**ANGUILLA**

**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**(CIVIL)**

CLAIM NO AXAHCV2012/0024

BETWEEN:

**IONA IRINA TRUICA**

Respondent/Claimant

AND

**REMUS TRUICA**

1st Defendant

**IRNAMA LTD**

Applicant/2nd Defendant

Appearances
Ms Kristy Richardson for the Applicant/Second Defendant
Ms Jean Dyer for the Respondent

……………………………………………….
2013: March 18; April 29; October 2
……………………………………………….

## DECISION

### INTRODUCTORY

[1] **LANNS, M:** This is an application by IRNAMA LTD, the Second named Defendant in this matter for an Order setting aside a default Judgment obtained by the Claimant/Respondent against it on 30th October 2012..

[2] The application was filed on 1st March 2013 pursuant to CPR 13.3 (1) and 26.8.

[3] Eight grounds are put forward, namely:

1. The Second Defendant has a real prospect of successfully defending the claim;
2. The Second Defendant has a good explanation for failure to file the Defence and has applied as soon as reasonably practicable;

3. The Directors of the Second Defendant are not residents of Anguilla and have not been able to properly retain the services of Counsel on Island to assist with the matter;

4. The Second Defendant was also aware that there were divorce proceedings before the French Court between the Claimant and the First Defendant and was of the view that this matter would be stayed pending the outcome of the divorce proceedings;

5. The Second Defendant was confused as to why it was made a party to the Claim as the First Defendant was not a shareholder of the Second Defendant at the time of the filing of the Claim. Therefore, the Second Defendant did not think that it would be held liable for any claims made against the First Defendant. The First Defendant was the owner of Fifty Thousand (50,000) shares of the nominal capital of Irnama Ltd. However, on 14th June 2011, the First Defendant transferred his shares;

6. Furthermore, the Second Defendant did seek legal advice from Counsel in Anguilla and had previously retained the services of Alex Richardson and Associates. However, the relationship had broken down, and the Second Defendant again had to seek legal Counsel to assist.

7. Before being able to properly retain and or instruct Counsel on Island, the Second Defendant received a copy of a letter dated 27th November 2012 from Keithley Lake and Associates [to] which a copy of the Default Judgment that was entered on 30th October 2012 was attached;

8. The [Second] Defendant applied to the Court as soon as reasonably practicable to set aside this Default Judgment.

**RELEVANT BACKGROUND AND CHRONOLOGY**

[4] At all times material, the Respondent herein (Mrs Truica) and the First named Defendant (Mr Truica) were husband and wife. They purportedly owned a yacht called IRENA ESC (IRENA) which they rented to third parties. Subsequently, ownership in IRENA was transferred to a company called IRNAMA LTD (IRNAMA) which was incorporated in Anguilla. IRNAMA was originally managed by a company called United International Trust N.V. In November 2010, Mrs Truica was appointed as a second Managing Director of IRNAMA.

[5] The marriage relationship between Mr and Mrs Truica broke down, and Mrs Truica filed for divorce in Saint Martin. She then became concerned as to her interest in IRENA as well as IRNAMA; so she decided to take a certain course of action.

[6] On 5th April 2011, upon ex parte application by Mrs Truica, Mme Justice Louise Blenman granted an interim Injunction against Mr Truica and IRNAMA.

[7] By paragraph 2 of the Injunction Order, Mr Truica was restrained, whether by himself or through his servants, and or agents, proxies or otherwise howsoever from (i) dealing with and or carrying out any actions as relating to the assets of IRNAMA LTD, whether located within the jurisdiction or not, with specific note to his shares in IRNAMA; (ii) voting, selling, transferring, encumbering, pledging, and or borrowing against any respective shares in IRENA; (iii) removing IRENA from territorial waters in Saint Martin; until final determination of divorce proceedings between Mr and Mrs Truica before the French Court, or until further order of the Court.

