EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SUIT NO: NEVHCV2014/0179

BETWEEN:

First Fidelity Deposit Corporation

and Claimant

Andrew Michael Austin Titley

Judith Ann Bruton Titley

Caribbean Trust Company

Defendants

Appearances: Ms. Midge Morton for the Claimant.
Mr. Wesley George for the 1st and 3rd Defendants.
Ms. Kalisia Isaacs for the 2nd Defendant.

2015: July 22
2015: November 6

JUDGMENT

[1] **WILLIAMS, J.:** By Claim Form filed on the 30th July 2014, the Claimant claimed against the Defendants damages for breach of fiduciary duty, conversion, conspiracy, unjust

enrichment and negligence in at least the sum of US$992,740.04 that was taken by the 3rd Defendant on behalf of one or both 2nd Defendants and or the 3rd Defendant from the Claimant's bank account at the Bank of Nevis between July 2002 and September 2002.

[2] The Claimant also seeks an order from the Court in the amount of at least the sum of US$992,740.04 plus interest from July 2002 to trial date at the rate of 8% per annum or at such rate as the Court sees fit under Section 29 of the **Eastern Caribbean Supreme Court (St. Kitts and Nevis) Act** Cap 3.11.

[3] Further or in the alternative,

a) Orders are sought for payment of the sum of US$470,200.00 of funds improperly diverted from the Claimant by the 3rd Defendant for Defendants one or two.

b) The sum of US$181,000.00 in improper payments made by the 3rd Defendant from the Claimant's Bank account at Bank of Nevis to the 1st and 2nd Defendants from July 2007 to July 2009.

c) The sum of US$289,200.00 in funds improperly received by the 3rd Defendant from British American Insurance Company or Investment products purported to be held for the Claimant's benefit from July 2003 to July 2009.

[4] The Claimant also seeks an order for an accounting of all funds which were improperly taken from the Claimant as well as an order pending the outcome of these proceedings to preserve and identify all funds which the 3rd Defendant for the 1st and 2nd Defendants has improperly taken from the Claimant, as set out below.

[5] The Claimant seeks a further order injuncting all the Defendants and any corporations controlled or owned by one or more of them or anyone acting on their behalf or at their direction from dissipating, depleting or otherwise interfering with any funds resulting from the sale of the Carioke property or any of its related assets or the property at Lot 16,

Parish of St. James, Nevis which is known as Spring Hill Estate which is held in the name of the 1st Defendant and purchased with misappropriated funds of the Claimant's.

[6] Finally, the Claimant seeks an order rectifying the Certificate of Title for the Corioke Property back in favour of Mr. Titley and Declaration that the 1st Defendant and 2nd Defendant holds Spring Hill and the Carioke property on trust for the Claimant.

Relevant Background

[7] On the 3rd February 2000, the 1st Defendant incorporated the Claimant Company under the Nevis Business Corporation Ordinance 1984 for the sole purpose of holding the funds belonging to the sole shareholder of around US$970,000.00.

[8] By resolution of the 3rd February 2000, the 1st Defendant appointed the 3rd Defendant as sole director of the Claimant Company. By Instrument of transfer of the same date, the 1st Defendant transferred all rights, tittle and Interest in the one and only share capital stock of the Claimant Company to the sole shareholder.

[9] The 3rd Defendant by letter of the 13th May 2014, resigned as Director and registered agent of the Claimant Company.

On the said date and by resolution of the 13th May 2014, Dixcart of Dixcart House Charlestown, Nevis was appointed as Director and registered agent of the Claimant Company.

[10] The Claimant contends that from 3rd February 2000 to 13th May 2014, the 3rd Defendant acted as sole director of the Claimant Company. As such the 1st Defendant through its ownership and control of the 3rd Defendant had absolute control over the Claimant's bank account at the Bank of Nevis, which held the entirety of the sole shareholder's investment in the Claimant's Company.

[11] The Claimant Company further contends that from July 2002 to July 2009, the 1st Defendant misappropriated funds from the Claimant Company's bank account at the Bank of Nevis, which held the entirety of the sole shareholder's investment in the Claimant Company.

