[2019] JMCC Comm 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00144

BETWEEN	**HARVEST TABERNACLE LIMITED**	**CLAIMANT**
AND	**COLIN JACKSON**	**1st DEFENDANT**
	ARNALDO A. BROWN	**2nd DEFENDANT**

Application to set aside judgment in default – Delay in entering acknowledgement of service – Attorney's error cause of delay – 2nd Defendant an attorney-at-law- Relevance of want of candour - Agreement for sale- Undischarged mortgage on the property- Vendors mortgage also granted to Claimant who was the purchaser- Purchase price paid by instalments- Claimant put in possession- Instalments paid to 2nd Defendant as vendor's attorney at law -2nd Defendant disbursed payments to his client the 1st Defendant – Payments were not made to mortgagee who exercised power of sale –The Claimant was legally represented at all material times- Whether 2nd Defendant had duty of care or duty to account to Claimant- Whether 2nd Defendant has defence with real prospect of success.

Jalil Dabdoub instructed by Dabdoub Dabdoub & Co for Claimant

Leonard Green, Sheri Jones and Makene Brown instructed by Chen Green & Co. for 2nd defendant.

Heard: 24th May, 31st May, 17th June, and 26th July, 2019.

In Chambers

BATTS, J.

[1] On the first day of hearing there were two applications before me. One was for an extension to the validity of the Claim Form. This was necessary because the 1st Defendant had not yet been served. The other was an application to set aside a default judgment entered, in default of acknowledgment of service, against the 2nd Defendant.

[2] I granted the application to extend the validity of the Claim Form. I then commenced hearing the application to set judgment aside. In the course of argument, it emerged that, there was no evidence explaining the late filing of the Acknowledgment of Service. I therefore, over the objection of the Claimant's counsel, granted an adjournment to enable that evidence to be provided. At the resumed hearing, on the 31st May 2019, Claimant's counsel requested time to file an affidavit in answer. We therefore adjourned to the 17th June 2019. On that date the Defendant's counsel expressed a desire to file a further affidavit. I granted that request and the hearing resumed on the 20th June, 2019. After hearing oral submissions, and having considered the written submissions filed, I reserved my decision until the 26th July 2019.

[3] It is fair to say that, notwithstanding the several affidavits filed, there is not much divergence on the facts. The 2nd Defendant is an attorney at law. The 1st Defendant was the client for whom he acted in a transaction for the sale of land. The Claimant was the purchaser in that sale of land transaction. The 1st Defendant was the vendor of the land being sold. The Claimant paid sums, to the 1st Defendant as well as to the 2nd Defendant, in respect of the purchase. There was, as all parties were aware, an un-discharged mortgage on the property. The payments made by the Claimant were not used to service the mortgage which remained un-discharged. Although, the Claimant was put in possession, the mortgagee eventually exercised its power of sale and liquidated the property.

[4] The Claimant, in the Claim and Particulars of Claim filed on the 9th March 2018, alleges that the 1st and 2nd Defendants are liable for breach of contract and/or unjust enrichment and that the 2nd Defendant is liable for negligence. The Claimant alleges that the 1st and 2nd Defendants ought to account for the money paid to either or both of them.

[5] On the 6th day of April 2018 the Claimant filed a "Judgment for Damages to be Assessed." That judgment, in default of an Acknowledgment of Service, was entered on the 7th May 2018 against the 2nd Defendant. An affidavit of service, filed on the 6th April, 2018, says the 2nd Defendant was served with the Claim and Particulars of Claim on the 19th March 2018. An Acknowledgement of Service

was entered, on behalf of the 2nd Defendant, on the 11th February, 2019. On the 20th March 2019 the 2nd Defendant filed an application for permission to file Defence out of time. By Notice of Application, filed on the 10th April 2019, the 2nd Defendant applied to set the judgment aside and for a declaration that the judgment for damages to be assessed was irregular and, alternatively, that judgment be stayed "*until the General Legal Council comes to its conclusion*."

