IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 348 of 2006

BETWEEN:

LOUGHLING OVERSEA BIOTIC

TECHNOLOGY CULTIVATION LTD. **Claimants/Applicants**

AND

WAN YI FARM LIMITED COMPANY. **Defendant/Respondent**

CLAIM NO. 349 of 2006

BETWEEN

LOUGHLING OVERSEA BIOTIC
TECHNOLOGY CULTIVATION LTD. **Claimants/Applicant**

AND

HUANG WAN-YI. **Defendant/Respondent**

Before:	Hon. Mde Justice Shona Griffith
Dates of Hearing:	5th May, 2014; 29th May, 2014
Appearances:	Mr. Said Musa, S.C. of Musa & Balderamos for Claimants/Applicants
	No Appearance for either Defendant/Respondent

RULING

Dated 02nd June, 2014

[Dismissal of Claim on Non Appearance of parties – Application to set aside by Claimant – CPR 39.4 & 39.5 – No knowledge of trial date – Whether good reason for non attendance].

Introduction

1. These proceedings concern applications filed on behalf of the Claimants Loughling Oversea Biotic Company, to set aside orders of the then Acting Chief Justice of the Court dismissing two separately filed claims which having come on for trial, neither party appeared. The claims, though separately filed and numbered, were of related subject matter and related defendants, thus the applications, identical save for relevant particulars, were heard as one.
2. Both Claims were filed on 17th July, 2006 and in the case of Claim No. 348 of 2006, alleged a breach of contract and claimed damages, whilst Claim No. 349, sought specific performance of sale of land. Both parties were represented by Counsel on record and pleadings were completed in relation to both matters on identical dates of 27th March, 2007 and the matter progressed through case management. On 16th June, 2009 (nothing further having been filed in the matter after 27th March, 2007), a Notice of Change of Attorney (dated 5th June, 2009) was filed in relation to the Defendants in both matters. No further documents were filed in relation to either matter, until 27th March, 2014 when again, the identical Applications to Set Aside Judgment were filed in both matters. In between that time, there were several Notices from the Court for trial dates and adjourned trial dates.
3. The Applications were to set aside orders of dismissal made in relation to both matters, on different days – in relation to 348/06 on 15th February, 2012 for reason of non appearance of either party or Counsel.

In relation to 349/06, dismissal was on 23rd March, 2012, again for non appearance of either party or respective Counsel. The Applications were supported by Affidavit sworn by Counsel for the Claimants, presented however by learned Senior Counsel.

4. The Affidavit of Counsel for the Claimant, detailed what occurred, at least according to his position. According to the Applicant, the last trial dates were successive days in June, 2009 for each suit, when the matter was adjourned 'sine die'. In August, 2011 – more than two years after the last adjournment, Counsel wrote to the Registrar requesting a trial date. Trial dates were apparently fixed, for each matter – 15th & 17th February, 2012 for 348/12 and 23rd & 26th March for 349/12.
5. From Counsel's perspective, not having been notified of these dates, thus not having heard anything regarding a date for his matters, he next enquired by letter on 24th February, 2014 citing inordinate delay and requesting new dates for trial. By return letter dated 13th March, 2014, he was informed by the Registrar that the matters had been struck out by the then Acting Chief Justice on 15th February and 23rd March, 2014 respectively. The Applications to set aside the dismissals were then as stated before, filed on 27th March, 2014.

Hearing on 5th May, 2014

6. On this the day set for hearing, Learned Senior Counsels each appeared for both parties, albeit with a rather curious development. Learned Senior Counsel for the Defendants – the Attorney on record by virtue of the change of Attorney filed in June, 2009 - advised the Court that he was present as he received notice from the Court, but that he was never retained by the Defendants; that it was not his signature on the Notice of Change of Attorney and that knew naught about the matter before the Court. Inasmuch as there were

in fact no actual steps taken by this Counsel subsequent to the Notice of Change of Attorney, and on the faith of Counsel's representations in person, the Court ordered that his representation as purported and disclaimed, be removed from the record. The Application was then obviously not served and the hearing of the Application was adjourned to the 29th May, 2014 subject to appropriate service on the Defendants.

