IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2003/HCV 2008

BETWEEN	KEITH ROBERTS	CLAIMANT
AND	ROBERT RUSSEL	DEFENDANT

Raphael Codlin instructed by Raphael Codlin and Company for the claimant.

Mrs. Denise Senior-Smith instructed by Gifford Thompson and Bright for the defendant.

Heard 8th, 9th and 16th November 2005

Campbell J

On 30th October 2003, Keith Roberts filed a fixed date claim form seeking recovery of the sum of Fifteen Thousand Six Hundred and Twenty-nine United States Dollars (US$15,629.00) being monies loaned by him to Robert Russel. He also sought to recover interest on the said sum at the rate of 27% as of 31st March 2003. On the 23rd January 2005, the interest was calculated at US$3445.23.

The affidavit of service attest to the serving of the particulars of claim and fixed date claim form on the defendant personally on the 11th November 2003.

On the 23rd August 2004, eight and a half months later, the claimant entered judgment in default of appearance and defence. That appeared to have secured the attention of the defendant, for just over a month later, he filed an application to set aside the default judgment entered against him. The application was supported by an affidavit with a defence and counter-claim exhibited to it. The reasons given by Russel for the failure to file a defence within time, were; (1) that through inadvertence he failed to give his attorneys-at-law instructions within the stipulated time; (2) that his defence and counterclaim disclose triable issues, which in the interest of justice, should be heard.

Claimant's Case

Mr. Codlin, on behalf of the Claimant, submitted that the defendant has failed to satisfy any of the three requirements of Rule 13.3(1) of Civil Procedure Rules. No arguments were however advanced on the first limb "that the application was made as soon as practicable after judgment was entered." He advanced that;

1) <u>The explanation given for the delay is insufficient</u>.

The defendant says that he sought legal advice from his attorneys-at-law and was advised to produce certain documents that would support "my defence and counterclaim." He says that he had great difficulty finding the

documents as many items were out of place and could not be found. Despite the clear instructions of his attorney that his defence would require documentary support, the applicant states that he was not aware that his attorneys were awaiting the documents before filing a defence.

Having had a claim filed against him, and having failed to comply with his attorneys' request, the defendant allowed "several months to elapse." He comforted himself with the thought that his lawyers must have filed his defence despite their clear instructions to him. I find it was unreasonable for him to believe his attorneys would still file a defence. For approximately nine months he refrained from taking any action. His conduct "flies in the face" of his counsels' instructions. The failure to check to see the result of his non-compliance with his attorneys' instructions must be regarded as being far less than a good explanation.

If I am correct that the explanation is less than good, that should be the end of the matter. Because all the requirements at (a), (b) and (c) of Rule 13.3(1) of the Civil Procedure Rules are to be read conjunctively. The "preamble" to Rule 13.3 restricts the court's discretion to set aside **only if** all the conditions are satisfied. The judge is cribbed and confined, perhaps, due no doubt to his overly generous exercise of his discretion in the old

dispensation which lead to inordinate delays and granted applications in inexcusable circumstances.

If I am wrong on the question of the explanation, I turn my attention to the third head

- **The defendant has a real prospect of successfully defending the claim.**

The claimant had, annexed to his particulars of claim, four relevant documents. (i) Loan Agreement dated 28th August 2000 – claimant's Citibank. (ii) A cheque in sum of US$15,190.00. (iii) Defendant's Citibank cheque in the sum of J$629.00. (iv) Defendant's cheque – Mutual Security cheque #4 in sum of US$15,100.00.

In the agreement dated August 2000 Robert Russel acknowledges owing the claimant $15,100.00 as evidenced by Mutual Security cheque no. 164, payable on 31st August 1999. The claimant alleged that when attempts were made to encash Russel's cheque, there were insufficient funds in the bank. The defendant alleges that the claimant was author of his own frustration because he made a demand on the bank before the date on the face of the instrument.

The defendant alleges that on or about the 29th September, 1999 a cheque in the sum of five hundred thousand Jamaican dollars was given to the claimant in repayment of the loan. There was no denying that sum was

paid on that date, but it bears no relevance to the August 2000 Loan Agreement which it predates.

The defendant has not availed himself of the opportunity provided by the Court to provide the necessary documents he informed the court were available to establish certain payments.

In Swan v Hilman [2001] 1 All E.R 91, a case in which the term "real prospect" of success is construed in the context of Rule 52.13 (6) of the Civil Procedure Rules 1998 (U.K), Lord Wolf, Master of the Rolls said that the words

> "direct the court to the need to see whether there is a realistic 'as opposed to a fanciful' prospect of success."

Is there then any 'real chance of success' in respect of this defence?

I find that the defendant has no real prospect of successfully defending the claim. The payments of $500,000 was not relevant to this transaction, in fact predated it, it is acknowledged that the claimant did not get any funds in respect of defendant's cheque in the sum of US$15,100.00

In respect of the counterclaim for US$36,000.00 for docking fees for a period 28th July 1999 to 31st March 2003, this hinges on the final sentence in the Loan Agreement.

Counsel for the defendant submitted that the true construction of that clause was that "the defendant would not seek payment of dockage fees but would off-set such cost against interest accrued.

Mr. Codlin construes that sentence as, "instead of paying interest, the defendant would not charge docking fees. As a result, no docking fees would accumulate under this agreement." Although not said by Mr. Codlin, it also means that no interest would accrue under the loan.

I find that the agreement made impermissible any claim for docking fees. The counter-claim therefore fails.

It is therefore unnecessary to make a finding on the first limb, whether the application was made as soon as reasonable practicable after finding out that judgment had been entered.

The application to set aside judgment is refused. Judgment for the claimant on the claim and counter-claim in the sum of US$16,129.00 and J$28,000. Costs to the claimant to be agreed or taxed.