

EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: ANUHCV 2015/0646

BETWEEN:

ALEXANDRE MONCHATRE
MARIANA RANALI

Claimants/Respondents

AND

FREEDOM LIMITED

Defendant/Applicant

Appearances:

Safiya and Kamilah Roberts for the Claimant/Respondent
Kelvin John and Loy Weste for the Defendant/Applicant

2015: December 3

2016: January 19, May 9, June 7

August 17

APPLICATION TO SET ASIDE DEFAULT JUDGMENT

- [1] GLASGOW, M: The applicant (hereinafter Freedom Limited) applied to the court on 26th October, 2015 seeking an order setting aside the default judgment obtained by the claimants (hereinafter the purchasers) on 13th October, **2015 further to Freedom Limited's** failure to file an acknowledgment of service within 14 days as required by rule 9.3(1) of the Civil Procedure Rules 2000 (CPR). The application is made pursuant to CPR 13.3 wherein Freedom Limited also prays that if the court sets

aside the default judgment, Freedom Limited would be granted an extension of time to file the necessary defence, the court would additionally stay the claim and send it to arbitration as agreed by the parties.

- [2] The application recites that the claim was filed on 27th July, 2015 and served on Freedom Limited on 15th September, 2015. The application further states that the period to file an acknowledgment of service would have expired on 30th September, 2015 and the period to file a defence would have expired on 13th October, 2015. Freedom Limited found out about the default judgment on 22nd October, 2015 after a search at the High Court registry conducted by its attorneys and applied on 26th October, 2015 to set it aside. The purchasers filed a response to the application on 24th December, 2015.

Background

- [3] The course of dealings that brought the parties to this juncture covers 3 agreements and several other documents regarding the sale of land owned by Freedom Limited. In some of its evidence and submissions, Freedom Limited disputed the subject matter of the various agreements but this **issue was never strenuously pursued as it is apparent that the parties' relationship concerned Freedom Limited's desire to sell the particular lands.** Indeed Freedom Limited presented evidence and submissions to support their statement that the sale concerned land that was at some point mutated from a larger piece of land owned by Freedom Limited¹.
- [4] The first agreement dated 21 May, 2012 was concluded between real estate firm, Antigua Real Estate Limited (hereinafter the estate agents) and Freedom Limited (hereinafter the listing agreement). The listing agreement engages the estate agents to sell the land on behalf of Freedom Limited at the purchase price of USD 1,999,000.00 (Clause 2). Freedom Limited in its sole discretion could authorize offers below the stated purchase price. The listing agreement also provided for a commission to be paid to the estate agents at closing. The estate agents were nonexclusive and Freedom Limited retained the right to appoint other persons to sell the property

¹ Affidavit of Marvette Richards filed on March 9, 2016 at paragraphs 2 to 5

or to sell the same directly in which case the estate agents would not be paid a commission. Of particular relevance to this discourse are clauses 10 and 14 of the listing agreement which state –

*10. All payments paid in respect of the sale of the property shall be made payable directly to the Attorney-at-Law of the Vendor Sir Clare Roberts as Stakeholder including the **purchaser's deposit and** the reservation deposit that will be held by the Attorney –at – Law of the Vendor Sir Clare Roberts as legal stakeholder.*

14. The Agent shall perform its services under this Agreement as an independent contractor. Nothing contained in this Agreement shall be deemed to create any association, partnership, joint venture, or relationship of principal and agent or employer and employee between the parties hereto or to provide either party with the right, power or authority, whether expressed or implied, to create any such duty or obligation on behalf of the other party. The Agent also agrees that it will not hold itself out as partner, joint venture, co-principal or employee of the Vendor by reason of the Agreement. In the event that the seller is adjudicated to be a partner, joint venture, co – principal or employer of or with the Agent, the Agent shall indemnify and hold harmless the Vendor from and against any and all claims for loss, liability or damages arising therefrom.

[5] Further to the foregoing, the estate agents entered into an agreement with the purchasers which agreement is dated 7th April, 2014 (hereinafter the reservation agreement). The reservation agreement provided that the purchasers would buy the property for the agreed purchase price of USD 825,000.00. There is no evidence that the purchase price was agreed with Freedom Limited but nothing turns on this issue for this ruling. The reservation agreement states at clauses 2 to 6

2. The Prospective Purchaser shall pay the amount of US \$41,250.00 (Forty one Thousand, Two Hundred and Fifty United States Dollars) as a 5% reservation deposit which is payable by Bank Wire Transfer to ANTIGUA REAL ESTATE LIMITED as legal stakeholders to reserve of (sic) the property in favour of the prospective purchaser at the agreed purchase price. This amount is in addition to a further 5% deposit US \$41,250.00 (Forty One Thousand Two Hundred and Fifty Dollars United States Dollars) which is

required on the execution of the forthcoming Sales Agreement, made payable to the purchasers Lawyer, identified as the further deposit.