Hearing on 29th May, 2014

7. On 29th May, 2014, there having been filed requisite affidavits of service, the Application was set to proceed, but another curious development occurred. Learned Senior Counsel who was excused from the record based on his representations to the Court at the 1st hearing, appeared with a gentleman with name given as Ralph Huang whom he described as a past client, who had approached him as having some knowledge of the claims. Mr. Huang however wholly disowned any interest in the defendant company Wan-Yi Farm Limited Company (348/06) and disclaimed any connection with the defendant Huang-I (349/06) but volunteered having had some dealings in the past with the Claimant company albeit none that connected him with the subject matters of the claim before the Court.

8. Again the strength of denials of any connection or interest in the subject matter or defendants of the claims, and the matter being one in Chambers, the Court advised Mr. Huang that his presence was not required and invited him to take his leave.

   His Counsel however requested to remain in Chambers, to observe the matters in which his client had no interest. The Court declined, Mr. Huang left the Courtroom however learned Senior Counsel elected to remain in Chambers without the concurrence of the Court, to observe the proceedings in which his client declared he had no interest. The

Application was thereafter presented but having regard to the circumstances described above, the Court considers it prudent to reduce its reasons into writing.

The Application

9. The Applications to set aside the dismissal of the claims were filed pursuant to **CPR Rule 39.5**, supported by Affidavit sworn by Counsel on record for the Claimants. The Court's power to set aside pursuant to Rule 39.5 follows upon the provisions of **Rule 39.4(a)**, under which the Court is empowered to strike out a claim where neither party appears for trial. For ease of reference both rules are set out as follows:

39.4 Where the judge is satisfied that notice of the hearing has been served on the absent party or parties, in accordance with these Rules –

(a) if neither party appears at the trial, the judge may strike out the claim; or

(b) if only one party appears, the judge may proceed in the absence of the other.

39.5 (1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –

(a) A good reason for failing to attend the hearing; and

(b) That it is likely that had the applicant attended, some other judgment or order might have been given or made.

The grounds of learned Senior Counsel's application were that Counsel on record had received no notice of the trial dates and as such was unaware when the matters were set for trial. Further, that he received no notice of any orders of dismissals (and indeed no orders had been formally drawn up or filed), but that as soon as he received notice of the said dismissals, he applied promptly to have the dismissals set aside. It was submitted therefore that the Application to set aside having been filed within the requisite 14 days, and Counsel's lack of knowledge of the trial dates being good reason for the Claimants failing to appear for their trial, the dismissal of the claims ought to be set aside. No submissions were made with respect to the Rule 39.5(3)(b).

The Court's consideration

10. The Application having been brought within 14 days of Counsel for the Claimant's notification of the dismissals of the claims, the Court was then obliged to consider the requirements set out in Rule 39.5(3). These requirements being (a) good reason for absence; and (b) a likelihood of some other order having been made had the Applicant attended. Firstly, the reason put forward for the Claimant's absence was simple – their Counsel had not been made aware of the trial dates, presumably meaning that the Claimant itself was not aware (the Court notes that no evidence was filed from the Claimant itself). Was this a good reason?
11. In this case, the Court had on the 1st hearing of the Application brought to learned Senior Counsel's attention, the Court's notices of the hearings for each of the two claims. These

notices both bore a signature acknowledging receipt by the Claimant's Attorneys and that signature appeared the same as had been appended on prior notices issued by the Court for which receipt had been acknowledged in the same manner. On the face of the notices therefore they had been received by Counsel for the Claimant – through his employees or agents. Learned Senior Counsel's position was that even if the notices were received, Counsel had not personally been notified of the trial dates and as such had not appeared. Neither, it was submitted had Counsel for the Defendant.

12. The Court's position in relation to Counsel for the Claimant's personal lack of knowledge of the trial dates is that the Claimant's address for service was that of their Attorney. Notices had been given by the Court on several prior occasions in respect of dates in the matters. Those notices were acknowledged as received by the Claimant's Attorneys by placement of initials of someone not disputed to be an agent or employee of the Claimant's Attorneys. The initialed notices of the trial dates were also not disputed by any evidence presented to the Court. In the Court's view therefore, there was sufficient indication that the dates of trial set by the then Chief Justice had been properly brought to the attention of the Claimant's Attorney. In the circumstances any lack of knowledge of the trial date on the part of the Claimant's Counsel arose from administrative failings within his office for which the Court was not responsible.

