THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 476 OF 2010

BETWEEN:

**TIMOTHY McKREE**

Claimant

**v**

**RAPHAEL QUASHIE**

Defendant

**Appearances**:
Ms. Elizabeth Ryan for the Claimant.
Mr. P.R. Campbell, Q.C., and Ms. Ramona Frederick for the Defendant.

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2012: April 19th
May 10th

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**DECISION**

[1] **JOSEPH, MONICA (Acting):** The Defendant filed this application on 24th January 2012 applying for -

(1) A stay of execution of the default judgment entered on 24th March 2011.

(2) An order setting aside the default judgment and giving the defendant leave to file a defence within seven days.

(3) Further or consequential orders as to the court might deem just.

**HISTORY:**

[2] The Claimant filed a claim form and statement of claim against the Defendant on 20th December 2010 for special damages in the sum of $42,000.00,representing salaries and bonuses payable to the Claimant by the Defendant, and interest as the court deems necessary.

[3] On 31st December 2010 the Defendant was served with the claim form and an acknowledgment of service was filed by the Defendant on 6th January 2011. The time frame fixed by the Civil Procedure Rules 2000 for the filing of a defence was 28th January 2011, but no defence was filed.

[4] Under Part 12.10 (1) the Claimant filed a request for entry of judgment in default of defence on 7th March 2011. On 29th March 2011, the Claimant received judgment in default of defence, which was served on the Defendant, on 1st June 2011, as shown by affidavit of a High Court Bailiff, M. Mulcaire.

[5] The Claimant filed a judgment summons against the Defendant on 12th October 2011. On 16th December 2011, the Clamant obtained an Order permitting him to serve the judgment summons by notice in two publications of a local newspaper.

[6] The first publication showed that the judgment summons was set down for hearing on 19th January 2012. On 24th January 2012, the Defendant filed an application seeking a stay of execution of the default judgment, an order setting aside the default judgment and the giving to the Defendant leave to file a defence within seven days thereof. With that application is filed the Defendant's affidavit and a draft defence.

**PROCEDURE FOR SETING ASIDE JUDGMENT IN DEFAULT**

[7] The procedure for setting aside of a judgment falls under Part 13.3 of CPR 2000 which reads:

> "(1) If rule 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 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."

[8] Ms. Ryan submits that all three requirements must be present and, where they are not as in this case, the Defendant's application should not be granted. ***Kenrick Thomas v RBTT Caribbean Ltd.*** Civil Appeal No. 3 of 2005.

[9] Mr. Campbell argues that there is a rules regime outlining a three step procedure. The Defendant has given an explanation that, as soon as he was able to, financially, he instructed legal practitioners. It should not be held that a person, who does not have the finances, should be denied the opportunity to defend himself in court. Injustice, he submits, should not be ignored.

[10] I think the rules provide the setting in which the court functions. It is for the court to follow what the rules have mandated, and to ascertain how the discretion of the court may be exercised within those rules. In doing so, the court keeps in mind that the overriding objective of those rules, as outlined in Rules 1 and 1.2. Rule 1 (1) is to enable the court to deal with cases justly. Dealing justly with the case includes –

(a) ensuring so far as is practicable, that the parties are on an equal footing;

(c) dealing with cases in ways which are proportionate to the –

(i) amount of money involved;

(ii) the importance of the case;

(iii) complexity of the issues; and

(iv) financial position of each party.

Rule 1.2: "The court must seek to give effect to the overriding objective when it –

(a) exercises any discretion given to it by the Rules; or

(b) interprets any rule."

**DID THE DEFENDANT GIVE A GOOD EXPLANATION FOR THE FAILURE TO FILE A DEFENCE?**

[11] Ms Ryan submits: it is the duty of the Defendant to satisfy the court that it has a good explanation for failure to file a defence: The defendant's explanation is not good and so he has failed to comply with the dictates of Part 13.3(1) of the Rules. The reason stated in his affidavit is that his failure to file a defence is due to his lack of resources and he could not instruct legal practitioners to organize his defence.

[12] Counsel further submits: that the evidence shows that the Defendant's legal practitioners filed an acknowledgment of service on his behalf on 6th January 2011 and so the Defendant would have retained his legal practitioners to defend this matter. Further, there is no evidence that, upon receiving the judgment in default, he attempted to contact his legal practitioners. Instead he left the State several months after being served with the judgment without applying to discharge the default.

[13] Counsel contends that the Defendant has not presented to the court any proof of his financial status after he had been served with the judgment. The Defendant's deliberate action shows an intention not to do anything after he received a copy of the default judgment. He disregarded the rules and now wants to be liberated from the consequences of his default.

[14] Mr. Campbell argues that the Defendant has given a good explanation for his failure to file a defence. Learned Counsel submits that the penury of the defendant should not be allowed to frustrate justice. It was his view that the injustice of the rules seem to penalize persons who are unable to access resources, to enable them to follow the rules. Here, the Defendant has given an explanation that he did not have the funds to instruct legal practitioners and, as soon as he was able to obtain funds, he gave instructions for the preparation of his defence.

[15] I recount and comment on the explanation given by the Defendant: After having being served with a claim form on 31st December 2010, he engaged a legal practitioner to file the acknowledgment of service on 6th January 2011. By so doing I find that the Defendant promptly acknowledged that he intended to defend the matter.

[16] He deposed that he did not have the means to properly instruct the legal practitioners as he had been unemployed for most of 2010 and not in receipt of any income. He tried unsuccessfully to borrow funds to finance legal representation.