[12] The Claimant Company also contends that from July 2002 to July 2009, the 1st Defendant had been misappropriating funds from the Claimant Company's bank account without the sole shareholder's knowledge or consent, without the requisite resolutions or shareholder approvals, and for the sole benefit of the Defendants. These funds according to the Claimant were diverted from the Claimant Company exclusively for the 1st and 2nd Defendants personal gain.

[13] The Claimant Company states further that throughout the said period, the 1st Defendant had communicated to the Claimant that the said funds were intact. On the 24th May 2013, the 1st Defendant produced a "Register report" showing that the Claimant's funds were safe. However on the 15th April 2015, the sole shareholder requested a transfer of $350,000.00, and discovered that the funds were not forthcoming.

[14] The Claimants state that the Defendants misappropriation took two forms;

i. Withdrawals from the Claimant's Bank account.

ii. Direct encashment requests for interest from unauthorized and undisclosed investments in British American Insurance a company which is now insolvent and under judicial management in the Bahamas.

[15] The Claimant company submits that according to Bank statements from July 2007 to July 2009, the 1st Defendant made personal withdrawals from the Claimant's account totalling at least US$180,161.00.

The Claimant Company's bank's statements specify as follows;

"Debit advice F/O Andrew Titley" and "Debit advice F/O Judith Bruton."

The Bank statement from July 2002 to July 2009 also show outbound payments of over US$1 million, whereas no such withdrawals were shown in the client's register reports.

[16] The Claimants state that by contract dated 18th July 2002, the 3rd Defendant acting as Sole Director of the Claimant Company invested US$700,000.00 of the Claimant's funds in a "corporate savings contract" with British American Insurance Company, and by another contract dated 18th July 2003, the 3rd Defendant invested a further $100,000.00, and by a further contract dated 10th September 2007. The 3rd Defendant invested a further $171,250.00.

[17] By letter dated 3rd April 2009 (Tab 12) British American Insurance Company shows that the 3rd Defendant invested a sum of $971,250.00 of the Claimant's funds into British American Insurance Company, without the Claimant's knowledge or consent.

[18] According to the Claimant the policy investment held in the name of the 3rd Defendant yielded between 7.8%-8% interest and totalled at least US$289,200.00 and the 1st Defendant has admitted to taking this Interest.

[19] The Claimant Company states that in September 2009, British American Insurance Company became insolvent and went into judicial management. The Claimant appears to believe that British American Insurance Company will not pay any distribution on "corporate savings contracts" and assumes loss of total principal of US$971,250.00

[20] The Claimant further contends that the 3rd Defendant was in a fiduciary relationship with the Claimant and owed the Claimant the commensurate duties and obligations. The 3rd Defendant had a duty to act in the best interests of the Claimant to conduct itself honestly and in good faith and to avoid conflicts of duty and self interest in accordance with the duty of loyalty.

[21] The Claimant submits that the 3rd Defendant misappropriated, diverted and converted its funds for the sole, personal use and benefit of the service provider and its beneficiaries and directly benefited for at least seven years by wilfully and entirely disregarding the Claimant's interests.

[22] The Claimant therefore seeks an accounting and disgorgement from the 3rd Defendant and the entities related to them for all funds improperly stolen and profits earned therefrom.

[23] The Claimant states that the 1st and 2nd Defendant have wrongfully and fraudulently converted their funds for their personal use. Further that the 1st and 2nd Defendants have conspired and unjustly enriched themselves by their misconduct, which also amounts to negligence.

[24] The Claimant also seeks an order to rectify the Certificate of Title for the Carioke property to reverse the alleged fraudulent conveyance.

[25] The Claimant therefore claims against the 1st and 3rd Defendants;

a) Damages for breach of fiduciary duty, conversion, conspiracy, unjust enrichment and negligence.

b) An order for an accounting of all funds which the Defendants have improperly taken from the Claimant.

c) An order to injunct, trace and locate all funds which the Defendants have improperly taken from the Claimant.

[26] The Claimant also seeks an interim injunction enjoining the 1st and 2nd Defendants from; dissipating, depleting or interfering with the funds of the sale of the Carioke property or Spring Hill Estate and

b) A Declaration that the Corioke property and Spring Hill Estate are held on Trust for the Claimants, and an order to rectify the Certificate of Title by reversing the conveyance.

c) Costs.