[8] By paragraph 3 of the Injunction Order, IRNAMA was restrained, whether by itself, through its directors, officers, servants, agents and or registered agents, shareholders nominees, transferees, assignees, proxies or otherwise from unlawfully interfering with Mrs Truica's Intended Claim by (a) selling, transferring or disposing of any assets of any kind including but not limited to "the yacht known as IRENA ESC" and (b) removing IRENA from the territorial waters of Saint Martin. Paragraph 3 also ordered that the injunction was to be sustained and continue in full force and effect until the final determination of divorce proceedings between Mr and Mrs Truica in the French Court or until further order of the Court.

[9] Orders were also made requiring Mrs Truica to serve her intended Claim by a specified time. She duly complied.

[10] On 20th April 2012, Mrs Truica filed a Claim Form and Statement of Claim asserting among other things that there was a common understanding and an agreement between her (Mrs Truica) and Mr Truica that she (Mrs Truica) was the beneficial owner of 50 % of the issued and outstanding shares in IRNAMA. She further asserted that there is to be inferred a common intention that United International Trust NV should hold shares in trust for Mr and Mrs Truica in equal shares. She prayed for (1) a declaration that Mr Truica or his nominee, United International Trust NV holds 50% of the issued and outstanding shares in IRNAMA Ltd as constructive trustee for her; (2) An Order that Mr Truica or his nominee United International Trust NV do transfer to her, the shares held in trust by him as constructive trustee for her.

[11] The Claim Form together with Statement of Claim was served on Mr Truica in Romania in accordance with Romania Law on 30th July 2012. Mr Truica failed to file an Acknowledgement of Service or Defence, and thus, Judgment in Default was entered up against him.

[12] As to IRNAMA, the Claim Form together with Statement of Claim was served on it on 20th April 2012. On 25th April 2012, the Law Offices of Alex Richardson and Associates filed an Acknowledgment of Service on behalf of IRNAMA indicating an intention to defend the Claim. The Defence should have been filed by 20th May 2012; but no such defence was filed. On 25th May 2012 - four days after the time limited by the rules for filing of the Defence, and before the filing of the Defence, Alex Richardson and Associates filed an application to be removed from the Record as legal practitioners for IRNAMA.

[13] No defence having been filed by, or on behalf of IRNAMA and Mr Truica, default Judgment was entered against them by Master Tabor [Ag] in accordance with the procedure laid down under CPR 12.10 (4) and (5) The judgment is in the following terms:

"UPON IT APPEARING that

1. The 1st named Defendant has been served with the Claim Form and Statement of Claim;
2. The period limited by the Order dated 11th June 2012 for filing an Acknowledgment of Service has expired;
3. The 1st named Defendant has not filed an Acknowledgement of Service or a Defence to the claim or any part of it;
4. The 2nd named Defendant has been served with the Claim Form and Statement of Claim;
5. The 2nd named Defendant has filed an Acknowledgement of Service Form;
6. The period for filing a Defence has expired;
7. The 2nd named Defendant has not filed a Defence to the claim or any part of it;

IT IS HEREBY ORDERED that:-

1. Judgment is entered against the 1st and 2nd named Defendants.

2. The 1st and second named defendants do pay to the Claimant's (sic) prescribed costs to be assessed if not otherwise agreed;

3. The 1st named Defendant or his nominee United International Trust N.V. holds 50% of the issued and outstanding shares in the 2nd named Defendant as constructive trustee for the Claimant;

4. The 1st named Defendant or his nominee United International Trust N.V. do transfer to the Claimant the shares held in trust by him as constructive trustee for her."

[14] IRNAMA is aggrieved by the entry of Judgment against it; hence its application for an order setting aside the said Judgment.

**THE EVIDENCE**

[15] Mr Gregory Elias, who is represented as Director of IRNAMA, swore to an Affidavit in support of the Application, with three documents attached thereto as exhibits; and Mrs Truica swore to an Affidavit in opposition to the Application, with nine documents attached thereto as exhibits. Mr Elias in turn swore to an Affidavit in Reply to the Affidavit of Mrs Truica. Four Exhibits were attached to his second Affidavit.