*3. In the event that the company Freedom Limited fails to perform to the conditions, under **the forthcoming sales agreement or the company shares don't come with full title** guarantee free from all charges, liens or other encumbrances, or the company is not in good standing, then the reservation deposit and further deposit will be refunded in full with immediate effect.*

5. If any default on part of the Prospective Purchaser causes the non-completion of this Reservation Agreement or the Prospective Purchaser fails to formalize a sales agreement within the stipulated 30 days provided that such inability to perform is not due to third parties and beyond the control of the Prospective Purchaser, the Company² shall be entitled to be paid the full reservation deposit under clause 2 of this agreement , and this agreement shall be deemed terminated and all rights of the Prospective Purchaser hereunder shall cease to exist.

6. This Reservation Agreement, after execution by both parties is an official receipt for the amount collected as above.

[6] On the day before the reservation agreement was signed, the purchasers sought clarification from the estate agents on several clauses of the reservation agreement. I must confess that some of what is written in the correspondence between the estate agents and the purchasers is not well written but it is clear from what was stated in the email that the purchasers harbored some fears about the terms of the reservation agreement. The estate agents responded on 7th April, 2014 by repeating the questions asked and replying thereto

*How come the reservation agreement is made between the agent as legal **stakeholder (sic) of the vendor's company and the prospective purchaser**? This is a reservation agreement which underlines the terms in principle with the agent and*

² Antigua Real Estate Limited is referred to as the Company in the reservation agreement.

prospective purchaser. We as the agent have a listing agreement with the vendors. Normally it should be between the vendor (or company directors) of the prospective purchaser. The forthcoming in depth sales/share transfer agreement is with the purchaser and vendor which will state within that the purchaser has signed a reservation agreement between the vendors agent and paid a 5% reservation deposit which comes off the sale price as well as the further 5% deposit. This agreement is just to underline the terms in principle to secure the property for you with us taking it off the market agreed within our **listing agreement so you don't get a bidding war. The 30 days allows then for the vendors lawyer to draft the share transfer which will be sent to your lawyer which will give a 3 month completion date plus the automatic extension of 90 days should your licence to hold shares application not be approved by cabinet in a timely manner! ... Note** without a signed reservation agreement all we have is a verbal agreement of which the property is still on the open market and in my experience of 16 years here usually if you bypass the res agreement to go straight to the share transfer agreement which would take up to 30 days to draft and agree there is always a chance that some other person comes in and gazumps you like in the UK with a higher offer, whereby you wasted time and in some cases your left with lawyers invoice!

What is the mechanism which guarantees (sic) that the 5% paid out as reservation amount is afterwards passed over to the vendor? The agent holds the 5% as legal stakeholder as per there listing agreement in trust which will be identified in the share transfer agreement. Should there be any issue/default with the company you get your reservation deposit returned. Note the 5% reservation which is held by us as legal stakeholder until completion then would be realized to us as agreed by the vendor as our **5% agents commission only on a successful sale...**

Is the additional 5% you mentioned in the reservation agreement is to be paid at exchange? If yes, I suppose it is not payable with the first 5%. Correct this is to be paid once the in depth draft share transfer is agreed by both the vendor and purchaser to be paid on the execution which is identified within the share transfer as the further deposit

making up of the 10% deposit leaving a 90% final balance to pay on completion. (Agent's bold emphases)

[7] Freedom Limited and the purchasers then entered into what is styled '**Agreement for Sale and Purchase**' (hereinafter '**the sale agreement**') which agreement is undated. Freedom Limited has submitted and the purchasers **have not disputed that the agreement was signed 'on or around May 29, 2014'**. The agreement at clause 2 thereof makes reference to the purchase price of USD 812,500.00³ which is made up of -

(1) *Reservation deposit of USD 41,250.00 paid to Antigua Real Estate, to be held as stakeholder;*⁴

(2) *A further deposit of USD 40,625.00 on signing of the agreement to be held in escrow by Messrs. Roberts & Co, attorneys at law as stakeholder;*

(3) *The balance of USD 730,625.00 which will be paid to the purchaser on the date of completion.*

[8] Of further relevance to this discourse are clauses 13 to 16 and 19 of the agreement which delineate what are events of default, what is happen in the event of default and the referral of disputes to arbitration –

*13. In the event that the Purchaser shall be refused the grant of a Non – **Citizen's** Land Holding Licence or citizenship under the CIP, as the case may be, then and in either such case the Purchaser shall be entitled to the return of the reservation deposit forthwith and this Agreement and any related agreement shall be at an end.*(bold emphasis mine)

*14. If at the date of completion the Purchaser's application for Non – **Citizen's** Land Holding Licence or citizenship under the CIP is neither granted and ready for issuance by*

³ There is again no reference to whether Freedom Limited agreed to a further reduction to the purchase price as stated on the listing agreement.

⁴ Antigua Real Estate is not a party to the agreement

the Inland Revenue Department or the Citizenship Investment Unit or (sic) refused then the Completion date shall automatically be extended by 90 (ninety) days (the 'Extended Completion Date'). Thereafter, if the Purchaser's Non – Citizen Land Holding Licence or citizenship under the CIP is neither granted and ready for issuance by the Inland Revenue Department or the Citizenship by Investment Unit (as the case may be) nor refused by the Extended Completion Date either party may agree in writing to further extend the date of completion.