[27] On the 19th December 2014, the Claimant filed a Notice of Application pursuant to Rule 7.3 of the Civil Procedure Rules for:

a) An order granting permission to serve the Claim Form filed on the 30th July 2014 and Statement of Claim out of jurisdiction on the 2nd named Defendant at 1110 Jackson Street, Idabel, Oklahoma 7475, USA.

b) Further and in the alternative, an order for alternative service of the claim on the 2nd named Defendant, by personal service on the 1st named Defendant- being the spouse of the 2nd named Defendant.

c) An order dispensing with service of the Claim Form on the 2nd named Defendant outside of the jurisdiction, and deeming the Claim Form served on the 1st Defendant as properly served on the 2nd Defendant.

[28] The Grounds of the Application are set out in the Notice of Application dated 19th December 2014 and I need not restate them here.

[29] On the 26th January 2015, this Court granted an order after hearing the Notice of Application in the following terms;

a) That the Claimant is granted permission to serve the Claim Form and Statement of Claim herein on the 30th day of July 2014, out of the jurisdiction on JUDITH ANN BRUTON TITLEY, the 2nd named Defendant who resides at 1110 Jackson Street, Idabel, Oklahoma, USA 74745.

b) That once service is effected, the 2nd named Defendant has 35 days to file an acknowledgment of service of the Claim Form.

c) That the 2nd named Defendant has 56 days after service of the Claim to file a Defence.

d) Alternatively, if the Claimant is unable to locate and serve the 2nd Defendant, the Claimant is granted permission to serve the Claim Form and Statement of Claim field herein on the 30th day of July 2014, on the 2nd Defendant by personal service on the 1st Defendant in the jurisdiction. ("Exhibit D").

[30] On the 25th February 2015, Mr. John Arthurton Senior Bailiff of the Eastern Caribbean Supreme Court, Nevis deposed to an Affidavit in which he stated that upon the instructions of the Claimant's attorneys, he served copies of a cover letter, Claim Form, Statement of Claim, Notice to the Defendant, Notes for the Defendant, Acknowledgment of service form, Defence and Counterclaim Form, Notice of Application, an Order, Certificate of Exhibits, and a Notice of Hearing on the 1st Defendant for and on behalf of his wife Judith A. Bruton Titley the 2nd Defendant at Jones Estate on the 24th February 2015.

[31] On the 28th April 2015, the 2nd Defendant filed an Application to the Court;

a) For an order to strike out the Claim Form and the Statement of Claim against the 2nd Defendant.

b) An order setting aside the purported service on the 1st Defendant on behalf of the 2nd Defendant as being invalid.

c) In the alternative an order extending the time period within which the 2nd Defendant is required to file and serve a Defence to the claim.

d) Costs of the application to the 2nd Defendant.

e) Such further relief as the Court may permit.

[32] The said application was heard by the Court on the 4th June 2015 where Counsel for both parties were present and were heard.

Learned Counsel for the Claimant Ms. Midge Morton submitted that while the Notice of Application to strike out was filed on the 28th April 2015, no Acknowledgment of Service was filed by the 2nd Defendant in compliance with Part 9.2 (1) (2) (5) of the **CPR 2000**. Learned Counsel further submitted that the 2nd Defendant has not followed the rules of civil procedure litigation.

Learned Counsel for the 2nd Respondent Ms. Kalisia Isaacs contended that it is not mandatory under the rules to file an acknowledgment of the rules and referred to Part 9.2 (4) and 9 (1) (3). Learned Counsel also argued that the 2nd Defendant has not been served and objected to the manner of service on the 2nd Defendant. Learned Counsel further argued that the Claim had expired and therefore the service was not in compliance with the Court order.

[33] Learned Counsel Ms. Morton replied by referring to Rule 8.12 (2) (a) which states "that the period of service of a Claim Form out of the jurisdiction is 12 months" and therefore the Claim was valid;

Further learned Counsel argued that the Order of the Court of the 26th January 2015 does not set any time parameters when the Claimant must serve the 2nd Defendant in the alternative way; and according to the said order learned Counsel submitted that "if the Claimant is unable to locate and serve the 2nd Defendant, the Claimant is granted permission to serve the Claim Form and Statement of Claim filed herein on the 30th July 2014, on the 2nd Defendant by personal service on the 1st Defendant in the jurisdiction." Learned Counsel submitted further that if the Claimant was not successful in serving the 2nd Defendant in the U.S.A, then the Claimant could still effect service in St. Kitts and Nevis on the 1st Defendant.

