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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 2913/2004

BETWEEN	RAYMOND CLOUGH	CLAIMANT
A N D	JANET MIGNOTT	DEFENDANT

Mr. Maurice Manning instructed by Nunes, Scholefield, Deleon and Company for Applicant/Defendant.

Mr. Abe Dabdoub instructed by Clough Long and Company for Respondent/Claimant.

Heard: June 5, 2006 and April 27, 2007

Hibbert, J.

On the 26th November, 2004 the Claimant brought an action against the Defendant, claiming the sum of eight hundred and fifty two thousand, four hundred and sixty-four dollars and forty cents ($852,464.40) for work done by the Claimant on behalf of the Defendant.

Subsequently on the 17th January, 2005 Default Judgment was entered on behalf of the Claimant, the Defendant having failed to file a Defence. A copy of this judgment was served on the Defendant on the 21st January, 2005.

On the 25th January, 2005 the Defendant filed an application seeking to set aside the Default Judgment.

Since the judgment was regularly obtained, in order to succeed the Defendant is required to meet the conditions imposed by Part 13.3 (1) of the Civil Procedure Rules (as they then stood)

It states:

13.3 (1) 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 had 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.

At the outset I ruled that the Defendant had met the conditions laid down in rule 13.3 (1) (a) and (b) but reserved judgment in relation to 13.3 (1) (c).

The question to be resolved, therefore, is; Does the Applicant have a real prospect of successfully defending the claim? This question is the same as on an application for summary judgment. The Civil Court Service 2002 in dealing with rule 13.3 (1) (a) of the English Civil Procedure Rules 1998, one which is identical to our rule 13.3 (1) (c), at page 507 in discussing "a real prospect of successfully defending the claim" states at page 507:-

> "This mirrors the provisions in relation to resisting application for summary judgment under pt. 24 which are based on the decision in **Alpine Bulk Transport Company Inc. v. Saudi Eagle Shipping Company Inc.**

The Saudi Eagle [1986] 2 Lloyd's Rep. 221 C.A. The rule requires a case to be better than merely arguable before a default judgment can be set aside.

The passage goes on to give a reason for this, citing the decision in **International Finance Corporation v Utexafrica Spr. [2001] CLC 1361 QBD**

In that case Moore-Bick, J stated:

> "The fact is that in ordinary language to say that a case has no realistic prospect of success generally much the same as saying that it is hopeless; whereas to say that a case has a realistic prospect of success carries the suggestion that it is something better that merely arguable. That is clearly the sense in which the expression was used in the Saudi Eagle and in my view is also the sense in which it is used in r 13.3 (1) (a). There are good reasons for that. A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the judgment aside. In my view, therefore, Mr. Howe was right in saying that the expression "realistic prospect of success" in this content means a case which carries a degree of conviction.

In **Swain v. Hillman [2001] 1 Sec. ER 91 Lord Woolf M.R.** also considered the meaning of the words "no real prospect of succeeding". He stated that the word 'real' directed the court to the need to see whether there is a realistic, as opposed to a fanciful prospect of success. He added that the phrase did not mean real and substantial prospect

of success nor did it mean that summary judgment will be granted only if the claim or defence is ' bound to be dismissed at trial'.

In **Three Rivers.District Council v. Bank of England (No. 3) [2003] 2AC (1)** a claim or defence was said to 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 document or other material on which it is based.

Although a judge, at an application to set aside a default judgment or for summary judgment should not embark on a mini trial there are occasions when the court has to consider fairly voluminous evidence before it can understand whether there is a real prospect of success.

This situation arose in **Miles v. ITV Networks Ltd. (2003) LTL 8/12/03**. In dismissing the allegation that the Master had conducted a mini trial in dismissing the Claimant's claim, Laddie J stated that the consideration of fairly voluminous evidence was necessary for him to understand the facts which were in issue.

The instant case also requires the examination of several documents in order for the Court to understand the real issues and to make a determination as to whether there is a real prospect of defending the claim.

The Defendant, an Attorney-at-Law acted on behalf of the Claimant in **Suit No. C.L. 1997/M-357 Terrence Mignott v. Guardsman Armoured Courier Services Limited** by virtue of a Contingency Agreement. Terrence Mignott is the brother of the Defendant in this case and was the legal representative of the estate of their late father who died as a result of a motor vehicle accident.

Subsequent to the filing of the writ, the Defendant sought and obtained the assistance of the Claimant, a partner in the firm Clough, Long and Company who were thereafter placed on record as the attorneys representing Terrence Mignott by virtue of a notice of change of attorneys. The terms of the agreements were reduced into writing in a letter from the Defendant to the Claimant dated 21st November 2001 which states in part:

Thanks for helping me to conclude Daddy's suit. In light of my family situation I think it best to put on record the agreement between us. I agreed with my brother to work on a contingency basis for 25% of the amount awarded. However in light of the potential insolvency of the defendant company, this percentage would have to be of the money actually recovered. As nothing can be recovered without the trial I think it fair that I split the sum I would be entitled to with you 60/40. (60% to you 40% to me.)

During the course of negotiations a settlement was arrived at and this was formalized on the 7th November, 2003 when at a Case Management Conference at which the Claimant was represented by Mr. Raymond Clough, a consent judgment was entered on behalf of the Claimant.

On the 28th October, 2003 the Defendant wrote to the Claimant a letter concerning the settlement of Suit No. C.L. M-357/97. It states in part:

Thanks for helping me to conclude Daddy's suit. I confirm my arrangement with you and agree fees to you being 60% of 25% of the settlement to be paid on collection of sums due.
By my reckoning the sum due to you in total is $825,000.00 to be paid as follows:

On first payment of $3,000,000.00 - $450,000.00

On payment of $1,250,000.00 - $187,500.00

On final payment of $1,250,000.00 - $187,500.00

The letters of 21st November, 2001 and 28th October 2003 along with the Consent Judgment and other letters written by and to the Defendant were exhibited to the Claimant's Statement of Claim and form the basis for the claim.

None of these letters or other documents relied on by the Claimant were challenged by the Defendant. The Defendant, however, takes issue with the interpretation of these letters.

From the proposed Defence and from the submissions made before me the Defendant contends that there was no agreement to pay the Claimant the sum claimed. She further contends that the letter of 21st November, 2001 shows an arrangement which was conditional on the case actually going to trial and that the letter of 28th October, 2004 does not confirm the arrangement claimed by the Claimant.

It is quite clear, to my mind, that the interpretation which the Defendant seeks to place on these letters is without basis. Clearly the retention of Mr. Clough was based on the expectation that the matter would go to trial and not conditional on the matter going to trial. This to my mind is supported by the letter of 28th October, 2003.

I therefore find that the defence being put forward is fanciful and without merit and so has no real prospect of success, as it is totally at odds with the documents being relied on by the parties.

Consequently the application to set aside the default judgment is dismissed with costs to the Claimant/Respondent to be agreed or taxed.