



[2021] JMSC CIV. 79

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2019CV01633**

<b>BETWEEN</b>	<b>LAMEATA JAMES</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MARSHA WHITE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ANDREW GLANVILLE</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

Miss Coleasia Edmondson instructed by Earle & Wilson Attorneys-at-Law for the Claimant.

Mrs. Tamara Powell-Francis Attorney-at-Law for the 1<sup>st</sup> Defendant.

**March and April 28, 2021**

DEFAULT JUDGMENT – Application to set aside judgment entered in default of defence; test to be satisfied; what is a reasonable prospect of success.

**MASTER ORR, (Ag)**

[1] The First Defendant Marsha White has applied to set aside the judgment entered against her in default of defence on June 26, 2020. After careful consideration of the affidavit evidence before me and the submissions filed on behalf of both parties, I have set aside the judgment entered against the 1<sup>st</sup> Defendant and outline my reasons for doing so below.

- [2] Miss James the Claimant herein purchased land at Maple Leaf Drive in the parish of Saint Andrew from the 2<sup>nd</sup> Defendant, Andrew Glanville in or around 2016. Miss White who is an Attorney-at-Law had conduct of the sale for both parties.
- [3] Miss James alleges in her claim that she purchased the property for an agreed price of \$9,000,000.00 but only realized that she had paid the 2<sup>nd</sup> Defendant \$11,000,000.00 when she reviewed the receipts which she received for payment of monies towards the purchase price.
- [4] She now claims the sum of \$2,020,000.00 which she alleges she overpaid the 2<sup>nd</sup> Defendant as she agreed to purchase the property for \$9,000,000.00 only. She alleges that Miss White who represented both the vendor and the purchaser in the sale, colluded with the vendor, Mr. Glanville to fleece her of \$2,020,000.00.
- [5] Miss White filed an Acknowledgement of Service on May 20, 2019, wherein she indicated that she was served with the claim form herein on May 6, 2019. She was required to file her defence within 42 days of being served with the claim but failed to do so. She was served with the default judgment on September 2, 2020.
- [6] In her affidavit in support of her application and also in the draft defence exhibited to her affidavit Miss White denies that she owes Miss White the sum claimed or any sum at all. She argues that this claim should not have been made against her.
- [7] She has outlined her recollection of the events surrounding Miss James' purchase of 10 Maple Leaf Avenue, Kingston 10, and the role that she played as Attorney-at-Law.
- [8] In defending the claim Miss White states that while she acted for both parties in the agreement for sale, she acted in a limited capacity for the claimant as Miss James retained solicitors in the UK who perused the agreement for sale on behalf of the claimant before she executed same.
- [9] In further response to the allegations that she colluded with the 2<sup>nd</sup> Defendant, Miss White states that she had previously represented the 2<sup>nd</sup> Defendant Andrew

Glanville in the purchase of the disputed land. She was contacted by Mr. Glanville and arranged to meet with him. She first met the Claimant at that meeting and it appeared to her that both parties had already discussed the purchase price of the property. Her discussion with both parties was limited to the government taxes payable on the sale price and the potential risk and tax benefits associated with what she referred to as a split agreement.

**[10]** Thereafter she states that the parties entered into two separate contracts totalling \$11,000,000.00: \$9,000,000.00 for the property at Maple Leaf Avenue and \$2,020,00.00 for chattels.

**[11]** Miss White also alleges in her defence that in September of 2016 the Claimant lodged a complaint at the General Legal Council (GLC) against her in relation to the said \$2,020,000.00 which she then alleged were fees owing to her by Miss White.

**[12]** She also references previous inconsistent statements alleged to have been made by Miss James at this disciplinary hearing in relation to her knowledge about the purpose of the \$2,020,000.00 paid to the 2<sup>nd</sup> Defendant.

**[13]** The 2<sup>nd</sup> Defendant also relies on the ruling by the GLC upholding a no case submission made by her Attorney-at-Law at the hearing and on this basis alleges that this case is res judicata.

**[14]** She also raises the issue that the claim has been brought seven years after the purchase of the Maple leaf property was concluded.

**[15]** In opposing the application on behalf of Miss James, it has been argued that the proposed defence relied on by Miss White is replete with mere assertions and that there is no chattel agreement exhibited to the defence although Miss White speaks to this agreement.