[6] In his affidavit, filed on the 10th April 2019, the 2nd Defendant alleges that:

a) His attorney made checks "*sometime in February [2019]"* and no Request for Default Judgment had been filed and, "*on that basis*", filed an Amended Acknowledgement of Service. His attorney also filed an application to extend time to file defence. A draft defence was attached to the affidavit, dated 19th March 2019, in support of that application.

b) On the 21st March 2019 he was surprised to be served with a document entitled "Judgment for Damages to be Assessed."

c) It was always his intent to defend the claim but he "*was unable to properly instruct"* his lawyers, who needed time to assess his case.

d) The averments in the Claim are false and misleading as the Claimant at all times had its own legal representation in the sale of land transaction.

e) The Claimant did not fulfil its obligations under the agreement. The instalments to be paid by the Claimant was the exact figure to pay the mortgage. He says "*all monies collected by me were paid directly to the 1st Defendant or the 1st Defendants agents ".*This, he says, was part of the expressed

agreement which involved the sale purchase and discharge of the mortgage debt.

f) He intended to counterclaim for an amount of $1,100,000.00 being a dishonoured cheque.

[7] The Claimant relied upon the affidavit of Boswell Raymond filed on the 20th May, 2019. That affidavit referenced an Affidavit of Service of the Claim and Particulars of Claim proving that the 2nd Defendant was served on the 19th March, 2018. That affidavit outlined difficulties experienced while trying to serve the Default Judgment on the 2nd Defendant. It also pointed to prejudice if the judgment were to be set aside and a trial delayed.

[8] In a supplemental affidavit, filed on the 29th May, 2019, the 2nd Defendant admitted that he was served with the Claim Form and Particulars of Claim. He passed it on to, his attorneys at law, Chen Green and Co. He says he was asked, by his attorneys, to produce several documents to support his defence. He said it was extremely difficult to locate the documents. He stated in paragraph 5 of the said affidavit :

> "*My difficulties arose from my full time involvement as a Minister of State in the Ministry of Foreign Affairs and Foreign Trade and my involvement as a Teacher at the University of the West Indies around the time of the transaction and it was extremely difficult to make the transition to full time legal practice. Among the things that made it difficult was the need to relocate offices and hire new staff members who were unfamiliar with vagaries of my legal practice. Additionally I had duties as a lecturer which took up more time than I anticipated.* "

[9] He said, also in the supplemental affidavit, that he thought his attorneys would have entered an acknowledgement on his behalf, and he was surprised that that had not been done. He again denied that he was guilty of any act of misconduct or negligence. He again made reference to the dishonoured cheque. By an affidavit, filed on the 17 June 2019 Ms. Sylvan Edwards of Chen Green & Co.

explained the delay in filing the Acknowledgement of Service. The failure was explained as follows:

> *"The documents were placed on the same file that was opened for the documents that contained all the papers issued with respect to the complaint against the attorney before the General Legal Council and were never separated and was not dealt with the urgency that was required."*

[10] In the Second Affidavit of Boswell Raymond, filed on the 12th June 2019, the Claimant responded to the Defendant's assertion that documents could not be located. He attached, to his affidavit, the Defendant's response to the complaint made to the General Legal Council being: a letter dated 22nd January 2015, an affidavit dated 21st July 2015 and another one filed on the 21st March 2019. Mr Boswell Raymond says that evidence was taken before the disciplinary committee on the 17 June 2017, 17 October 2017, 7th March, and 21st March 2019 and 2nd May 2019. He asserts, and this seems apparent when the documents are perused, that the issues before the General Legal Council concern the same transaction in issue before this court.

[11] Mr. Boswell stated that the dishonoured cheque was part of the deposit for the purchase of the land. Further that a total of $3,040,000 was collected by the 2nd Defendant and, in the proceedings before the General Legal Council; the 2nd Defendant stated that he had paid over sums to his client (the vendor and 1st Defendant) as well as to his client's friend and his client's company. The 2nd Defendant, stated that he expected his client to honour his obligations to the mortgagee and, stated the following, at paragraph 26 of his affidavit dated 8th May 2018 (before the General Legal Council),:

> *"26. That the principal responsibility for securing the mortgage rested with my client and as stated in my letter dated the 22nd day of January 2015 I felt particularly secured in the knowledge that this transaction would have proceeded uneventfully provided the vendor lived up to his obligations to the National Commercial Bank."*

[12] The 2nd Defendant, in the proceedings before the General Legal Council, also stated that the Claimant had made payments directly to the 1st Defendant. He also asserts that the 1st Defendant had been servicing the mortgage and that the mortgagee had acted "*capriciously."*