[34] After hearing submissions of both learned Counsel on this issue and considered the Application, Affidavit, and submissions, the Court did not grant the order as prayed by the Applicant/2nd Defendant.

[35] On the 22nd May 2015, the Claimant filed a Notice of Application, Request for Judgment in Default pursuant to CPR Rule 12.7.

The Claimant sought an order for Entry of Default Judgment against all three Defendants in default of Defence.

[36] The Claimant's legal practitioner certified that;

a) The time for the Defendant to file and serve a Defence has expired.

b) No Defence or counterclaim has been served.

c) The Defendant has not paid any monies in settlement of the claim.

[37] Further the Claimant sought on order for Default Judgment against the 1st and 3rd Defendants pursuant to CPR 12.9 (2) and an order permitting the Claimant to serve the Claim Form and Statement of Claim on the 2nd Defendant within the 12 month period prescribed by Rule 8.12 (2) (a) (c) by the 29th July 2016 or in the alternative if such efforts were unsuccessful, then by way of service on the 2nd Defendant via service on the 1st Defendant or such other person(s) within the jurisdiction as the Court may specify and that once served, the 2nd Defendant has 14 days to file an acknowledgment of service and 28 days to file a Defence. Alternatively an order extending the time for service out of the jurisdiction on the 2nd Defendant or a variation of the terms of paragraph 1 of the order dated 26th January 2015.

[38] The Claimant's grounds for the application are:

a) On the 1st August 2014, the Claimant served the Claim Form and Statement of Claim on the First and Third Defendant.

b) On the 12th August 2014, the 1st Defendant filed an Acknowledgment of service stating he intended to defend the Claim.

c) The Third Defendant did not file an acknowledgment of service.

d) For over 10 months, neither the 1st nor the 3rd Defendant has filed a Defence, and the Claimant has not consented to such delay or waived its procedural rights in any other manner.

e) By an order dated 26th January 2015, the Claimant was granted permission to serve the 2nd Defendant out of the jurisdiction within 28 days of the order (i.e.) by the 24th February 2015, or alternatively, if the Claimant was unable to locate the 2nd Defendant, to serve the 2nd Defendant by way of personal service on the 1st Defendant.

f) From the 21st to 24th February 2015, the Claimant duly attempted to serve the 2nd Defendant in Oklahoma through a local process server no less than five times as per the Affidavit of the Oklahoma through a local process server no less than five times as per the Affidavit of the Oklahoma process server Mr. Brandon Smith.

g) On the 24th February 2015, the Claimant subsequently served the 2nd Defendant via personal service on the 1st Defendant, as per the affidavit of the Nevis process server, Mr. John Arthurton.

h) Service has been effected on all three Defendants, none of whom have filed a Defence and the period for filing a Defence has expired.

i) The relief that the Claimant has sought in its Claim Form is not a claim purely for a specified sum of money, but rather for an unspecified sum of money in addition to but not restricted to other declaratory relief. In these circumstances, the Claimant

cannot simply file a request for default judgment, but must apply for entry of judgment pursuant to CPR Rule 12.10.

[39] The matter came up for hearing on the 4th June 2015 where the 1st and 3rd Defendants were present and the Court concurred with learned Counsel for the Claimant that proper service had been effected on the Defendants in particular the 2nd Defendant and ordered that;

1. There be judgment in default of a Defence by the 1st Defendant, and with respect to the 2nd and 3rd Defendants, judgment in default of Acknowledgment of service to the Claimant's claim.
2. That the Claimant/Applicant has permission to apply to the Court to determine the terms of the Judgment.
3. Costs in the cause.

[40] However on the 28th May, the 2nd named Defendant Judith Ann Bruton Titley filed an Affidavit in opposition to the Request for Judgment in Default.

The 2nd Defendant stated that on the 24th February 2015, the Claimant purportedly served her ex-husband, the 1st named Defendant with the Claim Form and Statement of Claim on her behalf, however this did not come to her attention until the 15th April 2015.