## THE APPLICABLE RULE

[16] CPR 13.3 (1) states that in order for a default judgment to be set aside the Defendant must:

(a) Apply to the court as soon as reasonably practicable after finding out that judgment had been entered;

(b) Give a good explanation for the failure to file an acknowledgement of service or a defence as the case may be;

(c) Have a real prospect of successfully defending the claim.

[17] The three requirements are conjunctive and IRNAMA must satisfy all the requirements. Failure on the part of IRNAMA to satisfy any of the three requirements could be fatal to its application, unless, there are exceptional circumstances which would empower the court to set aside the default judgment in relation to IRNAMA as provided by CPR 13.3.2.

## WHETHER THE DEFENDANT APPLIED AS SOON AS REASONABLY PRACTICABLE AFTER FINDING OUT THAT JUDGMENT HAD BEEN ENTERED

[18] At paragraph 8 of his Affidavit in support of the Application, Mr Elias avers that IRNAMA became aware of the default judgment on 27th November 2012. The Application to set aside was filed on 1st March 2013 – 108 days after being served with the default judgment. Mrs Truica does not agree with the date of service as stated by Mr Elias. At paragraph 12 of her Affidavit in opposition filed 15th March 2013, Mrs Truica, avers that she was advised by Counsel that the Default Judgment was served on the Applicant at its registered office on 12th November 2013. Exhibit "IIT 3" is a copy of the backing of the Default Judgment with the following endorsement:

"Served by: N. Mills for KLA

""Received by: S Webster on behalf of United Trust Anguilla Limited, registered office of Irnama Ltd

Date: 12/Nov/ 2012

"Time: 2:20"

[19] Obviously, there is a discrepancy here with the date of service of the Default Judgment. However, on 13th November 2012, Ninette Mills, a Legal Clerk at Law Offices of Keithley Lake and Associates swore to and filed an Affidavit of Service wherein she deposed that on 12th November 2012, at 2:20 pm she "personally served Irnama Ltd with a true copy of the Default Judgment dated 30th October 2012, by leaving it at the registered office of United Trust (Anguilla) Limited with Miss Sherise Webster, a corporate administrator at the said registered office.'

[20] CPR 6.7 deals with service of court documents other than a claim form. It allows service of any document to be proved by any method of proving service set out in Part 5. By virtue of Part 5.7 service of the Default Judgment on a limited company may be effected by leaving the Default Judgment at the registered office of the company. Part 42.6 also deals with service of judgments. I am satisfied, based on the affidavit of Ninette Mills that service of the default judgment was effected on IRNAMA on 12th November 2012. This means that the application to set aside was filed 108 days "after service" as opposed to "after becoming aware" that the Default Judgment had been entered. Learned Counsel Ms Richardson referred to the case of Earl **Hodge v Albion Hodge**, BVIHCV2007/0098, wherein Justice Hariprashad-Charles quoted Justice Thomas in **Louise Martin v Antigua Commercial Bank,** Claim No ANUHCV1997/0115 as saying that no specific time period is given in the rules and that reasonableness depends on the facts of the case.

[21] Learned Counsel Ms Dyer on the other hand, referred me to the Anguilla cases of **Linda (LIndy) Tamm v The Fountain Beach and Tennis Club Limited**, (Claim No AAHCV2009/0067); and **Lystra Orma Ewen v Charles Sylvester Liddie, (**Claim No AXAHCV2007/0042, wherein Justice Blenman, (as she then was) dealing with similar applications held that delays of 5 weeks and 122 days respectively cannot be said to be as soon as reasonably practicable, after finding out about the judgment, and even making provisions for residence abroad

Discussion

[22] Even if it could be shown that IRNAMA became aware of the Default Judgment on 27th November 2012, (amounting to a period of 93 days after), 93 days can hardly be said to be as soon as reasonably practicable. However, as noted by Thomas J in **Antigua Commercial Bank v Louise Martin,** , the phrase 'as soon as reasonably practicable' depends on the facts of each case.