[13] The parties placed before me a copy of the agreement for sale, dated 12th March 2012, which was not exhibited to an affidavit. It provides for completion after 13 years. The purchaser was to pay $458,000.00 monthly to the vendor "*or to the account provided by the vendor*." The total purchase price is $36,000,000.00. The way it is set out in the agreement is instructive:

a) A deposit of $2,500,000 payable to the vendor's attorney upon signing.

b) A further payment of $1,000,000 within 30 days of signing.

c) A further payment of $1,000,000 within 60 days of signing.

d) A further payment of $2,700,000 within 90 days of signing

e) Balance of $28,800,000 is subject to a Vendor's Mortgage.

[14] It is apparent that the 2nd Defendant's explanation, for his delay in entering an acknowledgement of service, has to do with his own attorney's negligence. They, rather belatedly in the proceedings, admitted that the Claim Form and Particulars of Claim were wrongly placed on their file for the disciplinary proceedings. Due to oversight neither an acknowledgement nor a defence was filed. This evidence also demonstrates that there has been a want of candour. The failure to provide instructions could not account, for the failure to file a defence, given the detailed instructions the 2nd Defendant had already provided to his attorneys with respect to the disciplinary proceedings. The question will

therefore arise whether the attorney's negligence is a sufficient explanation for delay..

[15] The other issue is, of course, whether the Defendant has a real prospect of successfully defending this claim. In this regard it is important to note that the legal issue before the court is not identical to that before the disciplinary committee. The court at trial will ask whether the 2nd Defendant has been negligent. That is, did he have a duty of care to the Claimant, if so was the duty breached and if it was, did a loss flow from the breach of duty? As regards negligence, the disciplinary committee will be asking, whether the attorney acted "*with inexcusable or deplorable negligence or neglect*" (Canon IV (s) The Legal Profession (Canons of Professional Ethics) Rules. In order to find misconduct the committee will have to find an act of negligence or neglect which was deplorable or inexcusable. It is an intriguing question yet to be answered whether neglect, as against negligence, is possible in the absence of a legal duty of care. When answering the question, whether the Defendant has a defence with a real prospect of success, the court will not be addressing the same issue that is before the General Legal Council . I will not therefore accede to the Defendant's request to stay this process.

[16] The law, on the tests applicable when deciding whether or not to set judgment in default aside, is settled. It is the exercise of the discretion, when applying the established principles, which often proves problematic. The overarching aim, of not driving litigants from the seat of judgment without first affording them a fair hearing, is tempered by the need for efficiency and finality in litigation as well as the need to ensure respect for the court's rules procedure and timelines.

[17] The Civil Procedure Rules 2002 (as amended) provide :

Rule 13.2 *(1) The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because:*

a) In the case of a failure to file an acknowledgement of service any of the conditions in rule 12.4 was not satisfied;

b) In the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or

c) The whole of the claim was satisfied before judgment under this rule on or without an application.'

(2) The Court may set aside judgment under this rule on or without an application.

Rule 13.3 *(1) 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.*

(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

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it"

There is in this case no evidence, or assertion, that the judgment in default was irregularly entered. The 2nd Defendant concedes as much in paragraph 17 of his written submissions filed on the 20th may 2019. The application therefore falls to be considered under Rule 13.3.

[18] In this regard it is clear that the primary question is whether the proposed defence has a real, as against a fanciful, prospect of success. If it does the court must then consider whether, the application was made "*as soon as reasonably practicable"* and, whether "*a good explanation*" for the failure to file an

Acknowledgement of Service was provided. The approach, to be adopted when considering these issues, has been clearly outlined by Edwards JA (Ag) (as she then was) in the Court of Appeal. I cannot improve upon her analysis–

