and it was only when several weeks after it was served, a friend of his who was passing the hotel and saw the Default Judgment and brought it to his attention.

Issue

- [16] The issue that arises for the court to resolve is whether the court should set aside the Default Judgment.

Law

- [17] Part 13.3(1) of CPR 2000 provides that the court may set aside a judgment entered under Part 12, only if the defendant:
- (a) applies to the court as reasonably practicable after finding out that judgment had been entered;
 - (b) gives a good explanation for the failure to file an Acknowledgment of Service or a Defence, as the case may be; and
 - (c) has a real prospect of successfully defending the claim.

Applicant/Defendant's Submissions

- [18] Learned Counsel, Mrs. Richardson-Hodge urged the court to set aside the Default Judgment that was granted against Fountain Beach and to grant it leave to file its Defence and Counterclaim.

Mrs. Richardson- Hodge also referred the court to Part 13.3(1) of CPR 2000 as being applicable for the application. The requirements are conjunctive.

Applies As Soon Reasonably Practicable

- [19] Learned Counsel, Mrs. Richardson-Hodge urged the court to find, in the circumstances that, Fountain Beach applied reasonably practicable after finding out of the judgment. Counsel referred the court to *Thorn PLC v MacDonald*, Civil Appeal Division of England. The Times, 15th October 1999. She also referred to *Hodge v Hodge* BVI 0098/2007.
- [20] Mrs. Richardson-Hodge also referred the court to *Louise Martin v Antigua Commercial Bank*, Claim No. 0115 of 1997, in support of her position that Fountain Beach's application should be favourably considered.
- [21] Mrs. Richardson-Hodge reminded the court that the Default Judgment was obtained on 16th July 2009 but Fountain Beach only became aware of the judgment on the 17th August 2009. The application to set aside the Default Judgment was filed on 22nd September 2009, approximately five weeks after.
- [22] Learned Counsel, Mrs. Richardson-Hodge asked the court to accept that this period of time is a reasonably practicable period of time to ascertain the nature of the matter, retain counsel, instruct counsel and file the necessary documents with the court.
- [23] Learned Counsel, Mrs. Richardson-Hodge stated that, on becoming aware, Fountain Beach took immediate steps to retain counsel in order to obtain a copy of the court's file on the matter and to file the necessary application, as soon as reasonable practicable.

Good Explanation for not filing an Acknowledgment of Service or Defence.

- [24] Next, Learned Counsel, Mrs. Richardson-Hodge referred the court to Mr. Amatangel's affidavit filed in Support of the Application. Mr. Amatangel deposed in his affidavit that he became aware of the Default Judgment on 17th August

2009, as a result of someone passing by the hotel and seeing the Judgment in Default notice posted on the door of the hotel. The registered office was located at the hotel premises but the property was closed, non-operational, and all of the beneficial owners were residing outside of Anguilla.

- [25] Mrs. Richardson-Hodge invited the court to accept that these are good reasons for Fountain Beach's failure to file an Acknowledgement of Service or Defence. It simply was unaware that the Claim and the Statement of Claim had been served on its registered office.

Real Prospect of Successful Defending Claim

- [26] Learned Counsel, Mrs. Richardson-Hodge stated that the standard that Fountain Beach must achieve is that it has a reasonable prospect of success.
- [27] Referring to the Draft Defence and Counterclaim, Mrs. Richardson-Hodge referred the court to Mr. Mark Amantangel's affidavit dated 22nd September 2009, in which he stated that the Open Listing Agreement of 20th December 2006 was over taken by another further Listing Agreement dated 7th February 2007.
- [28] Mrs. Richardson-Hodge, Learned Counsel, argued that Fountain Beach does not deny that there are sums of monies owed to Ms. Tamn but that the time for payment has not become due, as a result of the fact that it has not received the balance of monies from the sale. Mrs. Richardson-Hodge urged the court to find that Fountain Beach has a real prospect of defending its claim.
- [29] Finally, Mrs. Richardson-Hodge said that Fountain Beach has satisfied the requirements of Part 13.3(1) of CPR 2000 and the court should exercise its discretion and set aside the Default Judgment.

Legal Submissions for the Respondent/Claimant

- [30] Learned Counsel, Ms. Fontaine urged the court not to set aside the Default Judgment due to the non-compliance by Fountain Beach with the dictates of Part 13.3(1) of CPR 2000. Ms. Fontaine said that the matters set out in Part 13.3(1) of

CPR 2000 must be read conjunctively and should be satisfied in order for the court to exercise its discretion in favour of Fountain Beach.

