[2013] JMSC Civ 150

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 1140

BETWEEN	**NADINE BILLONE**	**CLAIMANT**
AND	**EXPERTS 2010 COMPANY LTD.**	**DEFENDANT**

Marvalyn Taylor-Wright instructed by Marvalyn Taylor-Wright & Co., for the Claimant

Zavia Mayne instructed by Zavia Mayne & Co., for the Defendant

Heard: July 17 and 31, 2013

APPLICATION TO SET ASIDE DEFAULT JUDGMENT – WHETHER GOOD REASON FOR FAILING TO FILE A DEFENCE SHOWN – WHETHER DEFENDANT ACTED PROMPTLY UPON HAVING BECOME AWARE THAT A DEFAULT JUDGMENT WAS ENTERED AGAINST IT – WHETHER PROPOSED DEFENCE HAS A REAL/REALISTIC PROSPECT OF SUCCESS

Anderson, K., J.

[1] The claimant in this claim filed her claim on March 11, 2011 and thereafter, filed an amended claim form on March 30, 2012. In her claim, she has claimed for the sum of $16,775,144.28 which she has claimed, constituted principal and interest up until the date of filing, arising from payments made towards the purchase of Lot 30 Discovery Pointe Estate, Discovery Bay, in the parish of St. Ann.

[2] The defendant, in response through its attorney at that time, filed an acknowledgement of service or amended claim form, in which it acknowledged that it had been served with the claimant's amended claim form and particulars of claim on

April 10, 2012. That acknowledgement of service was promptly filed, insofar as it was filed the next day, that being, April 11, 2012.

[3] Up until April 11, 2012, the claimant was being represented, for the purposes of this claim, by the law firm – Sheldon Codner & Company, whereas the defendant was then being represented by attorney - Arnaldo Brown. By virtue of respective notices of change of attorney, the claimant changed her legal representation, as of July 22, 2011, such that, since then and until now, she has been and is being represented by attorney Marvalyn Taylor-Wright. Equally too, the defendant has, subsequent to the filing of its acknowledgement of service, been represented by Zavia Mayne & Company, as of May 21, 2012.

[4] By virtue of **rule 10.3(1) of the Civil Procedure Rules (CPR)**, as this is a claim form proceeding, as distinct from a fixed date claim form proceeding, the defendant was legally required to file its defence within 42 clear days of receipt from the claimant, of the claim form and particulars of claim. The defendant did not comply with that legal requirement. As a consequence, the claimant, pursuant to the provisions of **rule 12.7 of the CPR**, filed, on June 6, 2011, a request for default judgment. In that request, the claimant contended that she was owed by the defendant, principal and interest calculated up to June 30, 2011, in the sum of $10,852,158.52, plus costs and court fees amounting to $29,547.23. A modified request for default judgment was filed by the claimant on June 4, 2012 and in that modified request document, sought modified sums as principal and interest (up to June 4, 2012) and attorneys-at-law fixed costs together with interest, which when aggregated with attorneys-at-law fixed costs on entering judgment and court fees on claim, totalled - $11,796,353.41 – this being the precise sum claimed by the claimant in her modified request for default judgment.

[5] Following on the filing of that modified request for default judgment, the claimant was awarded a default judgment against the defendant and that judgment was, as of October 17, 2012, entered by a Deputy Registrar of this court, in judgment binder 755, folio 206. Thereafter, the defendant filed an application to this court, to set aside that default judgment. That application to set aside was filed on November 6, 2012 and of

course, seeks to have the said default judgment set aside and to have, in the alternative, the defendant being permitted by this court to file its defence within seven days of the making by this court, of its orders on the application. The grounds set out for the making of the orders applied for by the defendant, are '(1) That the defendant has a real prospect of successfully defending the claim,' and '(2) That the granting of the orders being sought herein will be prejudicial to the claimant.'

[6] It is worthy of stating at this juncture that the defendant's contention as per one of its grounds for the application, that the granting of the orders sought by it, would not be prejudicial to the claimant, is untenable and of no merit whatsoever. Clearly, since the claimant is in receipt from this court, of a regularly issued judgment, it inexorably follows that if that judgment were, for whatever reason, to be set aside, there would be prejudice to the claimant, insofar as she would likely then incur far more costs and utilize far more time in trying to regain that judgment and will thereafter, likely only be able to do so, after a contested trial, if even she can regain the same at all.