**[16]** I am not persuaded that a Defendant who seeks to have a judgment set aside is required to provide documentary proof of her claim. It is to be remembered that at

this stage the court is not called upon and is not to embark upon a mini trial. All that is required is for the court to assess the reasonableness of the proposed defence. In addition, she did not state that she prepared that agreement. Proof of the existence of such an agreement is therefore an issue for trial.

[17] The proposed defence was further challenged on the basis that although Miss White stated that she represented the Claimant in a minimal way, the agreement for sale lists her as the Attorney-at-Law representing both the purchaser and the vendor.

[18] Paragraph 6 of the proposed defence is also challenged. Miss White alleges at paragraph 6, that she only issued receipts for the monies she received in her office and that the Claimant never questioned the statement of account given to her for \$9,000,000.00. Miss Edmondson argues on this basis that the 2<sup>nd</sup> Defendant admits to having given Miss James a statement of account for \$9,000,000.00 and not \$11,000,000.00.

## **ANALYSIS**

[19] It is now well known that the primary consideration in an application to set aside a judgment entered in default of defence is whether the Defendant has a good prospect of defending the Claimant's claim.

[20] Civil Procedure Rules (CPR) 13.3 (1) speaks specifically to this requirement where it states:

*"The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of defending the claim."*

(2) *In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:*

(a) *applied to the court as soon as is reasonably practicable after finding out that judgment has been entered*

(b) *given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be."*

- [21] It is therefore only after the Defendant has satisfied the court that it has a reasonable defence that the court will thereafter consider the other requirements under CPR 13. (2)- any delay in making the application and the reason given by the Defendant for failing to file the defence within the time prescribed by the rules. The court should also consider any likely prejudice that the Claimant may suffer where the judgment is set aside.
- [22] In ***ED & F Man Liquid Products Limited v Patel and Another***, [2003] EWCA Civ. 472 (delivered April 3, 2003) Potter, LJ said that the distinction between a realistic and a fanciful prospect of success is that the defence sought to be argued must carry some degree of conviction. The Defendant must put forth a case which is better than merely arguable.
- [23] In ***Jamaica Beverages Limited v Janet Edwards*** [2010] JMCA App 11, the court said that the Defendant in default must demonstrate that its defence has a real prospect of success. This means there must be some evidence presented which the court can consider to determine whether there is such a prospect.
- [24] Put another way, the Defendant must file evidence to persuade the court that the proposed defence raises serious issues which provide a real prospect of the Defendant being able to successfully defend the claim. The evidence must be in sufficient detail to satisfy this test. Bare denials will certainly not provide this evidence.
- [25] There are good reasons for this requirement as the Claimant has a judgment of value albeit that it was entered in default and without the court considering the merits of the claim. The Defendant will need to provide a defence that is more than arguable to tilt the scales in his favour.
- [26] In considering whether Miss White has satisfied this threshold, I have observed that she has joined issue with several aspects of the Claimant's claim and outlined her recollection of the events to support the challenges she has raised to the Claimant's case.

**[27]** The 1<sup>st</sup> Defendant has raised several issues that could not be resolved on the allegations set out in the Claimant's case and would therefore necessitate a trial where the parties' evidence is challenged under cross examination. Some of the issues I have identified are:

- (a) What was the agreement as between the Claimant and the 2<sup>nd</sup> Defendant?
- (b) Was there an agreement for the sale of any chattels and was this agreement written or oral?
- (c) Was the 2<sup>nd</sup> Defendant present when this agreement was made?
- (d) If the agreement was written, who prepared this agreement?
- (e) Did the 2<sup>nd</sup> Defendant represent both parties – what was the extent of this representation?
- (f) Was the Claimant ever represented by UK solicitors?
- (g) What was the complaint raised at the General Legal Counsel in relation to the \$2,020,000.00?

**[28]** Although Miss Edmondson has submitted that the 1<sup>st</sup> Defendant seeks to rely on mere assertions, I could not agree with this statement. Her affidavit and proposed defence outline her evidence as to what she recalls took place as between the parties. At the trial of the claim, she will be required to give more detailed evidence and provide any documentation to substantiate her evidence.

**[29]** To my mind the 1<sup>st</sup> Defendant would have satisfied the requirement to provide a defence with a realistic prospect of success.

**[30]** I have also considered whether the other requirements of CPR 13.3 have been satisfied. Judgment in default of defence was entered on June 26, 2020 and served on the 1<sup>st</sup> Defendant through her Attorney-at-Law on September 2, 2020. The application to set aside the default judgment was filed on October 2, 2020.