15. If any default on the part of the Vendor causes the non – completion of this transaction, the Purchaser shall be entitled to the return of the deposit or in the alternative, the Purchaser may pursue all legal remedies available including but not limited damages and specific performance. (Bold emphasis mine)

16. Subject to paragraphs 13 and 14 herein, should the Purchaser without cause fail to complete the transaction on or before the Completion date or the Extended Completion Date (if any), the Vendor shall be entitled to retain the deposit and this agreement shall be at an end. (Bold emphasis mine)

19. All disputes, differences and questions whatsoever which may at any time hereafter arise between the parties hereto out of the construction of or concerning anything contained in or arising out of this Agreement or as to the rights or liabilities hereunder in accordance with the provisions of the Arbitration Act for the time being of Antigua and Barbuda. For the avoidance of doubt the parties agree that no court proceedings shall be taken until arbitration is exhausted.

[9] The statement of claim recites that the purchasers applied for and were refused the grant of citizenship under the Citizenship by Investment Programme. They were so informed by the Citizenship by Investment Unit by way of letter dated 28th October 2014. **The purchasers' lawyers** thereafter sent a letter dated 6th January, 2015 to Freedom Limited invoking clause 13 of the sale agreement narrated above. In the letter, the purchasers rescinded the agreement and requested that Freedom Limited repay both the reservation and further deposits (hereinafter the deposits).

When Freedom Limited failed to respond the purchasers requested by way of letter dated 19th May, 2015 that the parties refer the matter of the repayment of the deposits to arbitration as a dispute **pursuant to clause 19 of the sale agreement.** The purchasers solicited Freedom Limited's concurrence with the appointment of a sole arbitrator within 14 days of the service of the request. Freedom Limited did not respond. The purchasers further requested, by way of letter dated 5th June 2015, that the parties agree to have the dispute on the refund of the deposits referred to arbitration. Again, there was no response from Freedom Limited. On 15th June, 2015 the purchasers sent another request that the parties agree to refer the issue of the deposits to arbitration. This time Freedom Limited was asked to respond within 7 days failing which the purchasers would approach the courts for relief. When Freedom Limited failed to respond the purchasers filed this claim on 27th July, 2015 and served the same on Freedom Limited on 15th September, 2015. As stated above, Freedom Limited failed to file an acknowledgement of service within the time limited by the rules. The purchasers obtained default judgment on 13th October, 2015. The set aside application was filed on 26th October, 2015.

Grounds of the application

[10] CPR 13.3 stipulates

13.3(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 acknowledgement of service or a defence as the same 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.

(3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it

- [11] Freedom Limited asserts that it has satisfied CPR 13.3 (1) and if it has not done so, these circumstances are sufficiently exceptional to propel the court to set aside the default judgment pursuant to CPR 13.3(2).
- [12] Freedom Limited submits that it applied as soon as reasonably practicable to set aside the default judgment after it found out that it had been entered. In this regard, Freedom Limited pleads that it found out about the default judgment on Friday, 22nd October, 2015 after a search was conducted at the court office by its attorneys. The application was filed on 26th October, 2015. It is submitted that a delay of 2 business days is not inordinate.
- [13] Freedom Limited also contends that it has a good reason for failing to file an acknowledgment of service within 14 days as mandated by CPR 9.3(1). The default stems from the fact that Freedom Limited has been represented by the same attorneys in Antigua for the past 15 years. When the **dispute arose regarding the return of the deposits, Freedom Limited's attorneys advised that** they could not represent the company since they were the same firm of attorneys who acted for Freedom Limited on the sale agreement and as escrow holders of the further deposit. The attorneys further informed Freedom Limited that they could not act for either the company or the purchasers unless an agreement was reached on the further deposit held in their escrow account. When the claim was served on Freedom Limited, the company had substantial difficulty finding **other legal representatives since for one thing, the company's principals all reside overseas and** secondly, it would have taken some time to **repose confidence in another attorney** 'who we would not have gotten the chance to meet and only communicated via telephone or email.'⁵ Freedom Limited explains that this difficulty was 'exasperated' by the fact that company was

working with Roberts & Co. since 2001 and have never worked with any other attorney in Antigua. As a result, there was a delay in engaging an alternative attorney and we were unable to file an Acknowledgment of Service in the fourteen day time period...⁶ As soon as we understood that our long standing attorneys could act for us, we immediately gave instructions to them to proceed to represent us in this matter and put forward our defence.

- [14] The conflict is said to have been removed thus

⁵ Freedom Limited's affidavit filed on 26th October , 2015 at paragraph 7

⁶ Ibid

*On the evening of the 21st day of October, 2015, we confirmed our agreement to Roberts & Co., as escrow agents, to return the 5% deposit held under the Sales Agreement entered into between the Claimant and Defendant Company. On the evening of the 21st day of October, 2015, we are advised by our attorneys that Roberts & Co., as escrow agents, **communicated with the Claimant's attorney and notified them that the Defendant has confirmed their agreement to return the 5% deposit held as escrow agents to the Claimant's attorney, and requested their wiring instructions to effect the transfer.** We are advised by our attorneys that on the 23rd day of October, 2015, acting on the agreement between the Claimants and Defendant that the 5% deposit being held in escrow by Roberts & Co (as escrow agents) should be returned to the Claimants, instructions were sent to effect the transfer of the 5% deposit held by Roberts & Co to the attorneys for the Claimant.*