[23] The default judgment was obtained on 30th October 2012. As previously stated, Irnama is taken to have been served with the default judgment on 12th November 2012. Mr Elias stated that he became aware of the judgment on 27th November 2012. Although not expressly stated, I take it that he did not have sight of the default judgment until 27th November 2012, it having been received by Ms Webster. Nevertheless, Mr Elias's First Affidavit is hollow. Mr Elias deposed to the breaking down of the attorney-client relationship and his having to retain new counsel. He also deposed to his difficulty and inability to instruct new counsel. He does not say what efforts were made, and difficulties encountered in instructing new counsel. Apart from Juris Chambers, Mr Elias does not name any other legal practitioner contacted.

[24] The Court is of the opinion that a delay of 93 days after becoming aware of the default judgment is lengthy. Additionally, the court is of the opinion that there is no or no sufficient evidence upon which it can conclude that the application was made as soon as reasonably practicable after finding out that default judgment had been entered. Accordingly, the court is not satisfied that IRNAMA has crossed the first threshold required by rule 13.3 (1).

**WHETHER IRNAMA HAS GIVEN A GOOD EXPLANATION FOR FAILURE TO FILE ITS DEFENCE**

[25] At paragraphs 7 and 10 of his First Affidavit, filed 1st March 2013, and at paragraph 12 of his Second Affidavit filed 2nd April 2013, Mr Elias seeks to satisfy the second condition for setting aside the default judgment:

> "7. The Second Defendant … sought legal assistance to properly advice and /or defend the Claim. We retained the services of Alex Richardson and Associates who filed an Acknowledgement of Service on behalf of the Second Defendant. However, the relationship had broken down and we again had to seek legal counsel for assistance."

> "10. Delay in filing this application was not intentional and in no way to prejudice the Claimant. Irnama Ltd intended to defend the Claim and made efforts to do so by retaining the services of Alex Richardson and Associates. However, Alex Richardson and Associates applied to be removed as solicitors on or about 25th May 2012. … "

> "12. Alex Richardson and Associates were retained as their company was also the registered office for Irnama Ltd. However, the relationship was strained as Irnama could not afford the fees that Alex Richardson and Associates invoiced. Consequently, Alex Richardson and Associates applied to be removed from the record. However, we did not have any relationships with any other law firms on Island and had difficulties retaining counsel…."

[26] Ms Richardson, in her written submissions stated that there were many reasons for the delay in filing the defence. According to her, the Second Defendant is a Company incorporated in Anguilla. However, the directors, counsel stated, are not resident in Anguilla. The United Trust Company NV, Managing Director of the Second Defendant is a registered company in Curacao. This, counsel submitted, posed difficulties when trying to retain alternate counsel. Counsel stressed that shortly before the defence was due to be filed, Alex Richardson and Associates applied to be removed from the record and the applicant encountered difficulties retaining alternate legal counsel to assist, but it was always the Second Defendant's intention to defend the claim, submitted Counsel.

[27] Ms Dyer, on behalf of the Claimant, refuted the representations of both Mr Elias and Ms Richardson. She submitted that the applicant cannot be said to have provided a good explanation for its failure to file a Defence. Counsel pointed to the fact that the deadline for the filing of the defence had expired four days before Alex Richardson and Associates filed the Application to be removed from the Record, and they were not removed until 23rd July 2012. She pointed to the grounds of the application of Alex Richardson and Associates to be removed from the record, (being failure to properly instruct Counsel and failure to pay retainer fees) and submitted that the Applicant's statement of its inability to instruct counsel

is at odds with the basis on which the Alex Richardson and Associates were removed from the record.

Discussion

[28] There is no dispute that Alex Richardson and Associates represented the Applicant up to 23rd July 2012, and that they (Alex Richardson and Associates) waited until four days after the time for filing the Defence had expired, to apply to be removed from the record as legal practitioners for the Applicant.