The 2nd Defendant also claimed that on the 28th April 2015, she filed an application seeking an order extending the time for her to file and serve a Defence which application was scheduled to be heard on the 4th June 2015.

The 2nd Defendant also deposed that on the 21st May 2015, the Claimant's solicitor wrote to her solicitor urging her to discontinue her application filed on the 28th April 2015 to have the Claim against her struck out, and offered an agreement on a reasonable time within which she could file a Defence.

On the 22nd May 2015, the 2nd Defendant states in her affidavit that her solicitor responded to the Claimant's letter indicating that they had sought an extension of time from the Court in which to file a Defence if they were unsuccessful in having the Claim against her struck out. An undertaking was also provided to file and serve her defence on or before the 17th June 2015.

[41] On the 22nd June 2015, the Applicant filed a Notice of Application for a stay of the execution of the Default Judgment dated 4th June 2015.

The grounds of the Application of the 2nd Defendant are as follows:

a) Pursuant to Section 20 (a) of the **Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act** Cap 3.11, the Court has jurisdiction to stay any pending proceedings if it thinks fit to do so.

b) Pursuant to Rule 26 (1) (2) (q) of the CPR 2000, it is within the Court's general powers of management to stay the whole or part of any proceedings generally or until a specified date or event.

c) There are related proceedings which should be heard and determined before the present proceedings, namely an application for leave to appeal to set aside the Default Judgment.

d) Refusal of an order to stay proceedings can result in undesirable consequences to the Applicant.

[42] The 2nd Defendant has also filed an Affidavit in support of the Application to stay the execution of Default Judgment dated the 4th June 2015. That Affidavit was deposed to by Clydette Maloney Legal Clerk of Myrna R. Walwyn Counsel on record of the Applicant/2nd Defendant which said Affidavit repeated the grounds for the Application to set aside the Default Judgment.

Issues

[43] The sole issue which arises in this matter is whether the Court should grant an Application for stay of proceedings pending an Application to the Court of Appeal for leave to appeal and to set aside the Default Judgment.

The Law, findings and analysis

[44] Rule 26 (1) (2) (q) of the CPR 2000 empowers the Court to stay proceedings before it; the Rule provides as follows;

"Except where these rules provide otherwise, the Court may;

a) Stay the whole or part of any proceedings generally or until a specified date or event."

[45] The Court of Appeal decisions in the cases of **Marie Makhoul and Marguerite Desir vs Sabina James Alcide** [1] are authorities which state very pellucidly the principles on which a stay of execution is granted.

In the High Court Civil Claim Case **Andrew Popely vs Ayton Ltd et al**[2] Thom J (as she then was) at paragraph 13 of her judgment restated the principles of Justice George Creque J.A (as she then was) in the case of **Marie Makhoul** Thom J stated as follows;

a) The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour; particularly after a full trial on the merits.

b) The modern authority on the guiding principles the Court employs in exercising its discretion to grant a stay was well illustrated in the case of **Linotype-Hell**

[1] SLUHCVAP NO. 30/2011
[2] No.1/2005 SVG

Finance vs Baker where Staughton L.J opined that a stay would normally be granted if the Appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bold assertion to the effect that an applicant will be ruined; rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.

c) The authority of **Hammond Studdard Solicitors vs Agrichem International Holdings** is grounded in the same principle though formulated differently. In that case, the Court pointed out that evidence in support of a stay needs to be full, frank and clear.

The principle in that case was stated as follows;

"Whether the Court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of Injustice to one or other or both parties if it grants or refuses a stay.

In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the Appeal succeeds and the judgment is enforced in the meantime, what are the risks of the Appellant being able to recover any monies paid from the Respondent.

[46] In the **Marguerite Desir** case the Court held inter alia as follows;

"The Court's jurisdiction to grant a stay is based upon the principle that Justice requires that the Court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the Court is whether there is a risk of Injustice to one

or both parties if it grants or refused a stay. Further the evidence in support of the application for a stay of execution should be full, frank and clear. The normal rule is for no stay, and if a Court is to consider a stay, the Applicant had to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of Appeal is not by itself a good enough reason."