- [15] The case of *Cuthwin Webster v Preston Bryan*⁷ is provided as authority for the view that there is a good **explanation for Freedom Limited's failure to file an acknowledgment of service in a timely manner.** Freedom Limited submits that a breakdown in relations between defendant and counsel was found to be a good explanation for a failure to file a defence in the circumstances of that case.
- [16] In respect of its defence, Freedom Limited claims that the defence has a real prospect of succeeding when the basis for the action is examined. The claim is one for moneys had and received and for a breach of contract for the return of the sum total of the deposits. It is contended that Freedom Limited was never in receipt of the reservation deposit or the further deposit as per the sale agreement. The purchaser paid the reservation deposit to the estate agents prior to contract and ought to pursue them for the return of the said sums. The further deposit was paid to Roberts & Co and has been repaid. There is no evidence that the estate agents were **Freedom Limited's agents or that the estate agents** ever held out themselves to be the agents of Freedom Limited. Freedom Limited never held or had control of the reservation deposit and cannot be held liable for the same.

⁷ [2009] ECSCJ No. 101

[17] In terms of moneys had and received, Freedom Limited submits that this is a restitutionary claim which comprises four elements⁸ –

- (1) *The defendant must have been enriched;*
- (2) *the enrichment must have been at the expense of the claimant;*
- (3) *the enrichment must have been unjust; and*
- (4) *consideration must be given to any applicable defences*

[18] Further **learning from Halsbury’s Law is relied on for the view that**⁹

*‘ a restitutionary claim can only be brought where the defendant has been enriched as a result of something which the claimant has done for or given to him. The absence of an enrichment is fatal **to the existence of a restitutionary claim... where the money has been paid not to the defendant but to a third party, it is generally necessary to show that the money has been paid at the request, express or implied, of the defendant in order to establish that the payment has resulted in a benefit to the defendant rather than the third party.***

[19] Freedom **Limited’s view is that the purchasers have not satisfied any of the** requirements to show that a cause of action for moneys had and received is sustainable. It repeats the fact that the further deposit was paid to the estate agents and continues to be held by them for the estate **agents’ sole benefit. Freedom Limited has not** in any way been enriched by the estate **agents’** receipt of the further deposit. If the default judgment is allowed to stand the wrong party would be asked to pay the reservation deposit and the purchasers would be thereby unjustly enriched.

[20] There is additionally no breach of contract since the reservation agreement and the sale agreement are separate arrangements each providing distinct terms on the deposits. Clause 5 of the reservation agreement, for instance, permits the estate agents to retain the deposit in the event that the purchasers failed to formalize the sale agreement. Freedom Limited was not a party to the listing agreement between the purchasers and the estate agents and as such it had no control over

⁸ Halsbury’s Laws of England, 4th edn, Vol. 88, para. 410

⁹ Ibid. paras 411-412

the funds paid under that separate third party agreement. There is further no evidence that the estate agents acted as agent for Freedom Limited. As such Freedom Limited cannot be held liable for a breach of contract. Freedom Limited asserts that the estate agents are liable as stakeholders. The company points out that the emails from the estate agents to the purchasers and clause 2 of the sale agreement prove that the estate agents acted as stakeholders and are liable to the purchasers in that capacity. Freedom Limited relies on pronouncements in the case of Sorrell v Finch¹⁰ to reason that the estate agents were in fact stakeholders liable to repay the further deposit to the purchasers.

[21] Alternatively, it is submitted that if Freedom Limited did not satisfy CPR 13.3(1), its defence discloses exceptional circumstances which support a setting aside of the default judgment pursuant to CPR 13.3(2). In particular, it is repeated that there is no claim against Freedom Limited as the claim should have been brought against the estate agents for the moneys they have received.

[22] It is also said that if the court finds that the above submissions are substantial, Freedom Limited should be allowed an extension of time to file a defence for the reasons set out above. The failure to grant an extension of time to file a defence would cause Freedom Limited undue prejudice as it would be confronted with an order to pay moneys that it never had and received, was never in possession of or had control over. It is repeated that the purchasers would be unjustly enriched.

[23] In respect of a referral to arbitration, Freedom Limited applies pursuant to CPR 9.7 which provides

9.7 (1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.

(3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence.

(4) An application under this Rule must be supported by evidence on affidavit.

¹⁰ [1977] AC 728

(5) A defendant who –

(a) files an acknowledgement of service; and

(b) does not make an application under this Rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.

(6) An order under this Rule may also –

(a) discharge an order made before the claim was commenced or the claim form served;

(b) set aside service of the claim form; and

(c) strike out a statement of claim.

(7) If on application under this Rule the court does not make a declaration, it –

(a) may –

(i) fix a date for a case management conference; or

(ii) treat the hearing of the application as a case management conference; and

(b) must make an order as to the period for filing a defence.

(8) Where a defendant makes an application under this Rule, the period for filing a defence is extended until the time specified by the court under paragraph (7) (b) and such period may be extended only by an order of the court.

[24] Freedom Limited asks the court to find that, if indeed an extension of time is granted to file the defence, that Freedom Limited would have complied with this rule. The company also relies on the ruling in *Ginger Villa Incorporated v Caribbean Developments (Antigua) Limited*¹¹ for the view that the parties ought to be held to their bargain to refer the matter to arbitration unless good reason is shown why the court should not do so. Freedom Limited reasons that there is nothing shown by the purchasers why this matter should not be referred to arbitration.