[7] This is why our rules of court make it clear that an application to set aside a default judgment cannot properly be granted as a matter of right. It is instead, entirely a matter for this court's discretion, as to whether a regularly entered default judgment should be set aside or not and that discretion is circumscribed by the provision in our rules of court, that there are certain specific considerations which this court must bear in mind in deciding on whether or not a default judgment is to be set aside.

[8] Accordingly, **rule 13.3(1) of the CPR** provides that – 'the court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.' **Rule 13.3(2) of the CPR** provides:

> *'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.'

[9] Thus, it is clear to this court, that the pre-eminent consideration for this court, when deciding on whether or not to set aside a default judgment, is whether or not the defendant's proposed defence has, 'a real prospect of success,' since if so, then the defendant would have, as required by **rule 13.3(1) of the CPR** – '… a real prospect of successfully defending the claim.' Whilst this is this court's pre-eminent consideration for the purposes of the defendant's application to set aside though, it is not the only consideration. The matters as set out in rule 13.3(2) must conjunctively be considered along with whether the proposed defence has a reasonable prospect of success, in order for this court to properly rule on the defendant's application for a completed enunciation of the law in this regard and as look at how Jamaica's rules of court have evolved in respect of matters to be considered by this court in deciding on applications to set aside regularly issued default judgments, see: ***Marcia Jarrett and South East Regional Health Authority and Robert Wan v The Attorney General –*** Claim No. 2006 HCV 00816, in which the judgment of this court, was delivered by McDonald-Bishop J. (Ag.) (as she then was).

[10] Who has the burden of proving that she or it has met or not met the requirements of rule 13.3 of the CPR, in respect of an application to set aside default judgment? The general rule in law, is that, 'he who asserts, must prove.' Thus, upon applications to set aside default judgment, the burden of proof rests squarely on the defendant's shoulders. See the judgment of Potter, LJ in the case – ***ED and F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472, esp. at para 9, in this regard. In that same judgment, the Court of Appeal of England made it clear that the test of whether the defence has 'a real prospect of success,' is the same as that to be addressed if a party seeks summary judgment. See also, in this regard – **Swain v Hillman** [2001] 1 All ER 91. It is not enough to show a merely arguable defence. The court's judgment which first established this and which has been expressly adopted by rule 13.3(1) of Jamaica's rules of court, is – **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.**

The test of 'reasonable prospect of success' was addressed in great detail by England's Court of Appeal, in the case – **Swain v Hillman** [2001] 1 All ER 91. In that judgment as reported, Lord Woolf, M.R. (as he then was) stated that the word 'real' directed the court to the need to see whether there was a realistic, as opposed to a fanciful prospect of success. It is important to note, that as clearly set out by the judgment of England's Court of Appeal in the case – **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 AC 1, a claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based. Equally too, if the proposed defence, in an application to set aside default judgment, is clearly undermined by virtue of relevant documentation, the purport of which is/are not being disputed by the defendant for the purposes of the application to set aside. See in that regard, an extract from the text – **Civil Litigation**, as authored by Craig Osborne, as recorded by the judge that rendered judgment in the **Marcia Jarrett** case (op.cit), which I approve of and adopt.

[11] Jamaica's courts have, time and time again, adopted all of the aforementioned legal principles, in respect of applications to set aside default judgments. See in that regard: **Eunice Holding v Yvonne Williams** – Claim No. C.L.H227/1995; **and Andrew Robertson and Toyojam Ltd v Ewen Haughton** - Claim No. 2006 HCV 2311 and **C Braxton Moncure v Doris DeLisser** – [1997] 34 JLR 423.

[12] What evidence has been placed before this court by the defendant, in support of its application to set aside the default judgment which was entered against it, on October 17, 2012? Two affidavits have been filed and served by the defendant in that regard, albeit the latter-in-time, of those two affidavits, was served belatedly on the claimant's counsel. The claimant's counsel has, however, not made an issue of such late service, albeit that she has understandably brought to this court's attention, such lateness of service of same. That latter-in-time affidavit was filed on July 17, 2013, whereas the affidavit which was filed first in time by the defendant, was filed on November 6, 2012. As earlier stated in this ruling, the defendant's application to set aside default judgment was filed on November 6, 2012. Both of those affidavits have been deposed to by the defendant's managing director, namely, Paul Buchanan.

