IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 180 OF 2011

BETWEEN

SERAFIN CASTILLO	**Claimant**
AND	
FRUTA BOMBA LTD. **(a limited liability company duly registered in Belize under the Companies Act)** **ANTONIO LUIS AGUILAR**	**Defendants**

November 17 and 24, 2011.

Appearances: Mr. Oscar Sabido, SC for the Claimant.
Ms. Darlene Vernon for the Defendants.

BENJAMIN CJ

JUDGMENT

[1] By an Amended Claim Form filed with Statement of Claim on March 29, 2011, the Claimant claims against the Defendants damages for loss and damage as a result of a motor-vehicular accident on the Northern Highway on December 28, 2006. No acknowledgement of service has been filed by any of the two defendants.

[2] On June 30, 2011, judgment was entered in favour of the Claimant in default of acknowledgement of service for the sum claimed in the statement of case. The application presently before the Court is for an order setting aside the said judgment and granting permission to the Defendants to file and serve an acknowledgement of service and defence. The stated grounds for the application are that: the

Defendants' application was filed as soon as reasonably practicable after finding out that judgment had been entered; the Defendants have a good explanation for failing to file an acknowledgment of service; and the Defendants have a good prospect of success in defending the claim.

[3] The Notice of Application is supported by the affidavits of Darlene Vernon, the Attorney-at-Law charged with the conduct of the matter on behalf of the Defendants and Ismael Gonzalez, an employee of the first-named Defendant authorized to swear to the affidavit on behalf of the said Defendants. Quite properly, Ms. Vernon acknowledged that her affidavit could not be relied upon in the light of her appearing on behalf of the Defendants. Accordingly, her affidavit was not relied upon by the Defendants.

[4] It is salutary for me to pause to acknowledge the correctness of this course of action. The Legal Profession (Code of Conduct) Rules frown upon an attorney appearing as a witness for his or/her own client except for merely formal matters. Rule 37(1) so states and sub-rule (2) prescribes that, in the event, conduct of the case should be entrusted to another attorney of the client's choice.

[5] The Claim Form and Statement of Claim having been filed simultaneously, it is provided in Rule 9.3(1) that the period for filing of an acknowledgement of service is that of 14 days after the date of service of the claim form. Be that as it may, a defendant is permitted to file such acknowledgement at any time before the filing of a request for default judgment (Rule 9.3 (3)). The Court's record reflects from affidavits of service filed May 31, 2011, that the first-named Defendant and the second-named Defendant were served with the Amended Claim Form on May 28 and May 25, 2011 respectively. Accordingly, the Defendants were allowed up to June 8 and 13, 2011 to file the acknowledgement of service in the first instance, and at the outside, not beyond June 29, 2011.

[6] The affidavit of Ismael Gonzalez deposed that he was informed on June 6, 2011 that the Amended Claim Form had been served on one of the managers of the first-named Defendant. Thereupon, the Company's Attorneys-at-Law were contacted and an acknowledgement of service was filed on June 10, 2011. It was,

however, stated in the following paragraph that he had been informed that "through some inadvertence, the office assistant, despite service (sic), a copy of the acknowledgement of service on the Attorney for the Claimant, failed to file a copy with the General Registry". Both sides are agreed that the acknowledgment of service was served but not filed.

[7] It was open to the Defendants to contest the claim and avoid default judgment by filing a defence by itself within 14 days (Rule 9.1 (2)(b). In which case, there is no need to file an acknowledgement of service. However, if an acknowledgement of service is filed, defendants wishing to defend must file a defence within 28 days after the service of the claim form (rule 10.3(1)). Provision is made for time to be extended by agreement of the parties for up to 56 days, which is not here relevant.

[8] In practical terms, the Defence in this case was due either on June 8 or 13, 2011 (without the filing of an acknowledgment of service) or on or before June 22 or 27, 2011 (with the filing of an acknowledgement of service). Failing that, the Defendants were entitled to apply for an extension of time to file their Defence (rule 10.3 (8)).

[9] Having failed to acknowledge service or file a Defence, the Claimant was at liberty to and did indeed request the entry of judgment in default pursuant to Rule 12.4. The Defendants have now invoked Rule 13.3 (1) and seek to have the judgment set aside. Rule 13.3 (1) provides:

> "Where 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 has been entered:
>
> (b) gives a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be; and
>
> (c) has a real prospect of successfully defending the claim."

The arguments did not address Rule 13.2 and as such that the Court proceeded on the basis that the conditions for the entry of judgment in default of acknowledgement of service under Rule 12.4 were satisfied. Also, for completeness, the Court is cognisant of its power to either set aside or vary the judgment (Rule 13.3 (2)).