Purchasers' opposition and submissions

[25] In their opposition to the application, the purchasers do not take much issue with the time within which Freedom Limited has filed the application to set aside the default judgment. However, they strongly deny that the company has a good reason for failing to file an acknowledgment of service or that it has a real prospect of successfully defending the claim.

¹¹ [2014] ECSCJ No.34

[26] In terms of the reasons for failing to file an **acknowledgment of service, the purchasers'** rejoinder is that Freedom Limited has merely stated its difficulty with instructing other counsel but has not provided any evidence of its efforts to secure other attorneys after discovering that Roberts & Co could not represent them. The purchasers submit that Freedom Limited has not **stated** '*which attorneys it attempted to contact, the dates it attempted to contact these Attorneys or the reasons for such failure to contact/instruct such Attorneys.*'¹² The purchasers contend that, applying the reasoning in the case of *Christenbury Eye Centre v First Fidelity Trust Ltd*¹³, the residence overseas of the principals of Freedom Limited cannot be offered as a good reason for failing to comply with the rules on filing an acknowledgment of service. The purchasers also assert that the failure to obtain further representation as a result of conflict of interest and residence overseas were not accepted as good reasons in the case of *Caribbean Sailing (BVI) Limited v The owners and other persons interested in the ship "Kelliste 11" et al*¹⁴ and the same should apply to the excuse in these circumstances.

[27] The purchasers similarly dispute Freedom Limited's **assertion that it** has a defence with a real prospect of succeeding. **They rely on what is termed** '*the clear and unambiguous language of the pertinent provisions...*'¹⁵ of the sale agreement especially clauses 2 and 13 to contend that, the agreement having been drafted by Freedom Limited, it must be interpreted contra preferentem the drafter and in favor of the purchasers. Accordingly, clause 13 of the sale agreement entitles the purchasers to the return of the reservation deposit. Freedom Limited is the only party to the agreement against which such a term can be enforced and as such it is obligated to return the reservation deposit to the purchasers.

[28] In respect of whether the action should have been brought against the estate agents instead of Freedom Limited, the purchasers submit that *Sorrell v Finch* does not apply to the facts of this **case. It is posited that** '*the line of decisions outlined in Sorrell indicate clearly that an Estate agent's obligation to repay the purchaser lasts only until a binding contract has been entered into between the purchaser and the vendor.*'¹⁶ The purchasers then distinguish the facts of this case on the

¹² Purchasers' submissions filed on 30th November, 2015

¹³ SKNHCVAP 2007/0014

¹⁴ BVIHAD 2001/005-009

¹⁵ Supra note 12 at para 20

¹⁶ Purchasers' further submissions filed on 9th March, 2015

basis that once a binding contract had been concluded, the purchasers cannot look to the estate agents for the return of the reservation deposit. Freedom Limited, having the reservation deposit credited to its benefit in the sale agreement must insist that the estate agents repay the purchasers. In any event, Freedom Limited has by its words/conduct led the purchasers to believe that the estate **agents acted with Freedom Limited's authority and/or** as its agent. Freedom Limited is now estopped from denying the estate **agents' apparent or ostensible authority**. Spiro v Lintern¹⁷ is proposed as authority for this submission.

[29] **The purchasers' claim that further** to its listing agreement with Freedom Limited, the company knew that the agents had no authority to collect and keep the reservation deposit. Notwithstanding the fact that Freedom Limited subsequently became aware that the agents had accepted and kept the reservation deposit, the company acknowledged the payment to the estate agents as part of the purchase price set out at clause 2 of **the sale agreement. The ratification of the estate agents'** retention of the reservation deposit created a relationship of principal and agent between the estate agents and Freedom Limited. At the time of drafting the sale agreement, Freedom Limited did not disclose to the purchasers that the estate agents lacked authority to accept the reservation deposit or the fact that the reservation deposit would not be considered a part of the purchase price. The estate agents held themselves out as agents for Freedom Limited and their conduct was thereafter ratified by the company. It is a matter of trite law that when an agent contracts for a principal, the contract is that of the principal and not the agent. Thus the only person who may sue is the principal and the only person who be sued is the principal. *Montgomerie v UK Mutual Steamship Association*¹⁸ is provided as authority for this posture. The purchasers ask the court to find that Freedom Limited has failed to show that the default judgment should be set aside and therefore their application must fail.

¹⁷ [1973] 1 W.L.R 1002

¹⁸ [1891] 1 Q.B.D 370

Findings and conclusion

[30] It is by now well settled law that the court retains the power to set aside judgments granted for failure to comply with the procedural rules of court¹⁹. A defendant confronted with a default judgment may resort to the extensive procedure laid out in CPR 13 for such recourse. Where the defendant wishes to **invoke the court's discretion recounted at CPR 13.3, it is also now** commonly accepted that the applicant must satisfy all the conditions of CPR 13.3(1) before the court will grant the requested order to set aside a default judgment²⁰. The court may, in any event, set aside a default judgment where the defendant demonstrates that exceptional circumstances exist to justify such recourse. It now remains to examine whether Freedom Limited has demonstrated that the court ought to set aside the default judgment.