[13] In the first of those two affidavits, Mr. Buchanan has deposed to his having been served with the claim form and particulars of claim herein, on April 4, 2011 and that he thereafter instructed Arnaldo Brown, his then attorney, 'to take all necessary steps to have the claim ... defended.' He further deposes in that affidavit to their having been an acknowledgement of service filed on April 14, 2011, which was duly served on the claimant's attorneys-at-law and that he thereafter provided his attorney, 'with all relevant information for him to successfully defend the claim against the defendant.' As things evolved, however, no such defence has ever been filed and as things now stand, the claimant has been awarded a regular judgment in her favour, in respect of this claim. In paragraph 7 of that affidavit, the deponent has stated that:

> *'...through inadvertence, Mr. Arnold Brown did not file a defence in the matter. He has advised and I do verily believe that he was a candidate in the last general elections and as such had not been practicing as an attorney-at-law for the last six months of 2011 leading up to the general elections*.'

[14] In neither of the two affidavits filed on the defendant's behalf, has any evidence whatsoever been led, in an effort to show why, it was not 'reasonably practicable' (as per rule 13.3(2) (6) of the CPR, to have filed the application to set aside default judgment, at an earlier time, after he, on the defendant's behalf, became aware that a default judgment had been entered against the defendant. As it is, the defendant's witness, for the purposes of this application, has not even, for the purposes of his evidence as regards the defendant's application, so much as made this court aware as to when or for that matter, by what means, he became aware of the default judgment having been entered against the defendant. Was it only 'reasonably practicable,' for the defendant to have filed its application to set aside as and when it did? Evidence ought to have been led in this regard and that aspect of this matter ought not to be left to be ruled upon by this court, based upon a presumption. The defendant has, to my mind, fallen woefully short of the mark, in that respect.

[15] The only 'saving grace' for the defendant in that respect, is firstly, that the period of time between the entry of the default judgment and the filing by the defendant, of its

application to set aside, has by no means been, 'inordinately long,' albeit that this court notes that it equally cannot be said that such period of time is 'brief,' or that the said application was made 'promptly.' Secondly, even though the defendant has led no evidence as could serve to satisfy this court that it was not reasonably practicable to have filed its application earlier than it did, after it had become aware of the default judgment having been entered against it, nonetheless, whilst this is a consideration which ought to be and has been carefully considered by this court, for the purposes of making a ruling on the defendant's application to set aside, nonetheless, it is by no means the pre-eminent consideration as regards same. As has been made clear in several cases which have been cited above, the pre-eminent consideration of this court, for the purposes of an application such as the present one, is whether or not the defendant has a defence which has a 'real prospect of success.'

[16] This then brings us to another important consideration, which is, whether the defendant has, in the present claim, given a good explanation for his failure to file a defence. As earlier stated, the default judgment was not entered until October 17, 2012. Mr. Paul Buchanan, has, on the defendant's behalf, deposed to having left the matter with the defendant's attorney at the time, namely Arnaldo Brown and had given Mr. Brown the instructions and documentation needed to file a defence. Mr. Brown's neglect in that regard, which incidentally, may very well constitute both tortious negligence as well as a breach of his ethical duty to his then client, as its then attorney-at-law on record (albeit that I am not now making judicial pronouncement on either such), cannot be treated as anything other than the neglect of his then client, this being the defendant. The attorney acts as the agent of the client for the purposes of all court proceedings in which that attorney is on record as representing that client. Thus, if for whatever reason, the attorney is unable to continue to act for that client, then it is incumbent on that attorney to inform his client of same and to ask his client to obtain the services of another attorney. Alternatively, the attorney should seek a court order removing his name from the record. Typically, if the client/attorney relationship is a harmonious one and the attorney is unable to continue to represent a client because of conflicting personal obligations, then it is the former course that should to be utilized.