THE LEARNING

[10] Before the Court of Appeal in the case of **Belize Telecommunications Ltd v Belize Telecom Ltd et al – Civil Appeal No. 13 of 2007**, it was argued that before the Court can exercise its discretion to set aside a default judgment under Rule 13.3 (1), the defendant must satisfy all three preconditions set out in paragraphs (a), (b) and (c) of that Rule. The Court was asked to treat the language as being conjunctive in its effect by the use of the words "only if". In accepting this argument, Morrison, JA agreed that "the requirement of Rule 13.3(1) is that all three pre-conditions be satisfied before the Court can exercise its discretion to set aside a regularly obtained judgment". The same conclusion has been arrived at in the Eastern Caribbean and Jamaica in respect of identical rules (See: **Luke v Alexander – Claim No. DOMHCV2001/0161 (Dominica)** and **Lewis v Dunn – Suit No. CL2001/LO98 (Jamaica)**. In this court, Legall, J has followed the **Belize Telecommunications** case and held in **Pedro Vasquez v Belize Western Energy, Ltd – Claim No. 140 of 2008**, as follows:

> "The presence of the conjunction "and" at the end of Rule 13 (3)(1)(b), together with the adverbial phrase "only if", is a clear indication that the intention of Rule 13.3 (1) is that the three pre-conditions – (a), (b) and (c) above – are cumulative rather than disjunctive. In other words, the three pre-conditions must all be satisfied by the defendant before the court could properly set aside a regularly obtained default judgment. If the pre-conditions are not satisfied by the defendant, the court has no discretion to set aside a regularly obtained default judgment."

Also, in **Maggie Perez v Lionel Banner – Claim No. 262 of 2008**, Hafiz, J in following **the Belize Telecommunications case** agreed that the conditions set out in Rule 13.3 (1) are conjunctive. Her Ladyship also relied on the dictum of Barrow,

JA in the case of **Kenrick Thomas v RBTT Bank Caribbean Ltd – Civil Appeal No. 3 of 2005** (St. Vincent and the Grenadines), which reads:

> "The appellant submitted that this provision (rule 13.3) specifies three conjunctive pre-conditions for setting aside. The submission is sound. 'Only if' can only mean that if the three matters are not present then the court may not set aside a default judgment."

Faced with this preponderance of authority, I must now examine the evidence to ascertain whether all three conditions are satisfied.

[11] It is to be noted that instructions for representation were relayed since on or around June 10, 2011 as evidenced by the service of acknowledgment of service. It must therefore be assumed that the decision had been made to defend the matter and steps to do so were in train. As such, to view the circumstances narrowly from the date of entry of judgment would not do justice to the matter. As I see it, the Court must take the entire time-line into account. It is noteworthy that if an extension by agreement was sought in a timely fashion the need for this application may have been averted. Even assuming the acknowledgment of service had been filed time would have begun to run for the filing of the Defence. In the case of **Maggie Perez v Lionel Banner**, Hafiz, J considered a lapse of 21 days to be reasonable. Contrarily, in **Pedro Vasquez v Belize Western Energy Ltd**, Legall, J held that a period of one month did not satisfy Rule 13.3 (1)(a).

[12] In my considered view, a period of 14 days would not be an unreasonable time for the making of an application to set aside judgment. I have taken into account that the 56-day extension period would not have elapsed. I therefore find that the application was made as soon as reasonably practicable after the Defendants found out that judgment had been entered against them.

[13] Turning to the second pre-condition, the Court must be satisfied that the Defendants' explanation for the failure to file an acknowledgment of service or a defence is a good one. As earlier set out verbatim from para. 4 of the affidavit of Ismael Gonzalez, the omission to file the acknowledgment of service was due to

inadvertence on the part of their Attorneys' office assistant against the background of the copy of the acknowledgement being served on the Claimant's Attorney-at-Law. Indeed, the Claimant's Attorney-at-Law had assumed the acknowledgement of service had been filed and had set out to file a request for judgment in default of defence. Learned Senior Counsel preferred to classify the failure to file acknowledgment of service as negligence of the office assistant rather than inadvertence. Reliance was placed on the dicta of Legall, J in **the Pedro Vasquez** case.

[14] In my view, the failure to file the acknowledgement of service must be put against the background of the said document having been served. This difference in detail distinguishes this case factually from the **Pedro Vasquez** case. It is not difficult to comprehend that the filing may have been overlooked through mere inadvertence as against negligence. Accordingly, I am persuaded that a good explanation has been given for the omission.

[15] The Defendants say they have a real prospect of successfully defending the claim and rely upon the draft defence exhibited to the affidavit of Ismael Gonzalez. In essence, that Defence alleges negligence on the part of the Claimant and denies negligence on the part of the Defendants. Learned Senior Counsel did not pursue the non-satisfaction of this pre-condition with vigour. This matter can be taken quite shortly as until the evidence is heard and assessed, liability in negligence arising from vehicular accidents offer up a real chance of success to both sides. Having perused the Draft Defence vis-à-vis the Amended Statement of Claim, I am convinced that the Defendants have a real as against a fanciful prospect of succeeding at trial. Accordingly, the pre-conditions have been satisfied and I would exercise my discretion and grant the Defendants' application.

[16] In the premise, the judgment entered on June 30, 2011 is set aside and the Defendants are ordered to file the Defence on or before November 30, 2011. The Defendants shall pay to the Claimant costs in the sum of $750.00.

KENNETH A. BENJAMIN
Chief Justice