> *"81. Before beginning the assessment, I will first consider the principles applicable to the exercise of a discretion to set aside a default judgment. The focus of the court in hearing an application to set aside a default judgment regularly obtained under rule 13.4 of the CPR and in considering how to exercise its discretion should be on whether the applicant has a real prospect of successfully defending the claim. The court must also consider the matters set out in rule 13.3 (2) (a) and (b) (see the judgment of this court in* ***Merlene Murray-Brown v Dunstan Harper and Winsome Harper [2010] JMCA App 1, per Phillips JA.*** *The primary consideration therefore is whether the appellant has a defence on the merits with a real prospect of success.*
>
> *82. For there to be a real prospect of success the defence must be more than merely arguable and the court, in exercising its discretion, must look at the claim and any draft defence filed. Whilst, the court should not and must not embark on a mini trail, some evaluation of the material placed before it for consideration should be conducted. The application must therefore be accompanied by evidence on affidavit and a draft of the proposed defence.*
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> *83. A defendant who has a real prospect of successfully defending the claim may still be shut out of litigation if the factors in rule 13.3. (2) (a) and (b) are considered against his favour and if the likely*

prejudice to the respondent is so great that, in keeping with the overriding objective, the court forms the view that its discretion should not be exercised in the applicant's favour. If a judge in hearing an application to set aside a default judgment regularly obtained considers that the defence is without merit and has no real prospect of success, then that's the end of the matter. If it is considered that there is a good defence on the merits with a real prospect of success, the judge should then consider the other factors such as any explanation for not filing an acknowledgement of service or defence as the case may be, the time it took the defendant to apply to set the judgment aside, any explanation for that delay, any possible prejudice to the claimant and the overriding objective.

84. *The prospect of success must be real and not fanciful and this means something more than a mere arguable case. The test is similar to that which is applicable to summary judgments....*

85 *.....*

86. *Accepting that the principles to be applied regarding a defence on the merits in summary judgment applications are similar to that in an application to set aside a default judgment regularly obtained, a defence with a real prospect of success in such an application may therefore involve a point of law, a question of fact or one comprising a mixture of fact and law. A defence will have little prospect of success if it is weak or fanciful and lacking in substance or if it is contradicted by documentary*

evidence or any other material on which it is based. A defence consisting purely of bare denials may have little prospect of success (See ***Broderick v Centaur Tipping Services (2006) LTL 22//8/06 as cited in Stuart Sime's "A Practical Approach to Civil Procedure," 15th Edition at page 272, paragraph 21.21****.)*

87. In ***Swain v Hillman [2001] 1 All ER 91*** *Lord Woolf said that:*

> *"The words, "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, ... directed the court to the need to see whether there was a "realistic" as opposed to a "fanciful" prospect of success."*

Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited [2016] JMCA Civ. 39 (unreported judgment delivered 5th July 2016).

[19] In the case at bar I am satisfied that the Defence has no real prospect of success. The draft defence placed before the court, and the affidavits in opposition to this application, really amount to denials of liability. They do not condescend to the level of detail one would have expected of an attorney at law who took his obligations seriously. However the evidence, supportive of a line of defence, does not in this case end with the draft defence and the Defendant's affidavits. The Claimant has introduced material, placed before the Disciplinary Committee of the General Legal Council, by the Defendant. That documentation explains, in some detail, what was done with the money paid to the 2nd Defendant by the Claimant or its legal representative. The 2nd Defendant asserted that he paid the money to his client (the 1st Defendant) or to others on

the instructions of his client. It is clear that he neither paid the money to the mortgagee nor took any, or any reasonable, steps to ensure that the money was paid to the mortgagee. The 2nd Defendant states that the Claimant paid some money to the 1st Defendant directly. It is also asserted that one of the Claimant's cheques had been dishonoured and he claimed a set off or counterclaim.

[20] In dealing with the last point first I fail to see how, in a context where the sale agreement has failed due to the mortgagee's exercise of a power of sale, a dishonoured cheque can be a defence. The Claimant had been put in possession. Several instalments had been accepted and encashed subsequently. There is no suggestion, and in the circumstances there could not be, that the dishonoured cheque was the reason for the frustration or termination of the agreement for sale. Furthermore, and in any event, the claim on a dishonoured cheque can be pursued as a separate cause of action under the Bills of Exchange Act.