Where however, the said relationship is either disharmonious, or virtually non-existing due to for example, an inability to make contact with one another, it is the latter course, which typically would and ought to be utilized. Neither such option was utilized by either party in this case, as far as this court is presently aware. The neglect of the attorney in such a circumstance as is presently known to this court, must be attributed to the neglect of the defendant, since, as has often been stated, an attorney is nothing other than, 'a creative of instructions.' If the attorney has, as such, failed in his duty to his client, whether legally or ethically, or both, then in either such event, it would be open to the client, or former client (as the case may be) to institute appropriate legal action to obtain redress against that attorney. The neglect of the attorney would not and cannot in and of itself, be properly considered by this court as constituting a 'good explanation for the failure to file a defence.' On that point, see the judgment of Jamaica's then President of the Court of Appeal – Harrison, P, as rendered in **Ken Sales & Marketing Ltd v James & Company (a firm)** – Supreme Court Civil Appeal No. 3/05, at page 6 of that judgment, whereupon His Lordship, the President of that court, made it clear, that 'inadvertence and certain procedural problems in office' on the part of an attorney which led to an acknowledgement of service having been filed out of time by the defendant in that claim, did not constitute, 'a good explanation for failure to file an acknowledgement of service' in time.

[17] In any event, this court finds itself entirely in agreement with a submission as made to it by the claimant's counsel, this being that even if, as has been deposed to by the defendant in the affidavit which he has filed in support of his application to set aside the default judgment which has been entered against him, he (the defendant) has been informed that Mr. Arnold Brown, attorney-at-law, was out of office engaged in political activities throughout the last six months of 2011, that cannot provide a good explanation for the failure on the defendant's part, to have filed a defence within time. This is so, even if, as allegedly reported to him by his then attorney – Mr. Brown, he (Mr. Brown), had been away from his law practice and engaged in political activities, for the last six months of 2011.

[18] The reason for this is simply that, insofar as the defendant's managing director was properly served with the claim form and particulars of claim on April 4, 2011, there existed by virtue of rule 10.3(1) of Jamaica's Civil Procedure Rules, a 42 day period, comprised of 'clear days,' within which the defendant should have filed a defence to the claimant's claim. That 42 day period would have expired in May of 2011, whereas the last six months of 2011 would only have commenced as of July 1, 2011. Why then, could a defence not have been filed within time? It is clear that, 'no good explanation' has been provided to this court by the defendant, for the failure to file same within the time as allotted to defendants by means of Jamaica's rules of court.

[19] When considered from the standpoint of the filing and service by the claimant, of her amended claim form and particulars of claim, the legal position of the defendant, in failing to have a good explanation for the failure to file a defence within time, remains just the same. This is because, the claimant's amended claim form and amended particulars of claim were both filed on March 30, 2012. The defendant acknowledged service of those court documents on them and in their acknowledgement of service, which was, interestingly enough, filed by attorney- Arnoldo Brown, confirmed that they had been served with both the amended claim from and the amended particulars of claim, on April 10, 2012. Accordingly, since the defendant would have had up until 42 days thereafter, within which to have filed and served a defence, it inexorably follows, that since the defendant has provided absolutely no explanation whatsoever, as to why this was not done, especially considered in the context whereby attorney – Arnoldo Brown had filed said acknowledgement of service of those amended court documents on his client's behalf and stated therein, that the defendant wanted to defend the claim. Clearly, no good explanation has been provided whatsoever, for the defendant's failure to have filed its defence within time, either in response to the claimant's claim form and particulars of claim as were originally filed and served, or in response to the amended particulars of claim, as were later filed and served, the latter set of documents being the court documents which ultimately provided the basis upon which judgment in default was entered against the defendant, on October 17, 2012.

[20] Thus, the defendant has, to this court's mind, failed to satisfy this court that it firstly, applied to this court to set aside the default judgment which has been entered against it, as soon as it was reasonably practicable to do so, albeit that this court accepts that the length of delay between the time of filing said application to set aside judgment, could not be properly described as having been, 'lengthy or inordinate.' Equally, the defendant has failed to give a good explanation for the failure to file a defence.

[21] As earlier stated in this ruling, however, the two matters required by this court, to be considered, for the purposes of an application such as the present one, although undoubtedly of importance, are not, either collectively or individually, the pre-eminent considerations for this court, in adjudicating on the defendant's application to set aside default judgment. Rather, the pre-eminent consideration is, as set out in rule 13.3(1) of the CPR, whether the defendant has a defence which has a real prospect of success.