- [31] In considering whether there was any delay in applying to set aside the default judgment, the court is concerned with the period from the date that the Defendant was first notified that the judgment had been entered against her to the date when she filed her application to set aside the default judgment.
- [32] The relevant period is therefore one month, the period between September 2, 2020 when the judgment was served on the 1<sup>st</sup> Defendant's Attorneys-at-Law and October 2, 2020 when she applied to set aside the default judgment.
- [33] I do not consider the period of one month to be egregious in the circumstances. The Claimant has not alleged any prejudice and there is no evidence before me to show that where the judgment is set aside the Claimant will be in anyway prejudiced in pursuing her claim at trial.
- [34] In explaining her failure to file a defence within the prescribed period, the 1<sup>st</sup> defendant said that she was preparing her affidavit in response to the claimant's complaint to the General Legal Council (GLC) and preparing her case generally. Miss Edmondson has submitted that she has not provided a good explanation for failing to file a defence as she was required to file her defence long before the express ruling of the General Legal Council was made. She further submits that the only documents relied upon by the claimant before the GLC were the documents and receipts disclosed by Miss White.
- [35] Miss White's explanation does not reflect that she intentionally breached the rules of court. Her breach may have been through inadvertence as she has explained that she was preparing a case to defend herself at the GLC and her ability to practice as an Attorney-at-law.
- [36] In considering the explanation put forth by the 1<sup>st</sup> defendant for failing to file her defence, I am guided by Edwards, J (as she then was) in ***Sean Greaves v Calvin Chung*** [2019] JMCA Civ 45, where she said that a judge is required to determine at her discretion whether as a question of fact, a good explanation has been

provided in all the circumstances of the case. The judge is not required to look for an infallible explanation.

[37] If I am incorrect in my assessment of her explanation, and she has not provided a good explanation for failing to file her defence, this is not detrimental to her application. As Phillips, JA reminded us in *Merlene Murray-Brown v Dunstan Harper & Winsome Harper* [2010] JMCA App 1 the provisions of CPR 13.2 are no longer cumulative which would provide a knockout blow if one of the criteria is not met.

[38] For the foregoing reasons I am satisfied that the judgment entered against the 1<sup>st</sup> Defendant in this claim should be set aside as the 1<sup>st</sup> Defendant's proposed defence has joined issue with several aspects of the Claimant's claim that are best resolved at a trial. I am satisfied that she has established that she has a real prospect of defending the claim.

[39] Although it was argued by counsel for the 1<sup>st</sup> Defendant that res judicata applies, I do not agree. The complaint before the General Legal Council surrounded the conduct of Miss White and whether disciplinary action should be taken against her. The claim before this court in relation to Miss White, differs significantly as the Claimant is asking the court to consider whether Miss White had a fiduciary duty to the Claimant, whether this duty was breached by the alleged collusion between the Defendants resulting in Miss James paying over \$2,020,000.00 in excess of the agreed purchase price for the property at Maple Leaf Avenue.

## **DISPOSITION**

[40] In disposing of this matter, I will make the following case management orders:

- (a) The time to file and serve the defence herein is extended and the defence of the 1<sup>st</sup> Defendant is to be filed and served on or before May 7, 2021.
- (b) Mediation in this claim is dispensed with.
- (c) Standard Disclosure is to take place on or before June 18, 2021.

- (d) Inspection of documents is to take place on or before July 2, 2021.
- (e) Ordinary witnesses are limited to 3 for the Claimant and 3 for the 1<sup>st</sup> Defendant.
- (f) Witness statements are to be filed and exchanged on or before October 1, 2021.
- (g) Trial by Judge alone in open court on September 16-17, 2026
- (h) A Pre-Trial Review Conference is to take place on June 2, 2026 at 10:00am for one hour
- (i) A Listing Questionnaire is to be filed by May 29, 2026.
- (j) Written submissions and a list of authorities is to be filed and served on or before September 11, 2026.
- (k) The Claimant's Attorney-at-Law is to prepare and file trial bundle on or before September 11, 2026 and serve the index to the trial bundle on counsel for the 1<sup>st</sup> Defendant on or before September 11, 2026.
- (l) The costs of this application are in the claim.
- (m) The 1<sup>st</sup> Defendant's Attorney-at-Law is to prepare file and serve this order.