[47] Therefore in applying these principles the Court is required to look at all of the circumstances of the case in considering whether there is a risk of Injustice to one or other or both parties and whether the appeal has some prospect of success. The onus is on the applicant to adduce evidence to show that there is a risk of injustice to the applicant if the stay is not granted. This evidence must be adduced in the Affidavits in support of the application and must be full, frank and clear. The Applicant cannot seek to do so by way of its submissions.

[48] The learned Blenman JA reinforced the principles upon which an application for a stay of proceedings pending appeal may be granted.

In the case of **C- Mobile Services Ltd. vs Huawei Technologies Co. Ltd.**[3] the learned Justice of Appeal states that;

a) There is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of its success pending appeal except in exceptional circumstances. There are five relevant principles a Court should apply when deciding whether to exercise its discretion to stay proceedings pending appeal.

The first is that the Court should take into account all the circumstances of the case; Second a stay is the exception rather than the rule;

[3] BVIHCMAP2014/0017

Third the party seeking a stay must provide cogent evidence that the Appeal will be stifled or rendered nugatory unless a stay is granted; Fourth in exercising its discretion, the Court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. The fifth is that the Court should also take into account, the prospect of the Appeal succeeding, but only where strong grounds of Appeal or a strong likelihood the appeal will succeed is shown.

[49] The Applicants application for a stay of execution was supported by two affidavits; the Affidavit of Clydette Maloney Legal Clerk of Myrna Walwyn & Associates filed on the 22nd June 2015 and the Supplemental Affidavit of Kiana Rawlins Legal Clerk of Myrna Walwyn and Associates and filed on the 13th July 2015.

The Affidavit of Kiana Rawlins sets out in greater detail the evidence which the Applicant rules on in support of the application.

The relevant parts of the 13th July 2015 Affidavit are paragraphs 5, 6 and 7.

"5. A successful appeal will have the effect of quashing the earlier decision of this Court, and also removing the ground upon which default judgment was entered against the applicant, that is the failure to file an acknowledgment of service and a Defence to the claim; where the stay is refused it would render the result of the Appeal insignificant/nugatory.

6. The Application to set aside Default Judgment, if successful will remove all liability from the Applicant and allow her to defend the claim on its merits. The Applicant is not a person of exceptional wealth, thus if the judgment is allowed to be executed, her assets will be depleted to the extent where bringing the application may no longer be affordable.

Her assets will be depleted when her Carioke property is transferred to the Claimant and/or she is restrained from using the proceeds of sale from her property.

7. The Applicant is likely to suffer prejudice if the default judgment is allowed to be executed prior to leave to appeal being obtained and any appeal being determined and/or the Application to set aside the default judgment being determined. The execution of the default judgment will not only expose the Applicant to liability for whatever order the Court makes but also affect her property rights to her home. The Claimant has sought an order to restrain the interference, dissipation and/or depletion of any funds raised from a sale of the property, as the Applicant is the sole legal owner of the Carioke property and her right to dispose of the proceeds of sale will be interfered with.

[50] On the 17th July 2015, Ariann Maynard legal clerk to the law firm of Morton Robinson L.P deposed to an Affidavit in response to the Supplementary Affidavit of Kiana Rawlins filed on the 13th July 2015.

[51] Ms. Maynard instructed by Ms. Midge Morton stated inter alia that it would not be just or convenient for a stay of execution of the default judgment since the Applicant has refused to give an undertaking not to deal with the property pending the determination of this cause.

[52] Ms. Maynard also deposed that the Applicant has made partial admissions on liability in her Draft defence which was annexed to her application; and is therefore openly admitting to benefiting from the use of the Claimant's monies.

[53] The Applicant/Intended Appellant listed 10 grounds in her application for leave to appeal. Grounds 1-5 are arguable, Grounds 6 & 7 involve evidentiary issues which have to be fully ventilated and determined.

Grounds 8-10 are no more than bold assertions from the Applicant that Claimant will only suffer a "loss of time".

However I am of the opinion that there are strong, arguable legal points which suggest that the Appeal will succeed. Paragraphs 1-7 contain live issues and evidence that the Applicant would suffer if a stay of execution is not granted.