[22] This court will therefore now carefully examine the merits or demerits (as the case may be), of the defendant's proposed defence, this considered, of course, in the context of the claimant's amended claim form and amended particulars of claim.

[23] In her amended claim form, the claimant has claimed against the defendant for the aggregated, sum of $16,775,144.28, this being a sum comprised of principal - $9,378,849.22 and interest at a commercial rate – $7,376,295.28. It is alleged by the claimant, that the principal sum of $9,378,849.22 was paid by her towards the purchase of Lot 30, Discovery Point Estate, Discovery Bay, in the parish of St. Ann. There existed only an oral agreement and correspondence between the relevant parties, as regards the then proposed purchase of the said property, by the claimant and her now deceased husband – Jeffrey Billone. At that time, it is alleged and confirmed by documentary materials both attached to the claimant's statement of case and appended as exhibits to affidavit evidence which has been deposed to and filed by the claimant in response to the defendant's application to set aside the default judgment which has been entered against it, that the defendant had undertaken the development and construction of residential homes at Discovery Bay in the parish of St. Ann. It was

pursuant to her then desire to purchase one of those homes, that the principal sum of $9,378,849.22 was forwarded via wire transfer in the amount of US$101,237.34 to a bank account then held by the defendant. That sum of US$101,237.34 (J$9,378,849.22 equivalent) was, in total paid in three tranches, on October 17, 2007, December 24, 2007 and January 8, 2008 respectively. That such payments were in fact made to the defendant, is borne out by documentary proof which has been provided by the claimant, of same. Following on such tranches of payments having been made however, in early 2008, the claimant decided not to purchase said lot of land. The reasons for her change of mind in that respect, are not relevant for present purposes, but once again, are borne out by documentary evidence. As such, the claimant's attorneys-at-law wrote to the defendant's attorneys-at-law, on two occasions, these being January 31, 2008 and March 4, 2008, demanding an immediate return of the monies which, by then, had been paid over to the defendant. Such efforts, for the return to the claimant, of such monies paid, have all, to date, undisputedly been in vain. In essence therefore, the claimant has sought, by virtue of this claim, to recover from the defendant, said principal sum and interest at a commercial rate and costs. Following thereon, the claimant was awarded, by means of default judgment, the sum of $11,796,353.41. The essence of the claim, it seems clear to this court, although by no means expressly so stated in either her claim or amended claim form, or her particulars of claim or amended particulars of claim, is one of unjust enrichment. The defendant has been unjustly enriched by receiving payment from the claimant, for a house which it has not provided to the claimant. As the claimant did not, at a fairly early stage after such payments were made to the defendant, want the house that was to have been built and as there was no agreement for sale on the land to have been purchased for the purpose of situating thereon, the house which was to have been built, the claimant clearly would not be desirous of acquiring such land and house now, even by means of a claim in equity. Instead, she is desirous of retrieving the money which she claims to have paid for the said land parcel and for the purpose of having a house built thereon, by the defendant.

[24] What then, is the essence of the proposed defence? There are in fact different facets of the proposed defence and therefore, solely for the sake of ease of reference, I

will refer to each of these different facets using my own terminology and set out the same, seriatim, immediately below:

i) The agreement to purchase one of the housing units at Discovery Pointe Estate was one which was entered into only as between, insofar as is relevant for present purposes, Jeffrey ('Jeff') Billone and the defendant. The claimant was never a party to the agreement and thus never passed on any money to the defendant, arising from such agreement. Instead it was Jeff Billone who passed on monies to the defendant, as a precursor to that agreement. That precursor was that Mr. Billone had orally agreed with the defendant, that he would invest in Discovery Pointe Estate. Following on that oral agreement, the defendant alleges that Mr. Billone invested a sum of money into the project of what was to have been the expected development by the defendant of a housing scheme at Discovery Pointe Estate. It is further alleged by the defendant though, that in or about January of 2008, Mr. Billone informed the defendant, that he was no longer prepared to invest in Discovery Point Estate and accordingly, he was uncertain of how to proceed. Thereafter, he agreed to purchase one of the housing units in the residential scheme which was still then to have been developed at Discovery Pointe Estate, by the defendant and also then agreed for the monies which he had, by then, invested, to be converted to his deposit. Regrettably, Mr. Billone died shortly thereafter and it was only at that time and since then, that Mrs. Billone, who was never a party to any contractual agreement between the parties pursuant to which said monies were invested/paid to the defendant, and who never invested/paid any such monies over to the defendant, has been seeking to have returned to her, the sums invested/paid by her late husband. As such, there exists a dispute between the parties, based on these allegations of the defendant, as to whether the claimant is entitled to the return by the defendant to her, of any monies at all.