- [31] In support of her contention, Ms. Fontaine, Learned Counsel relied on *Doreen Leslie v Bradley Davis et al*, Civil Appeal No. 13 of 2006.

Applies As Soon As Reasonably Practicable

- [32] Ms. Fontaine argued that Fountain Beach did not apply to the court as soon as reasonably practicable. Elaborating further, Learned Counsel, Ms. Fontaine said that Fountain Beach was served at its registered office with a copy of the judgment on the 29th July 2009. This was in accordance with Part 5.7(a), CPR 2000.
- [33] Ms. Fontaine said that Fountain Beach did not apply to the court to set aside the Default Judgment until the 22nd September 2009: 55 days after the service of the Default Judgment. Ms. Fontaine stated that section 243(a) of the Companies Act RSA C65 states that: *"a notice or document may be served on a company by leaving it at the registered office of the company."* Learned Counsel therefore said that the Default Judgment was properly served on Fountain Beach.
- [34] Ms. Fontaine posited that the effective date is that on which the Default Judgment was served on Fountain Beach and not on the latter date on which its manager says that he first became aware of the Default Judgment. Ms. Eustella Fontaine opined that it was incumbent on Fountain Beach to check its registered office and it is not satisfactory for it to contend that it had not checked its registered office since January 2009.
- [35] Learned Counsel, Ms. Fontaine contrasted the facts in the case at bar with that in *Louise Martin v Antigua Commercial Bank* *ibid*, the latter in which a delay of 15 days was held to be reasonably practicable. Ms. Fontaine maintained that a delay of 55 days cannot be said to be reasonably practicable.
- [36] In further support of her argument, Learned Counsel, Ms. Fontaine referred the court to *Choo Loi Poi et al v Donald Frederick*, Grenada 0556/2008 in which a

delay of nearly six weeks after the entry of the default hearing was held not to be in accordance with the provision of Part 13.3(1) of CPR 2000.

Good Explanation for not filing Acknowledgment of Service of Defence.

- [37] Turning next to the second requirement: good explanation for failure to file an Acknowledgment of Service or Defence, Learned Counsel, Ms. Fontaine said that Fountain Beach has not given any explanation for its failure to file the Acknowledgment of Service or Defence; one would have to glean from the Affidavit in Support that the reason for the failure was that no one was at the registered office. Learned Counsel said that this cannot be a good explanation for the Fountain Beach's failure to file the Acknowledgment of Service or Defence.
- [38] Fountain Beach is mandated by the law to maintain its registered office. Further, the law provides for service on a company by serving the documents on its registered office. This was done. Fountain Beach has failed to reach this threshold required by law.

Real Prospect of Successfully Defending the Claim

- [39] Next, Ms. Fontaine adverted the court's attention to the Draft Defence and Counterclaim that was exhibited by Fountain Beach. Learned Counsel, Ms. Fontaine said that in the Defence, Fountain Beach accepts that there was an agreement, the Open Listing of December 2006 however, in the Counterclaim, it asserts that the agreement was superseded by the 7th February 2007 Agreement. Ms. Fontaine reiterated that the latter Agreement could not have superseded the earlier one, insofar as no consideration was provided for the latter Agreement.
- [40] To reinforce her arguments, Ms. Fontaine stated that the monies that were paid to Ms. Tamn were already due and owing to her under the 20th December 2006 Agreement. Since no consideration was given to Ms. Tamn for the alleged 7th February 2007 Agreement, Fountain Beach was simply paying Ms. Tamn the monies that were already due and owing to her. Ms. Fontaine referred the court to *Halsbury's Laws of England, 4th Edition* Volume 9 paragraphs 316 and 319.

- [41] Finally, Ms. Fontaine, Learned Counsel said that Fountain Beach has yet another hurdle to cross: it must satisfy the court that it has a real prospect of successfully defending the claim.
- [42] Learned Counsel, Ms. Fontaine said that Fountain Beach does not have a real prospect of successfully defending the claim. The Draft Defence that it has placed before the court has not risen to that level. Counsel referred the court to *Swan v Hillman and Another* [2001] All ER 91.
- [43] In the Draft Defence, Fountain Beach admits to having entered into the Open Listing Agreement dated 20th December 2006 with Ms. Tamn, but alleges that they had entered into a further agreement dated 7th February 2007.
- [44] Learned Counsel, Ms. Fontaine said that, based on the second pleaded agreement, that agreement was unenforceable insofar as Fountain Beach provided no consideration for the agreement. See *Arthur Julian Harris v Robert Carter and Robert Brooks* [1854] 3 Ellis & Blackburn 559.