Can the default judgment be set aside pursuant to CPR 13.3(1)

Has Freedom Limited applied as soon as reasonably practicable after finding out about the default judgment

[31] As stated above, there has not been much debate on whether Freedom Limited applied as soon as reasonably practicable after finding out that the default judgment had been entered. The company found out about the default judgment on 22nd October, 2015 after a search at the High Court registry conducted by its attorneys and applied on 26th October, 2015 to set it aside. The purchasers have not argued that the delay is unreasonable in this case. I have no hesitation in agreeing that a delay of 4 days is not unreasonable in all the circumstances.

Has Freedom Limited presented a good explanation for failing to file a timely acknowledgment of service

¹⁹ *Evans v Bartlam* [1973] AC 473. See also *Antigua Commercial Bank v Louise Martin and Vehicles and Supplies Ltd et al v Financial Institutions Services Ltd* ABHCVAP 2007/0022 and *Straker v Gleaner Company Limited and Dudley Stokes* [2005] UKPC 33

²⁰ *Kenrick Thomas v RBTT Bank Caribbean Limited*, SVGHCVAP 2005/0003

[32] Regarding the reasons for failing to file an acknowledgment of service in a timely manner, I must disagree with Freedom Limited that the reasons provided are indeed adequate. Freedom Limited has helpfully cited the guidance given by Bannister J in *Inteco Beteiligungs AG v Sylmord Trade Inc*²¹ **regarding the meaning of the description 'good explanation' in CPR 13.3(1)(b)**

In my judgment, the expression 'good explanation,' where it occurs in CPR 13.3(1), means an account of what has happened since the proceedings were served which satisfies 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, an 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.

[33] The company has to provide a satisfactory explanation that it acted with the requisite seriousness necessitated by these proceedings. The company has argued that it had built up a long standing relationship with its attorneys. When a dispute arose in respect of the deposits, its principals who reside overseas were advised that its attorneys could not represent the company due to the fact that the very attorneys were acting as escrow holders of the further deposit. The company was advised to engage other attorneys but it harbored some reservations about approaching and **reposing confidence in other attorneys who 'we would not have gotten the chance to meet and only communicated via telephone or email.'**²² The company could not instruct new attorneys in time to file the necessary acknowledgment of service. These reasons cannot suffice to stand as a good explanation for the following reasons –

(1) Freedom Limited had been informed from 19th May, 2015 that the purchasers were raising a dispute in respect of the deposits. The company was expressly informed by letter dated 25th June, 2015 that the purchasers intended to approach the courts for recourse for the return of the deposits. **The alleged conflict affecting the attorneys' ability to offer legal representation on the suit of one of the parties ought to have been in the**

²¹ BVIHCMAP 2013/0003

²² Freedom Limited's affidavit in support filed on 26th October, 2015 a para 7.

contemplation of Freedom Limited from the time it was specifically threatened with legal action;

- (2) Even if the foregoing analysis is incorrect, it is nonetheless conceded by Freedom Limited that it had legal counsel who could have explained the imperative of filing a timely acknowledgment of service once it was served with the claim. If counsel could not advise Freedom Limited, the instructions on the forms that were served on Freedom Limited are not stated in obscure or incomprehensible fashion. The company was aware that it had 14 days to file an acknowledgment of service. That it harbored some diffidence or trepidation about reposing confidence in another lawyer may attract some sympathy in the circumstances but cannot remove the obligation to act with the requisite dispatch. If indeed Freedom Limited intended to strenuously maintain that it does not have an obligation to repay the purchasers, then I do not see any difficulty preventing the company from completing what is a fairly standard acknowledgement of service form and having the same filed while it sought to obtain further legal representatives;
- (3) Further, even if allowance must be **made for Freedom Limited's stated difficulties**, there are no details of when the attorneys informed it of the said difficulties and as correctly advanced by the purchasers, there is no evidence of the efforts made by the company to retain other counsel once it was advised that the attorneys could not act. Certainly that sort of evidence would have assisted the court to determine that the conduct in this case was something more than mere indifference to the need to comply with the rules in the manner stipulated. In the absence of evidence to demonstrate that the company made a concerted effort to retain other attorneys, I am left with the impression that the company did nothing about the claim until it was comfortable that its attorneys were no longer unable to act and could file the necessary response to the claim.

Does Freedom Limited have a defence with a real prospect of succeeding?

- [34] Having failed to satisfy the requirement that Freedom Limited presents a good explanation for failing to file an acknowledgment of service in a timely manner, the application to set aside the

default judgment must fail since it does not satisfy the cumulative requirements of CPR 13.3(1). This is rather unfortunate because it is my view that the defence has a realistic chance of succeeding.

[35] Notwithstanding the extensive debate regarding the return of the reservation deposit, the issue turns simply on ascertaining the role played by the estate agents and whether if any responsibility falls on Freedom Limited to repay the reservation deposit. What then is the role played by the estate agents? Without venturing into a lengthy discourse on this issue, it is recalled that the listing agreement expressly recites **that the estate agents are not Freedom Limited's agent**. The estate agents were obliged, by clause 10 of the listing agreement to pay any moneys they received not to Freedom Limited but to the lawyer, Sir Clare Roberts who is identified on the listing agreement as the stakeholder for the purposes of the sale transaction. There is nothing set out on the listing agreement to show that the vendor Freedom Limited, ever authorized the estate agents to act as its agent or as stakeholder in respect of the agreement.