ii) What was the total sum paid over to the defendant, either by Mr. Billone alone, or by Mr. and Mrs. Billone, or by Mrs. Billone alone? The defendant contends that the initial oral agreement as between themselves and Mr. Billone was to the effect that the sum of $21 million was to have been invested into the project in tranches, where after, an overall sum of $6,886,496.74 was invested into the Discovery Pointe Estate project by Mr. Billone. As such, there also exists a dispute between the parties, as to the sum that, if any at all, would be legally due to be refunded to the claimant (this of course, assuming that this court were to be able to properly concluded that any monies paid to the defendant were, for all relevant purposes, paid by the claimant to them, pursuant to an oral agreement by the claimant with them, for the purchase of a Lot and the building of a house on that Lot. In that regard, the claimant claims that the principal sum inclusive of interest which was due to her, as of the date of

entry of default judgment, was then – $11,796,353.41, whereas, the defendant not only denies that any sum is due and owing to the claimant by the defendant at all, but also denies that the sum invested/paid over to them when aggregated, amounted to $9,378,849.22, as the principal sum – this being what the claimant has alleged, whereas the defendant is, on the other hand, now contending and desirous of being afforded the opportunity of raising as a defence to this claim, that the principal sum instead should be $6,886,496.74.

iii) The defendant further contends and seeks to have it placed before this court at this stage, as a defence to the claim, its assertion that the project has gone into receivership. The draft defence which has been appended as an exhibit to the affidavit of the defendant's managing director – Mr. Paul Buchanan which was filed on November 6, 2012, states nothing further as to why the said project has gone into receivership, nor has it specified that there was any other investor in the project, than the defendant and Mr. Billone. In the further affidavit evidence of Paul Buchanan, however, as was filed on January 30, 2013, such further details have been provided. Such further details should, to my mind, be considered by this court, for the purposes of enabling this court to determine whether or not the defendant has a defence which has a real prospect of success. This must be so, because at this stage, the court should consider the defendant's affidavit evidence in its entirety and in that regard, the defendant's draft defence is merely a part thereof. Clearly, if permitted to be filed, when same is finalized for the purpose for filing, if there are additional details that ought to be recorded therein, it certainly would be open to the defendant to do so. This court accordingly, should not simply disregard such further details, because the same have not been specifically referred to in the defendant's draft defence, even though the same have been referred to in one of the defendant's affidavits in support of the present application. Accordingly, it is noted by the court that not only is the defendant contending that the relevant project is now in receivership, but is also contending that the other investor in the project was Jamaica Mortgage Bank Ltd., which is responsible for having under-capitalized the project from the very onset, thereby causing same to have gone into receivership. As such, there is now a court dispute in the form of a court claim, brought by the defendant against Jamaica Mortgage Bank Ltd. Furthermore, the Real Estate Board has placed a caveat against the project concerning the development of Discovery Pointe Estate. Overall therefore, it appears from this, that the defendant is contending that due to events beyond its control, the investment made by various parties in the relevant development project are now at a standstill

> and have been at a standstill for a few years now and thus, there exists no basis for the claimant's claim.

[25] There is undoubtedly, to this court's mind a defence with a realistic prospect of success in the present case, being proposed by the defendant. This is more than a defence which is merely arguable. This is because it seems very clear to this court, that the land which was to have been purchased, as per the draft agreement for sale exhibited to the sole affidavit of Nadine Billone, filed in response to the defendant's application, makes it known that there were two purchasers, namely: Nadine Billone and Jeffrey Billone, of the lot upon which it was intended that the house would have been built by the defendant. In point of fact, the draft agreement for sale specifically refers to the purchasers' obligation to execute contemporaneously, an agreement for the construction of a house with the defendant as contractor. See clause 16(7) (ii) of the draft agreement for sale, in that regard.