[17] On 1st June 2011 he was served with a copy of the judgment of default of defence dated 29th March 2011. He deposed that being absolutely convinced of his innocence he thought he had time to fight the case as soon as he received funds. He was unemployed until

September 2011, when he accepted employment as a cook providing meals for the NATO forces in Afghanistan. He hurried to Afghanistan thinking that as soon as he returned to St. Vincent he would have made enough to properly instruct his lawyers to defend the case.

[18] In December 2011 he made arrangements to return to St. Vincent in early January 2012 to organize his defence with his legal practitioners. On 8th January 2012 while in Afghanistan he received information that a notice was published in a local newspaper of 6th January 2012 that his case had been set for 19th January 2012.

[19] He came to St. Vincent on 14th January 2012, as previously arranged, and was able to discharge a portion of his financial obligations to the legal practitioners and instructed them that this application be made. He was due to return to Afghanistan in the first week of February 2012 to resume his employment.

[20] The first point I decide on is whether his explanation is untruthful. If it is untruthful, then that is an end of this application, as that untruthful explanation would taint any argument advanced in support of the other legal requirements. I acknowledge that the court should exercise caution in accepting the Defendant's explanation. The Defendant might find it easy to fashion an explanation with the intention of escaping the consequences of his non-action.

[21] I accept the Defendant's explanation. I accept that he desired to file a defence but had no money so to do. The court is mandated by Rule 1.2, when exercising a discretion, to seek to give effect to the overriding objective of the rules. By Rule 1 (1) (c) (iv) the overriding objective of the rules is to enable the court to deal justly with a case. That rule mentions that one of the circumstances to be taken into account is the financial position of the parties.

[22] The fact that the Claimant filed the suit suggests that he was able to locate funds so to do, and he has obtained a default judgment which is of value, and is being weighed in the hearing of the application. The Defendant now has been able to locate funds and has filed a draft defence. I think that, in the circumstances of this case, the threshold under this

heading – of giving a good explanation for his failure to file a defence in time, has been reached.

**DID THE DEFENDANT APPLY AS SOON AS IS REASONABLY PRACTICBLE AFTER FINDING OUT THAT JUDGMENT HAD BEEN ENTERED?**

[23] Ms. Ryan submits: on 24th January 2012, the Defendant sought relief from the execution of the default judgment, an order setting aside the default judgment and leave to file a defence within seven days, after being served with the judgment on 1st June 2011. This is 232 days after being served with the judgment in default which cannot be said to be as soon as reasonably practicable. That period is unduly lengthy, fails to meet the threshold of the provisions of Part 13.3 (1) (a) of CPR 2000 and is fatal to the Defendant's application.

[24] Counsel referred to the periods of time considered by other courts two of which are ***Louise Martin v Antigua Commercial Bank*** it was held that a delay of 15 days was held to be reasonably practicable. In ***Choo Loi Poi et al v Donald Frederick***, Grenada 0556/2008; a delay of nearly six weeks after the entry of the default judgment was not in accordance with the provision of part 13.1(1) CPR 2000.

[25] Mr. Campbell's argument is the period of time is not unreasonably long taking into account the circumstances of this case, and the explanation given by the Defendant.

[26] I think on the face of the case, the period of time seems unreasonably long, but it is crucial to look at all the circumstances of the case to determine whether, in the circumstances outlined and the Defendant's accepted explanation; the period of 232 days is, in reality, unduly long.

[27] In September 2011, he accepted a job as a cook in Afghanistan. In January 2012, he used the funds earned to retain legal practitioners. I relate the expression "as soon as is reasonably practicable" to the passage of time between the finding out of the entry of judgment and this application, in the particular financial circumstances of the Defendant.

[28] In the Defendant's situation, I find that he applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

## HAS THE DEFENDANT A REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM?

[29] Ms. Ryan submits that the defendant does not have a real prospect of successfully defending the claim. The Defendant submits that, at all material times, the Defendant who was based in Louisiana, United States of America, dealt with the Claimant in regard to employment and receiving monies. At no time did the Claimant deal with anyone else and cheques that were paid to the Claimant came from the Defendant himself who wrote all the cheques to the Claimant in the Claimant's name.

[30] Mr. Campbell submits that the Defendant has a real prospect of succeeding and should be allowed the opportunity of putting forward his case. This is a case where the Defendant should be given the opportunity why he considers that the Claimant's claim he is the agent of the company, has no merit.

[31] I keep in mind that the Claimant has put forward a case which he considers he could win. On the other hand, the Defendant considers that he has a case which he may successfully defend. The Defendant is to satisfy the court that he has put forward a sufficiency of factual information which reaches the threshold of satisfying the court that he has a real prospect of successfully defending the claim.

[32] I consider the information he has put forward that the court would be required to consider and rule on: The Claimant sued the Defendant as agent for a company, Ocean Life Limited but he has not sued the company. The Claimant has not provided any information as to why he, (the Defendant) as an alleged agent, should be financially liable for the alleged debts of the company.

[33] The company was incorporated on 16th May 2006 as No. 65 of 2006, its main business being recruitment of seamen. The Defendant is not a shareholder or director of the company and was involved in the management of the company. The Defendant claims that that did not render him personally liable for any debt of the company. The company went out of business towards the end of 2009 and the offices were closed. The company's branch office in Louisiana in the United States ceased to function at about the same time. I find that the threshold has been reached.

**COSTS**

[34] I grant the Defendant's application. The Claimant has been put to expense by this application and I grant him costs.

**ORDER**

[35] 1. The application of the Defendant is granted: An order setting aside the default judgment entered on 24th March 2011 is made.

2. The Defendant is granted leave to file a defence within seven days of this order.

3. Costs of $3,000.00 to be paid by the Defendant to the Claimant within one month of this Order.

Monica Joseph
**HIGH COURT JUDGE (Ag.)**
6th May 2012.