[36] But this is not the end of the matter. For indeed the estate agents might have held out themselves as agents for Freedom Limited. The purchasers suggest that they did so. If they did so act as agents, the question would then have to be examined on the facts and the law to determine **whether Freedom Limited must be held responsible for the estate agents' action**. I do not agree that there is any material before the court at this juncture to indicate that the estate agents acted at any time as if they were the agents of Freedom Limited. In fact, Freedom Limited's reservation agreement with the purchasers is unambiguous. Clause 2 recites that the reservation deposit was to be held by the estate agents as stakeholder so that the estate agents could *'reserve of (sic) the property in favour of the prospective purchaser at the agreed price.'* The reservation deposit would be returned to the purchasers if any of the conditions set out in clause 4 of the reservation agreement occurred. Notwithstanding whatever was stated in the listing agreement, this was a specific undertaking by the estate agents to the purchasers on the reservation agreement for which they could claim against the estate agents. It would seem to me that, subject to what I have to say hereinafter about the terms of the sale agreement, Freedom Limited may consider a separate action against the estate agents for breach of the listing agreement to the extent that they decided to engage the purchasers as stakeholders when the listing agreement specifically identified Sir Clare Roberts as the stakeholder. But in relation to the purchasers, the estate agents had specific

duties regarding the reservation deposit. In fact by virtue of clause 5 of the reservation agreement, the estate agents were entitled to keep the reservation deposit if the purchasers defaulted without good reason.

[37] Further elucidation of the estate **agents' representation of their relationship with the purchasers can** be found in the terms of the email sent in response to the specific queries of the purchasers. The email explains that the reservation deposit is being paid to **halt the estate agents' engagement with** other potential buyers in order to **preserve the purchasers' right to close the deal. In response to a** request for a guarantee that the reservation deposit will be passed on to Freedom Limited, the estate agents further explained that they **hold the reservation deposit as 'legal stakeholder'**. The estate agents assured the purchasers that the sums would be returned in the event of default of the vendor, Freedom Limited. More tellingly, the estate agents assured the purchasers that they **would hold the reservation deposit 'until completion'**. There is no evidence before the court at this point in the proceedings to indicate that the purchasers were aware of the listing agreement. The reservation agreement and the email would have led the purchasers to conclude that their money would be deposited with the estate agents and returned to them by the estate agents if the sale did not occur for the reasons outlined in the reservation agreement. I cannot see how it can be argued, without more, that the purchasers are to turn to the vendor, Freedom Limited, for the return of the reservation deposit.

[38] But the purchasers go on to argue that the reservation agreement was overtaken by what was set out in the sale agreement. The purchasers are correct to the extent that the reservation agreement can be construed as a pre-sale arrangement. Indeed the disputation as to the role of the estate agent in respect of a pre contract sale of land was somewhat resolved in *Sorrell v Finch*²³ where **approval was given to Lord Denning's previous dissenting opinion** in *Burt v. Claude Cousins & Co. Ltd*²⁴ to the effect that

only when the estate agent, being duly authorised to do so, received a deposit "as agent for the vendor" is the latter liable; if he received it "as stakeholder," he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for

²³ [1977]AC728 at pages 745 - 746

²⁴ [1971] 2 Q.B. 426 at pages 435 - 436

the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v. Trustee of the Property of Reed (A Bankrupt)* [1967] Ch. 1194, 1200 per Cross J. Until the event is known, it is his duty to keep it in his own hands: or to put it on deposit at the bank:... If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v. Kingsman* (1818) 1 B. & Ald. 683; *Hampden v. Walsh* (1876) 1 Q.B.D. 189. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it."

Lord Denning M.R. continued, at p. 436: "I cannot believe that he receives it as 'agent for the vendor': for, if that were so, the estate agent would be bound to pay it over to the vendor forthwith: and the vendor alone would be answerable for its return. That cannot be right. Seeing that no contract has been made, the vendor is not entitled to a penny piece. If the estate agent should pay it over to the vendor, he does wrong: and if the vendor goes bankrupt, the estate agent is answerable for it... *Rayner v. Paskell and Cann*... Seeing that the estate agent must not, before a contract is made, hand the deposit over to the vendor, what is he to do with it? Clearly he must keep it in his own hands until a contract is made, or the purchaser asks for it back. And what is he then but a 'stakeholder'?... If no contract is made, the estate agent must return the deposit to the purchaser and can be sued if he does not... the proper inference is that he receives the money as stakeholder and not as agent for the vendor. I cannot agree, therefore, with the decision of Sachs J. in *Goding v. Frazer* [1967] 1 W.L.R. 286."

[39] Bowstead on Agency states the position in this way²⁵

Where the agent receives money under a pre-contract **situation in the sale of land "subject to contract"**, as estate agents sometimes do, he is often also said to hold as stakeholder, and it has indeed been said that this is the appropriate interpretation where there no other indications. **In this context the term "stakeholder"** has at best a specialized meaning ... For the holder is under a duty to return the money to the prospective purchaser on demand at any time before he has paid it away on the completion of the contract in accordance with instructions. Such a person is probably better described as agent of the purchaser,

²⁵ Bowstead on Agency 18th Edn, at para 9-026

authorized to hold and pay away the money unless that authority is revoked... In such cases the vendor is not liable if the estate agent defaults.