[29] The applicant seemed to have reposed confidence in its former legal representative, Alex Richardson and Associates to file its Defence. It fell short of saying that Alex Richardson and Associates were less than diligent. However, apart from seeking alternate solicitors, I do not see much involvement of the Applicant in moving the matter forward to the filing of the Defence. The Applicant's affidavit is silent as to what efforts, if any it made in ensuring the preparation and filing of the Defence before the Request for entry of Judgment had been filed and before the application to be removed was filed. No where is it mentioned that the Applicant had already provided any information for the filing of the Defence. The applicant gives no explanation as to why there had not been any application for an extension of time within which to file the Defence; or why there had not been a consensual extension of time to file the Defence. It would appear that it took an inordinately long period for the Applicant to retain alternate counsel. The applicant stated that it encountered difficulties in properly instructing counsel. I note that Mr Elias in his second Affidavit alluded to financial difficulties.

[30] The applicant's Counsel in her written submissions quite improperly made statements of facts that should have been contained in the supporting affidavits. Counsel stated that because the Applicant's directors and managers reside abroad, it encountered difficulties. What were the difficulties associated with residence abroad, the court does not know.

[31] As to residence abroad, there is authority for the view that residence abroad is not a good reason for delay. In the Nevis case of **Christenbury Eye Centre v First Fidelity Trust Ltd,** High Court Civil Appeal 2007/014, the applicants filed an affidavit seeking to explain their delay. They stated the application was not brought at an earlier date because it was necessary to take complete instructions from the applicants, two of which are located outside the jurisdiction, as well as the overseas representatives of the applicants. The applicants further stated they were not able to provide instructions in time for an earlier filing because they are located abroad and found it difficult to confer properly with their legal advisers. Barrow JA found it necessary to state at paragraph [11] "That explanation for a delay of three and a half months is meaningless in this age of daily air travel, courier services, telephone, facsimile and internet communication. It does not deserve any further treatment than that." I adopt the dicta of Barrow JA and I find that residence abroad is not a good reason for failure to file the Defence.

[32] The Applicant seems to say in his second affidavit that impecuniosity was one of the operating reasons for the failure to file a defence. It could not afford the fees charged, deposed Mr Elias. I am not satisfied that the Applicant has provided a genuine case of

impecuniosity. It does not proffer any solid reasons apart from not being able to "afford" the retainer fee to convince me that it could not afford the retainer fee. Why could it not afford the fee? Did it try to raise the funds? What efforts, if any in this regard? Did it make a counter offer? It is the duty of the applicant to satisfy the court in accordance with CPR 13.3 (1) (b) that it has a good explanation for its failure to file a defence. I am not satisfied.

[33] Having decided as I have, in relation to the first two conditions, it is not necessary for me to go any further and I decline to do so. However, if I were to consider the Defence the Applicant intended to mount, I would have found that the Defence as reflected in the draft raises triable issues, and that it does have merit.

**EXCEPTIONAL CIRCUMSTANCES**

[34] The applicant has not alleged that there are any exceptional circumstances which would empower the court to set aside the default judgment under CPR 13.3.2 which provides that in any event the court may set aside a default judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.

[35] As to whether the court may consider exceptional circumstances on its own volition without it being canvassed before it, is uncertain. I believe, however, that the court may look to the affidavits for any evidence of exceptional circumstances. Perhaps the element of impecuniosity can be regarded as an exceptional circumstance. However, in as much as I have found that the supporting affidavits do not provide sufficient information as to the reasons for the failure to file a defence, there can be no finding of sufficient evidence of exceptional circumstances. Accordingly, the application by the Applicant Irnama Ltd must be dismissed with costs to the Respondent/Claimant.

**CONCLUSION**

[36] It is hereby ordered that the application by IRNAMA LTD to set aside the Default Judgment entered against it on 30th October 2012, be and the same is hereby dismissed.

[37] Costs of the application is assessed to be assessed if not agreed.

[38] The Court acknowledges the industry of both Counsel and is grateful for their assistance.

**PEARLETTA E. LANNS**
**MASTER**