[21] As regards the other assertions by the 2nd Defendant these rise or fall on the question whether the fact, that the Claimant had its own attorney at law, relieves the 2nd Defendant of any duty of care. An attorney at law is part of a noble and honourable profession. The practice of law is reliant on certain standards of ethics and rules of conduct. Practice would become impossible if an attorney's word, for example, could not be trusted. The duties do not revolve only around the giving of formal undertakings. An attorney does not have a duty only to his client. The courts have, on occasion, implied duties to a third party, so that intended beneficiaries under a will, for example, have successfully sued the attorneys who negligently prepared it. The court is less likely to find that such a duty of care is owed to the party, on the other side of a transaction, who is legally represented. Highly persuasive authority, in recent times, decided not to impose such a duty in the ordinary conveyancing transaction see, **Gran Gelato Ltd v Richcliff (Group) Ltd[1992] Ch 560** and **P&P Property Ltd v Owen White & Catlin llp and another [2018] 3 WLR 1244**. In the latter case Patten LJ, explained Vice Chancellor Nicholl's judgment in the **Gran Gelato** case, and stated :

"74 *The imposition of liability in negligence towards a third party who is not the solicitor's client clearly requires something more than it being foreseeable by the solicitor that loss will be caused to the third party by a lack of care on the solicitor's part in carrying out whatever is the relevant task. Nor is it sufficient that the test of proximity is satisfied whether by an actual assumption of responsibility or by the existence of a direct interest on the part of the third party (as in Dean v Allin & Watts) in the product of the solicitors' instructions. The incremental approach approved in Caparo requires all these and any other relevant factors to be taken into account and globally assessed including any relevant policy considerations. In deciding whether it is just or reasonable to recognise a duty of care, the approach enshrined in the case law requires the court to take account of the contractual framework and any other factors bearing on liability. In Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 2) [1998] PNLR 564, 587–588 Neill LJ said:*

"The threefold test and the assumption of responsibility test indicate the criteria which have to be satisfied if liability is to attach. But the authorities also provide some guidance as to the factors which are to be taken into account in deciding whether these criteria are met. These factors will include:

"(a) The precise relationship between (to use convenient terms) the adviser and the advisee. This may be a general relationship or a special relationship which has come into existence for the purpose of a particular transaction. But in my opinion counsel for Overseas was correct when he submitted that there may be an important difference between the cases where the adviser and the advisee are dealing at arm's length and cases where they are acting 'on the same side of the fence'.

"(b) The precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.

"(c) The precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.

"(d) The presence or absence of other advisers on whom the advisee would or could rely. This factor is analogous to the likelihood of intermediate examination in product liability cases.

"(e) The opportunity, if any, given to the adviser to issue a disclaimer."

75 *The Supreme Court has recently reaffirmed the concept of an assumption of responsibility as the foundation of liability in negligence cases such as the present appeals: see NRAM Ltd (formerly NRAM plc) v Steel [**2018**] 1 WLR 1190. There the solicitor acting for a company with a secured loan from NRAM mistakenly prepared documentation which released the relevant charges rather than merely reducing the amount which they secured. The solicitor was not instructed by NRAM and their claim in negligence against her failed because it was not reasonable for NRAM to have relied on what she said and did when it was within their own knowledge that there was no intention to release the entire charge.*

76 *As Lord Wilson JSC explains in his judgment, the requirement that there should be an assumption of responsibility is to some extent a legal construct in the sense that in many cases the defendant solicitor or other professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair."*

[22] I find that the circumstances of the case before me are such that a duty ought to be imposed. The 2nd Defendant knew that the Claimant was purchasing property from the 1st Defendant. He knew that the property was subject to a mortgage. He knew also that the purchase price was paid by instalments which exactly matched the monthly mortgage obligation of his client, the 1st Defendant. He knew that the property would not be registered in the Claimant's name until the mortgage was discharged. He therefore knew that if the instalment payments delivered to him were not applied to the mortgage, as contemplated by the parties, the mortgagee might foreclose or exercise power of sale. It means that, as regards the sums paid to him, he accepted the responsibility to see they were

applied in the manner intended. He therefore had a duty to take reasonable steps to ensure they were applied in the manner contemplated by the agreement. The reasonable foreseeability of injury to the Claimant, if these payments were not applied in the manner contemplated, created a duty of care.