[54] Having reviewed the grounds of Appeal I am of the opinion that the Applicant has an arguable case and has shown by way of evidence in her affidavit that there is a risk of injustice if a stay of execution is not granted. Having recognized that a stay is the exception rather than the general rule and also being cognisant that the Court must take steps to ensure that its Judgments are not rendered valueless and that a successful litigant is not prevented from or frustrated in reaping the fruits of a Judgment, I am of the considered opinion that the Applicant/Intended Appellant has satisfied the Court that a stay should be granted in the circumstances of this case.

I therefore find that this is an appropriate case for the Court to exercise its discretion to grant a stay of execution.

[55] In relation to the Application to set aside the Default Judgment granted on the 4th June 2015, the Defendants failed to file a Defence, and in the case of the 2nd and 3rd Defendants they had failed to enter an Acknowledgment of Service.

[56] In the meantime, the Claimant has obtained Judgment in Default which the 2nd Defendant has applied to the Court to set aside.

[57] In the case of **Michael James vs Tasman Gaming Inc (2) Betcorp Limited**[4] Rawlins J.A (as he then was) stated at paragraph 25 of his Judgment that;

[4] Civil Appeal No. 6 of 2006- Antigua and Barbuda

"Mr. James did not file his defence within the Time directed because he was appealing the order. In the meantime Tasman and Betcorp obtained Judgment in Default which Mr. James has applied in the High Court to set aside. It would be a waste of the Court resources and inimical to the overriding objectives of the rules to permit any further proceedings, because if Mr. James prevails on his appeal, any further proceedings against him on the Judgment in Default proceedings would be rendered nugatory.

I shall therefore stay any further proceedings against Mr. James pending the determination of the Appeal."

[58] The Law is well settled in relation to an application to set aside a Default Judgment, Rule 13.3 of the CPR 2000 sets out the conditions to be satisfied if a Court is to 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.

2. In any event, the Court may set aside a Judgment entered under Part 12 if the Defendant satisfies the Court that there are exceptional circumstances.

[59] The three conditions under Rule 13.3 (1) are conjunctive, therefore the Defendants must satisfy all of the three criteria set out in the Rule for the Court to exercise its discretion to set aside the Default Judgment.

See: Kerrick Thomas vs RBTT Bank Caribbean Ltd.[5]

[5] Civil Appeal No. 3 of 2005

[60] The Default Judgment was entered by the Claimant on the 4th June 2015 and the Applicant filed an application to set aside the Default Judgment on the 22nd June 2015 after the judgment was served on the 2nd Defendants solicitors on the 10th June 2015.

[61] In the case of **Louise Martin vs Antigua Commercial Bank**[6] the Court held that a period of 15 days between being served with the Judgment and the filing of the Application to set it aside was "as soon as reasonably practicable" for the purposes of Rule 13.3 (1) (a) of the CPR 2000.

See also: Earl Hodge vs Albion Hodge[7]

Curthwin Webster vs Preston Bryan[8]

[62] In the circumstances I find that the applicant has met the threshold with regard to the first criteria of Rule 13.3 of the CPR 2000 and has applied to the Court as reasonably practicable after finding out that judgment has been entered.

[63] The Applicant must give a good explanation for the failure to file a Defence. In an affidavit in support of an application to set aside the Default Judgment filed on the 22nd June 2015 by Clydette Maloney, legal clerk of Myrna Walwyn & Associates, it states at paragraph 4, that the Applicant did not file an acknowledgment of service since she was not served with the Claim Form and Statement of Claim.

The Applicant states further that the failure to file a Defence was not intentional and the Applicant always intended to defend the action against her and had sought the Court's permission in her application of the 28th April 2015 to allow her to file a defence to the claim out of time.

---

[6] ANU/HCV1997/0115
[7] BVI/HCV 2007
[8] AXAHCV2008/0020

[64] The Applicant also states that the Application to set aside the Default Judgment was made promptly upon receiving a copy of the Default Judgment and the Applicant's instructions.

[65] The Privy Council decision in the case of **The Attorney General vs Universal Projects Ltd**[9] is instructive on this issue and was adopted by the Eastern Caribbean Court of Appeal in **Sylmord Trade Inc. vs Inteco Beteiligungs AG**[10] per Michel J.A. The learned Michel J.A quoted Lord Dyson in **the Attorney-General's** case and stated;

"If the explanation for the breach connotes real or substantial fault on the part of the Defendant, then it does not have a good explanation for the breach. An account of what has happened since the proceedings were served which satisfied the Court that the reason for the failure to acknowledge service or serve a Defence is something other than mere indifference to the question whether or not the Claimant obtains judgment."