- [40] The situation here is not as straightforward as has been illuminated in the above extracts of law. The estate agents in this case were specifically obligated under the listing agreement to turn over the deposit to Sir Clare Roberts who was identified as stakeholder in the classic sense of the word. The estate agents identified themselves on the reservation agreement as stakeholders who were entitled to keep the reservation deposit subject to completion. The estate agents must therefore repay the reservation deposit as they specifically contracted to do. This reasoning is of course constrained to the extent that one can argue that this pre contract situation was overtaken by the contractual position, that is to say, the sale agreement.
- [41] For my part, I must agree that there is nothing before the court to demonstrate that the sale agreement affected the obligations of the estate agents to repay the reservation deposit. As was said by Lord Denning in *Burt v. Claude Cousins & Co. Ltd*, the estate agents hold the reservation deposit until a determined future event. The future event in this case was, as was stated in the reservation agreement, the transfer of the reservation deposit to the vendor, Freedom Limited on completion or a return to the purchasers if the vendors defaulted. The purchasers would also be refunded in the event that they defaulted or were unable to complete the transaction without fault on their part. In view of the fact that the estate agents specifically obligated themselves to keep the reservation deposit until the occurrence of any of these conditions, the purchasers must turn to them for the return of the same except if the sale agreement says otherwise. The sale agreement at Clause 2 in pellucid terms acknowledges what the estate agents and the purchasers agreed under the reservation agreement, that is to say, that the estate agents hold the reservation deposit as stakeholders. There is nothing on the agreement or evidence thus far to show that Freedom Limited received the moneys deposited with the estate agents, that the estate agents hold the reservation deposit as agent for Freedom Limited or that Freedom Limited is entitled to receive the same before completion or to otherwise benefit from the reservation deposit before completion. As stakeholder, the estate agents must now return the sums deposited with them as agreed. This is not to say that the purchasers may not be able at trial to provide evidence that the reservation

deposit was in fact paid over to Freedom Limited or present other evidence to show that Freedom Limited is otherwise obligated to return the reservation deposit.

[42] At this juncture, the court need only be satisfied that on the present state of the pleadings and material available, the defence has a real as opposed to a fanciful chance of success²⁶. I therefore find, based on what has been demonstrated thus far, that the defence discloses a real prospect of succeeding.

Can the application be granted pursuant to CPR 13.3(2)

[43] Where the defendant has failed to satisfy the requirements of CPR 13.3(1), the court may nonetheless set aside the default judgment if the defendant shows that exceptional circumstances exist to justify such a finding. The description 'exceptional circumstances' may not be susceptible to concise definition. However, the learned Chief Justice Dame Janice Pereira has offered this guidance²⁷

What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it must be 'one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained'. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be

²⁶ See *Louise Martin v Antigua Commercial Bank Antigua ANUHCv 1997/0115*

²⁷ *Carl Baynes v Ed Meyer ANUHCVAP2015/0026*

said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a “knock out point” in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive.

[44] I have no hesitation in finding that while Freedom Limited has a defence with a realistic chance of success as extensively discussed above, this is not an instance in which one can say that the **purchasers’ claim is bound to fail or** is wholly unsustainable. As I have stated above, the purchasers may certainly provide proof or a basis at trial for asserting that Freedom Limited must pay the reservation deposit. There is in fact a vigorous contest to be engaged between the parties if the matter is allowed to proceed to trial. **The purchasers’ claim may** be difficult to prove but there is no compelling or convincing reason to find at this point in the proceeding that the claim is incapable of succeeding. At this juncture, the most that can be decided **is that Freedom Limited’s** defence has a realistic prospect of succeeding. Freedom Limited is not found to **hold a ‘knockout point’** against the claim. As was indicated by Pereira CJ, exceptional circumstances do not purely subsist due to the fact that the defendant has a defence with a real prospect of success. I therefore decline the request to exercise the discretion set out in CPR 13.3(2).

[45] Having regard to the foregoing, the application to set aside the default judgment is refused. The outcome of this application does not mean that Freedom Limited is without recourse. The sale transaction has not been completed and the reservation deposit must be returned to the purchasers. The estate agents are still in possession of the reservation deposit which Freedom Limited must repay to the purchasers by reason of the course of these proceedings. As was stated above at paragraph 36, Freedom Limited may consider a separate claim against the estate agents for any moneys that it has to pay to the purchasers pursuant to this claim.

[46] In respect of the application to send the matter to arbitration as agreed, the question is one of **exercise of the court’s discretion to stay its jurisdiction in favor of the parties’ agreement to refer the**

matter to arbitration²⁸. Evidently, the request could only arise for consideration if Freedom Limited was successful in its bid to remove the default judgment. Having failed in its bid to have the default judgment set aside, Freedom Limited must abide and comply with its terms. The purchasers are awarded their costs on this application in the sum of \$750.00. I thank counsel for their assistance.



.....
RAULSTON GLASGOW
MASTER

²⁸ Ginger Villa Incorporated v Caribbean Developments (Antigua) Limited ANUHCV 2012/0608