[23] This is not a case of negligent response to a requisition or of failure to verify his client's identity as in the cases cited. The 2nd Defendant, as custodian of money paid to him, which he knew was for a particular purpose, had a duty to ensure it was applied in the appropriate manner, or take reasonable steps in that regard. The 2nd Defendant cannot escape that responsibility by saying that, on his client's instructions, he did something else with the money. Were he to do so, he would at minimum, have a duty to advise the Claimant. Alternatively, he ought to decline to accept further payments and possibly withdraw as the attorney acting in the matter. It does not appear that he took any step to ensure that his client, the 1st Defendant, paid the mortgagee. In short he was complicit, by act or omission, in his client's intentional breach of contract. The subsequent exercise of a power of sale was, in whole or in part, a consequence of the 2nd Defendant's breach of his duty of care. It seems, on the facts of the case before me, that it is "fair just and reasonable' to impose a duty of care.

[24] My conclusion on the prospects for the 2nd Defendant's defence can be tested in another way. The question can be asked whether the 2nd Defendant had a duty to account for the money paid to him. The answer is obviously in the affirmative. The Claimant's attorneys might, at any stage of the transaction, have requested an account because the money was paid, on the common understanding/agreement, that: (a) the sale would proceed, (b) the purchaser put in possession, (c) completion, in the sense of transfer of a registered title would occur when the mortgage was discharged and, (d) the instalment payments of purchase price would be applied to discharge the mortgage. In effect the money is paid on trust to discharge the mortgage and therefore place the vendor in a position to make good title. The vendor was protected because the title remained in his name .Completion, being the transfer of title, was scheduled to occur 13 years later after the last instalment was paid. The instalment payments, made by the Claimant, were imbued with a trust. They were for the purpose of

paying off the mortgage owed by the 1st Defendant. Therefore the liability to account, for money paid to him, cannot be denied by the 2nd Defendant. An account is one of the remedies sought, against the 2nd Defendant, in the claim brought by the Claimant.

[25] The analysis at paragraph 24 above may be faulted because the Claimant at paragraph 7 of the Particulars of Claim asserts that at the time of contract it was unaware of the existence of a mortgage. If that is so, it may be argued, there could be no trust to discharge the mortgage. However the payments (over 13 years) were on account of the purchase price. Until and unless there was completion those funds are imbued with a trust. If the purpose, being completion of sale, failed then the money has to be accounted for as on a resulting trust. In this case there could only be completion if the mortgage was discharged .Hence, whether the Claimant was aware or not, the 1st and 2nd Defendants had a duty to apply the instalment payments received towards the discharge of the mortgage. Of course it is puzzling, to say the least, that the Claimant could be unaware of a mortgage registered on title to land it is seeking to acquire .It does not, even if true, affect the legal position. This turns on the purpose for which the payments were intended, a purpose for which the 2nd Defendant was fully aware, see paragraph 15 of his affidavit filed on the 10th April 2019.

[26] Liability, to account as trustees for money paid for a particular purpose that has failed, is well established, see **Barclays Bank v Quistclose Investments [1968] 3 All ER 651**. This trust principle has been applied where attorneys hold purchase money in respect of a sale which was not completed see, **Purrunsing v A'Court &Co (a firm) and another [2016] 4 WLR 81** and **P& P Property Ltd v Owen White & Catlin llp and another [2018] 3 WLR 1244.** In these cases the judges reference either the Law Society Code for Completion by Post (2011) and/or the Law Society's Conveyancing Handbook. Those documents created neither the resulting trust nor any new principle. In the case of the Law Society Code it makes applicable to the transaction undertakings and duties which may otherwise have to be expressed or implied. The Conveyancing Handbook was relevant because in that case the issue was whether the attorney had discharged a duty imposed by law to identify and verify his client. This of course in the

context of money laundering legislation. The underlying equitable principles remain. In the matter before me the purchase money, to be paid over 13 years and to be applied to discharge the mortgage prior to completion in the 13th year , is imbued with a trust. The 2nd Defendant, it seems to me, will have no answer when called upon to account. Those cases also discussed the possibility of relief for the trustee .There is no real prospect of the 2nd Defendant being granted relief given the fact that he took no step to ensure the money was used for the purpose it was paid to him .He was also well aware of the dire consequences for the Claimant if, the mortgage went into arrears and the mortgagee either foreclosed or, as indeed transpired, exercised power of sale.

[27] The defence not having a real prospect of success makes it unnecessary to consider, whether the application was brought as soon as reasonably practicable or, whether a good reason was offered for allowing judgment in default to be entered. Nevertheless, and for completeness, I will do so.