The explanation may be banal and yet be a good one for the purposes of CPR 13 (3). Muddle, forgetfulness, and Administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of Indifference to the risk that judgment might be entered.

[66] Having reviewed the Affidavit filed on behalf of the Applicant/2nd Defendant on the 22nd June 2015 and having perused the Draft Defence of the 2nd Defendant attached to the application, I am of the view that the Applicant/2nd Defendant has provided the Court with an explanation for the failure to file her Defence within the stipulated time; Her explanation is reasonable it is not banal, or muddled and in my opinion has met the threshold under Part 13.3 (b) that the Defendant must provide the Court with a good explanation.

[9] P.C Appeal No. 0067/2919 UKPC 37
[10] BVIHCMAP2013/0003

[67] Rule 13.3 (1) (c)- whether the Applicant/2nd Defendant has a real prospect of successfully defending the claim.

The 2nd Defendant has denied that she was involved in any way in the management and/or day to day affairs of the Claimant Company, and has never received any funds from the Claimant Company.

Further the Applicant/2nd Defendant states in her Draft defence that as the wife of the 1st Defendant, she was led to believe that their financials affairs were being met from the 1st Defendant's income from the 3rd Defendant Company.

The 2nd Defendant has proffered explanations of the acquisition of the Carioke property and the reasons for the transfer of the property to her which she claims was not done fraudulently. The Applicant has also put the Claimant to the strict proof of all the allegations contained in the Statement of Claim. These are live issues to be determined by the Court at a Trial of this matter and in my view the Applicant/2nd Defendant has pleaded her Defence fully and with sufficient precision.

[68] Having perused the Draft defence, the Affidavits and the authorities I am of the opinion that the Applicant has cleared the mandatory hurdles under Rule 13.3 (1) to permit me to exercise my judgment on this matter.

a) The Applicant has applied to the Court as reasonably practicable after finding out that a Default Judgment had been granted.
b) The Applicant has given a good explanation for the failure to file a Defence.
c) The Applicant has a real as opposed to a fanciful prospect of successfully defending the claim or

In any event the Court may set aside the Judgment entered under Part 12 if the Defendant satisfies the Court that there are exceptional circumstances.

[69] Therefore after reviewing all of the evidence and the cited authorities and having exercised my discretion under the inherent jurisdiction of the Court as provided for in Rule 26.9 (1) (3) and in further exercising the Court's discretion to ensure that the overriding objective of the CPR Part 1 is given effect to, I hereby set aside the Default Judgment entered against the 2nd Defendant on the 4th June 2015.

[70] Ordinarily, the 2nd Defendant would be entitled to costs for these applications. However, simultaneously with the 2nd Defendant's applications, the Claimant has also filed on the 26th June 2015, a Notice of Application for determination of the terms of a Judgment and for assessment of Damages.

However the application for leave to appeal the order of the Court of the 4th June 2015 is dated the 18th June 2015 and is pending before the Court of Appeal, I am therefore of the opinion that no costs will be awarded to the 2nd Defendant on these applications.

[71] A further issue for adjudication is the award of costs to the Claimants on the 2nd Defendant's application to the Court to strike out the claim against the applicant on the issue of service of the claim.

I have now made an order to stay proceedings and to set aside the Default Judgment pending the hearing of the 2nd Defendant's application for leave to appeal the decision of this Court. Consequently I will also grant a stay on the award of costs against the 2nd Defendant pending the determination of the application for leave to appeal.

[72] In conclusion it is hereby ordered that;

i. The 2nd Defendants application for a stay of execution of the Judgment of the 4th June 2015 is granted including the order as to costs pending the hearing and determination of the substantive appeal.

ii. The 2nd Defendant's application to set aside the Default Judgment dated the 4th June 2015 is hereby granted pending the hearing and determination of the Appeal process.

iii. There is no order as to Costs of these applications.

Lorraine Williams
High Court Judge.