Court's Analysis and Findings

- [45] The court has carefully perused the application and the pleadings in the matter and given deliberate consideration to the very lucid submissions of both Learned Counsel.
- [46] CPR 2000, Part 13.3(1) deals with cases where the court may set aside or vary Default Judgment. Part 13.3(1) of CPR 2000 states as follows-
- "if Part 13.2 does not apply, the court may set aside a Judgment entered under Part 12 only if the defendant:
- (a) applies to the court as soon as reasonably practicable after finding out that Judgment has been entered;
 - (b) gives a good explanation for the failure to file an Acknowledgment of Service or a Defence as the case may be; and
 - (c) has a real prospect of successfully defending the claim.

- [47] There is no doubt that the requirements of Part 13.3(1) of CPR 2000 are in the conjunctive. A successful applicant is required to satisfy all three conditions as stated in Part 13.3(1) of CPR 2000.
- [48] To put it another way, the failure to meet the requirement of any of the subsections would be a bar to the court setting aside a Default Judgment.
- [49] The court is not of the considered view that Part 1.1 CPR 2000 can have the effect of overriding or negating the specific requirements of Part 13.3(1) of CPR 2000. While the court must always pay regard to the overriding objective and the need to do justice between the parties, as mandated by Part 1.1 CPR 2000, this is not a panacea for any failure to conform to the stipulated provisions of CPR 2000.

Applies As Soon As Reasonably Practicable

- [50] It is clear that Part 13.3(1) of CPR 2000 does not stipulate any specific time frame within which the applicant must move to the court after finding out that the Default Judgment has been given, in order to have it set aside. The court will therefore have to examine the facts as revealed by the pleadings, and the evidence as provided in the Affidavit in Support of the Application to set aside the Default Judgment, in order to determine whether the application was brought reasonably practicably after finding out about the judgment.
- [51] It is for the applicant to persuade the court that this is an appropriate application for the court to grant the relief prayed for. Underlying the scheme of CPR 2000 is the need for parties to act with promptitude in order to have the Default Judgment set aside.
- [52] Insofar as Learned Counsel, Ms. Richardson-Hodge, relied on the English case, *Thorn PLC* *ibid*, it is prudent to briefly examine the equivalent English rule.
- [53] Part 13.3(1) of the English CPR 2000 stipulates as follows-

(1)"In any other case the court may set aside or vary a Judgment entered under Part 12 if (a) the defendant has a real prospect of successfully

defending the claim, or (b) it appears to the court that there is some other good reason why a Judgment should be set aside or varied.

(2)"in considering whether to set aside or vary a Judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the Judgment made an application to do so promptly."

- [54] This rule was examined in *Thorn PLC v Macdonald* *ibid*. In that case, it was determined that the absence of a good reason for delay in applying to set aside is sufficient to justify the court's refusal to exercise its discretion to set aside a Default Judgment.
- [55] The court notes that the English equivalent of Part 13.3(1) CPR 2000 is not similar in content. It therefore follows that the English cases that are based on that rule are not applicable. The court cannot therefore place any reliance on case of *Thorn PLC v Macdonald* *ibid* that Fountain Beach relied on.
- [56] See the Judgment of *Barrow JA in Kenrick Thomas v RBTT Caribbean Ltd*, Grenada, Civil Appeal number 3 of 2005 at paragraphs 3, 4 and 5.
- [57] *Barrow JA in Kenrick Thomas RBTT Bank Caribbean Ltd*-Civil Appeal of Grenada Number 3 of 2005 *ibid* stated at paragraph 5 as follows-

"Part 13.3(2), by specifying promptitude of the application to set aside as one of the matters to which the court must have regard, implies that there are other matters to which the court must have regard in considering whether to set aside. These other matters are unspecified and therefore are at large. It is left to the court's discretion to decide what matter is relevant and what weight is to be given to the matter. No judicial discretion is absolute, of course, but the discretion under Part 13.3(2) of the English CPR 2000 seems fairly wide."

[58] At paragraph 6 of *Kenrick Thomas v RBTT Bank* *ibid*, Barrow JA stated as follows:

“Notwithstanding the similarity in numbering, the provision of Part 13.3(1) of CPR 2000 is starkly dissimilar to the English provision.”