[28] On the matter of delay, in making the application, the judgment in default came to the Claimant's notice on the 21st March 2019 and the application was filed on the 20th April 2019. Claimant's counsel, endeavours to impugn the time taken, by asking the court to imply awareness of the existence of the judgment prior to it being served on the 2nd Defendant. I do not think I can do so on the evidence available. The fact, that the judgment in default had been on the Court's file since 6th April 2018 and that the 2nd Defendant's attorneys searched the court file in February 2019, is not a sufficient basis to assume they were aware of the entry of the judgment. Indeed the 2nd Defendant's attorneys applied for an extension of time to file Defence. This suggests they were not aware of the default judgment. I find the application to set judgment aside was made as soon as reasonably practicable.

[29] The 2nd Defendant's explanation, for failure to enter an Acknowledgement of Service, is that his attorneys at law omitted to do so. The attorneys have explained that the Claim Form was placed in error on their file treating with the report to the disciplinary committee. It is the type of thing that happens in a legal office from time to time. This resulted in their failing, by oversight, to file an

Acknowledgement of Service. The explanation demonstrates that the Claimant was not deliberate, or otherwise culpable, in allowing the judgment to be entered. He had not ignored the court's process. He had taken the Claim Form promptly to his attorneys at law. I consider the explanation a "*good*" one within the meaning of the rules. Administrative mistakes, and attorneys errors, have been accepted as good explanations: per Edwards JA at paragraphs 124, and 127 of ***Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited [2016] JMCA Civ 39*** *(*unreported judgment delivered 1st July 2016); see also ***Pacha Zona Libre v Mamdouh Saleh Abduljaber Sawalha t/a Madd Deal Wholesale & Retail [2014]JMSC Civil 232*** (unreported judgment delivered 13th November 2014); ***Hyacinth Mathews v University Hospital Board of Management [2015] JMSC Civil 40*** (unreported judgment delivered 27th January 2015) [upheld on appeal on the 2nd October 2015, SCCA no 12 of 2015.]; **Sherine Blake v LDcosta Loans and Financial Management Limited et al [2015] JMSC Civ 14** (unreported judgment delivered 20th April 2015) ; and, **Naetyn Development Company Limited v Kirk Holbrooke [2017] JMSC Civ 170** (unreported judgment delivered 27th October 2017).

[30] Each case turns on the facts before it so, in the absence of evidence or in the context of an extended delay, an administrative error may not be a "good" explanation, see ***Seymour Ferguson v Ameco Caribbean Inc et al [2014] JMSC Civ 233*** (unreported judgment delivered 13th November 2014) and ***Beverly Spence-Chin v Munair Badaloo et al [2014] JMSC Civ 238*** (unreported judgment delivered 6th January 2014). There is ,in the latter case, to be found an appropriate quote from the Caribbean Court of Justice :

> *" Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency, as we made clear in Barbados Rediffusion Services Ltd v Marchandani [2006] 1 CCJ (AJ) @ [44],[45] and [53], Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural*

breach committed by their attorneys. With great respect to the court below we disagree that there is anything in these rules to suggest that there is a time limit on the courts ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times."

Gladston Watson v Rosedale Fernandes [2007] CCJ 1 (CCJ Appeal No.CV 2 of 2006) per The Hon. Mr Justice Adrian Saunders (now the President of the Court) at paragraph 39.

[31] It certainly is a pity, and a matter for adverse comment, that the real reason for allowing judgment to go by default was not initially stated. The Claimant at first cited his work pressures, and the fact that he had relocated offices, as reasons which prevented him giving instructions to his attorneys. This was false. The evidence is clear that his attorneys had instructions, sufficient to file a response to the complaint at the General Legal Council, long before this Claim was filed. His attorneys therefore, but for the misfiling of the documents, would have been able to file an acknowledgment and a defence, within the time allotted. I considered but ultimately decided that I would not have, on account only of this want of candour, refused relief to the 2nd Defendant. He would instead have been asked to pay, the costs of the application and of the several adjournments, in any event.

[32] In the final analysis however, and for the reasons stated, I find that the 2nd Defendant has no real prospect of successfully defending the claim The application to set judgment aside is refused. Costs will go to the Claimant to be taxed or agreed.

David Batts
Puisne Judge