[26] As such, what would be the basis for Mrs. Billone being the sole person who should, solely on her own behalf and in her own name, be claiming for whatever sums of money were paid arising from that which was admittedly an oral agreement in that regard? The simple answer to this question is that there is a legal issue which ought to be determined by this court after a trial, as to whether there exists any proper legal basis for same. On the face of all of the information concerning this matter, as is now known to this court, the defendant has a defence which has a real prospect of success; insofar as it is being contended by the defendant that nothing is owed to the claimant at all. Whilst this may or may not be entirely correct legally, this is a defence which ought to be tried and ultimately pronounced upon by a court, after a trial.

[27] This court is strengthened in its legal position in that regard, by letter dated March 11, 2008 addressed to the claimant's then attorney-at-law, Mr. Maurice Simpson, from the defendant's then attorney-at-law, Ms. Hilma McNeil. In that letter, reference was made to a cheque drawn in favour of Maurice Simpson, 'being the first payment, of refund to Jeffrey and Nadine Billone.' This shows that the defendant did not, even as of March 2008, accept that it owed any money solely to Nadine Billone. A further

repayment was made, in the sum of $300,000.00, by the defendant to the claimant's then attorney-at-law – Ms. Heidi Johnson, re 'sale of unit No. 30, Discovery Pointe Estate, St. Ann, Discovery Development Co. Ltd. to Jeff and Nadine Billone.' Furthermore, by letter date November 14, 2011, addressed to the claimant's present attorney-at-law, under the hand of one Kadia Francis for Arnaldo Brown, attorney-at-law, the following was stated:

> *'Kindly note, that my client has advised the receiver of the debt owed to the estate in which your client has claimed an interest. Instructions have been given to the receiver to honour the debt, in the sum of $6,000,000.00.'*

As such, in that letter, it is accepted by the defendant that a debt of $6,000,000.00 was then owed by them. The question remains though – owed to whom? That letter suggests that the debt is owed to 'the estate' in which Marvalyn Taylor-Wright's client 'claims an interest.' The only reasonable inference from this wording is that 'the estate' to which reference in that particular letter has been made, is the estate of Jeff Billone. Accordingly, does the claimant have a proper legal and/or factual basis for her claim? This question ought to be answered by this court, after evidence and legal submissions have been presented to it, during a trial.

[28] Added to that though, is that there is dispute over the precise sum of money owed by the defendant either to the claimant and her husband, or to the estate of Jeff Billone. If even there were an admission by the defendant in its defence, as to a part of the sum of money being claimed by the claimant as per her amended claim form and amended particulars of claim, nonetheless, unless the claimant were to accept such admission of part of the sum claimed for, in full and final settlement of the entire debt owed, this court will have to fix a date, time and place for a case management conference, on the basis that the proceedings will continue and a trial will be held. If though, after a defence admitting part of the entire sum claimed, is, in terms of that admission, accepted in satisfaction of the claim, then judgment will be entered in the claimant's favour for the admitted sum, plus interest and fixed costs. It is clear therefore, that a defence to part of a larger sum claimed as being owed by a defendant

to a claimant can lead to a trial as regards that entire sum which is claimed to be owed. This will be what will ensue if the claimant does not accept the admission to part of the larger sum allegedly owed, in satisfaction of the whole sum. See rule 14.7 of the CPR in this regard.

[29] The defendant also wishes to put forward as its defence, essentially, a defence of frustration of contract. This would have to be clearly specified in any defence, if it is to be properly relied upon. See – Law Reform (Frustrated contracts) Act. It seems to this court though, that in view of the law as regards what would be sufficient to constitute, 'frustration of contract' as such term is understood and applied, this aspect of the proposed defence, would have no real or realistic prospect of success whatsoever. This court will not address such aspect any further.

[30] In the circumstances, the defendant has satisfied this court on the most important consideration for present purposes, this being that the defendant has a defence which has a real prospect of success. Accordingly, although the defendant did not provide a good explanation for its failure to file a defence and has not been able to satisfy this court, that it acted as soon as reasonably practicable, after having found out that default judgment had been entered against it, to have such default judgment set aside, nonetheless, this court will set aside the default judgment and order as to the time within which the defendant shall file its defence.

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Hon. K. Anderson, J.