[59] The wording of section 13.3(1) of CPR 2000 is clear. The court must seek to determine whether the applicant moved reasonably practicable and the court has no doubt that the relevant period, from which the time is calculated, is the date on which the applicant first obtained notice of the Judgment in Default and not from the date on which it was served on Fountain Beach.

[60] Even based on the Fountain Beach's application and examining the time when Mr. Amantangel first got notice of the Default Judgment and filed the application to set it aside the Default Judgment until 36 days had elapsed between that period.

[61] The court reiterates that the Applicant who seeks to have a Default Judgment set aside must apply as soon as reasonably practicable after becoming aware of the Judgment in Default. Therefore the court must examine the facts as stated by Mr. Amantangel as to what he did between the time of learning of the Default Judgment and the filing of the application to set aside. This is a period some five weeks later.

[62] In his affidavit, Mr. Amantangel stated that he immediately caused the Default Judgment to be taken to his lawyer. It took five weeks between that time and the time at which the application was filed. This period of time for any application is a very long one. This is more so since the rule requires promptitude. Even making provisions for the fact that Mr. Amantangel resides abroad, the delay of 5 weeks is definitely very long and takes it outside of the time frame in which a court could properly conclude that he acted with the promptitude required by CPR 2000, Part 13.3(1).

[63] This is not to lay down a definite position since the court must examine the particular facts in the application in order to determine whether the applicant has

acted with the promptitude. In the application at bar, to the contrary, the filing of the application to set aside the Default Judgment was protracted. The factual situation in *Louise Martin v Antigua Commercial Bank* ibid are to be contrasted with the facts in this application.

- [64] In the totality of circumstances, the court is of the view that the applicant has failed to reach the threshold of the legal requirement of acting as soon as reasonably practicable.
- [65] The court reiterates that the three requirements of Part 13.2(1) of CPR 2000 are conjunctive. If an applicant is to succeed in getting a Default Judgment set aside all three requirements must be satisfied.
- [66] Insofar as the court has decided that Fountain Beach has failed to reach the threshold of the first condition of Part 13.2(1), this is fatal to Fountain Beach's application to set aside the Default Judgment. The court need go no further. However, given the fact that the matter is of such importance, the court would nevertheless proceed to examine the second requirement: whether Mr. Amantangel has given a good explanation for the failure to file an Acknowledgment of Service or Defence.

Good Explanation for not filing an Acknowledgment of Service or Defence

- [67] The duty is on the applicant to satisfy the court that it has a good explanation for failure to file an Acknowledgment of Service.
- [68] It must be borne in mind that the law recognizes that services of a document on the registered office of a company is good service. In fact, Fountain Beach does not deny that the document was served on the registered office; it says that the (Hotel) registered office was not operational.
- [69] Part 5.7(a), CPR 2000, recognizes that service on a company is affected by serving a copy of the document on its registered office.

- [70] Having regard to the totality of circumstances, the court is of the considered view that the explanation proffered by the applicant does not rise to the level to meet the stipulation of Part 13.3(1) of CPR 2000. Fountain Beach has not given a good explanation for its failure to file an Acknowledgment of Service or a Defence.
- [71] It is important to look at the rule which addresses the period of time for filing an Acknowledgment of Service. Part 9.3(1), CPR 2000 states that the general rule is that the period for filing an Acknowledgment of Service is the period of 14 days after the service of the Claim Form.
- [72] Part 9.3(4), CPR 2000 stipulates that a defendant may file an Acknowledgment of Service at any time before a request for Default Judgment is received at the court office out of which the Claim was issued.
- [73] This additional basis is sufficient to dispose of the application, bearing in mind that the failure to satisfy any of the three prerequisites is fatal to the application.

Conclusion

- [74] In the premises, and insofar as the court has concluded that Fountain Beach has failed to meet the threshold of both of the above mentioned provisions of Part 13.3(1) of CPR 2000, its application fails.
- [75] The court does not propose to go any further.
- [76] In view of the premises, the application to set aside the Default Judgment is dismissed.
- [77] It is hereby ordered that Fountain Beach and Tennis Club Limited's application to set aside a Default Judgment obtained by Ms. Linda Tamn is dismissed.
- [78] Costs are agreed in the sum of US\$1,500.00.
- [79] The court gratefully acknowledges the assistance of Learned Counsel and apologizes for the administrative difficulties that caused the delay in finalizing the judgment.

Louise Esther Blenman

Resident High Court Judge

Anguilla