13. This view notwithstanding, the Court further considers, whether the Claimant's presumed lack of knowledge of the trial dates (stemming from their Counsel's lack of knowledge of the trial dates), can nonetheless be a good reason and provide a basis for the Court's setting aside of the dismissals. As will be explained by the authorities below, the Court

looks beyond the mere fact of lack of knowledge and looks at the circumstances in totality.

14. Prior to finding out that that the claims had been dismissed in March 2014, Counsel for the Claimants had last enquired about the claims in February, 2011. This means that just over three years had elapsed since the Claimant's Counsel requested a trial date. No evidence was presented to indicate that any other kind of enquiry had been made of the Court by Counsel in relation to the claims during this 3 year period. No evidence had been presented on behalf of the Claimants to show whether and if so what kinds of enquiries had been made by the Claimants of their Attorney in respect of the status of their claims.

15. Upon this lapse of time being pointed out by the Court to learned Senior Counsel, it was suggested in response, that such a lapse of time with no activity in a matter, was regrettably not uncommon in the ordinary course of business of the Courts. It is considered at the very least a dim view of the Court, for one to be able to say that a matter to be tried, sitting for three years with no action being taken is not uncommon. But such a dim view notwithstanding, the Court considers it unacceptable for an Attorney to have failed to have enquired, to have made complaints or to have taken any other sort of action deemed appropriate to secure a trial date or express his displeasure at not having been issued a trial date. The evidence presented instead offers no explanation as to why three years were allowed to have elapsed with no action on his part to ascertain the status of his matters. Against this backdrop, it is now an appropriate time, for the Court to examine relevant authorities.

16. The Court finds the case of **Justin Pemberton v the Attorney General of Dominica HCVAP No. 16 of 2010** which concerned the identical **OECS CPR 39.5**, to be of assistance. Mitchell JA cited a lack of authority within his jurisdiction (OECS) and made reference inter alia to the UK (CA) case of **Brazil v Brazil [2002] EWCA Civ. 1135.** This case dealt with the UK CPR 39.3 – striking out of case on non appearance at hearing – albeit set out differently but for all intents and purposes, in pari materia to the Belize CPR 39.4 and 39.5.

17. In relation to what is meant by 'good reason', **Lord Justice Mummery in Brazil**, had the following to say which I find useful to extensively extract [taken from paragraph 12 of the Report], with my own emphasis:-

> *"There has been some debate…about what is or is not capable of being a 'good reason'. In my opinion the search for a definition or description of 'good reason' or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree…that although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a 'good reason'. The Court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true 'reason' for non attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly".*

The Judgment of Lord Justice Mummery, has been quoted with approval and applied in a myriad of cases, dealing with applications to set aside or strike out.

18. In applying this approach to the instant case, circumstances 'in the round' amount to (i) inaction on the part of the Claimant's Counsel for just over three years in relation to his own matter; (ii) in the absence of any evidence to the contrary, inaction on the part of the Claimants in respect of their claim; and (iii) receipt of notice of the trial dates by the Claimant's Attorney by service acknowledged in the same manner as were other notices throughout the proceedings. Even if lack of knowledge of the trial dates were by itself to be acknowledged by the Court as good reason for non attendance, the subsequent lapse of three years before any further inquiry is made by the Claimant or its Attorney certainly nullifies such good reason.

    In considering the circumstances in their entirety, and considering the overriding objective of dealing with cases justly, the Court finds that good reason for non attendance has not been established so as to enable the Court to set aside the orders for dismissal.

19. For completeness the Court notes that the language of Rule 39.5(3) is cumulative, thus requiring the Applicant to show both (a) good reason for non attendance; and (b) likelihood of a different order being made had the Claimants attended. Given that the Court has already found that a good reason has not been established, no further consideration need be given to the second requirement, but in any event, no submissions were made to the Court in respect of this issue. It was noted by learned Senior Counsel that the orders of dismissal were never drawn up or served. The Court notes CPR 42.8 which provides that a judgment or order takes effect from the date it is given or made.

<u>The Court's Ruling</u> is therefore as follows:

1. The Applications to set aside the orders of dismissal dated 15th February, 2012 and 23rd March, 2012 in respect of claims 348 of 2006 and 349 of 2006, respectively are accordingly refused; and
2. The Defendants having not appeared, no order is made as to costs.

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Shona O. Griffith
High Court Judge.