IN THE COURT OF APPEAL OF BELIZE A.D. 2008

CIVIL APPEAL NO. 13 OF 2007

BETWEEN

BELIZE TELECOMMUNICATIONS LIMITED **Appellant**

AND

BELIZE TELECOM LIMITED
INNOVATIVE COMMUNICATIONS CORPORATION LLC
INNOVATIVE COMMUNICATIONS CORPORATION **Respondents**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Nigel Plemming, Q.C. and Mr. Rodwell Williams, S.C. for the appellant.
Mr. Michael Peyrefitte for the respondents.

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25 October 2007 & 13 March 2008.

CAREY, JA:

1. This appeal which comes before us by leave of Arana J relates to two orders made by her dated respectively 25 January whereby she set aside a default judgment in the action, and 27 April 2007 whereby she refused to vacate the order of 25 January on the failure of the first respondent to

comply with an unless order to pay costs, which would have had the effect of reinstating the default judgment.

2. The judge in dealing with the first application found that service was properly effected and that there had been inordinate delay in making the allegation and then she said this (p.27):

> "I believe that in fairness to the Applicants/Defendants they should be given an opportunity to ventilate their side of the story before the courts especially in light of the gargantuan amount of damage (sic) that have been awarded to the Claimant"

So far as the other application was concerned we were not afforded an opportunity to benefit from her reasons for the decision she made. At all events, no reasons have been included in the record provided for our use. Perforce, we must do the best we can in their absence. That is much to be regretted.

THE APPLICATION TO SET ASIDE DEFAULT JUDGMENT

3. The principles governing the setting aside of default judgments are governed by Rules 13.3 of the Supreme Court (Civil Procedure) Rules which provide as follows:

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 practical after finding out that judgment has 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.

By way of explanation, the reference to Rule 13.2 in the extract concerns judgments that have been irregularly obtained. The situation is otherwise in the present matter before us.

4. It was submitted by Mr. Plemming Q.C., that all the conditions must be satisfied to allow the court properly to exercise its discretion. He submitted that the phrase "only if", demonstrates that the conditions are to be understood in a cumulative sense. The judge, he said, in concluding that only one was satisfied, namely, that the respondent had a real prospect of success was not in a position to exercise her discretion and thus had erred in law and misdirected herself. With respect to the condition which found favour with the judge, he pointed out that the respondent was required to show not only a good defence but that the defence was such that it has a real prospect of success. It was a critical part of the onus which the Rules place on an applicant. The respondents had not addressed the merits of the defence in any aspect of their application. Indeed a proposed defence had been found with the papers supporting the application before Arana J and it simply denied the factual statements made by the appellant. That in itself was in breach of Rule 10.5(4):-

> "Where the defendant denies any of the allegations in the claim form or statement of claim on (a) the defendant must state the reasons for doing so; and (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence".

It was clear that condition (c) [Rules 13.3(1)(c) of the Rules] had not begun to be satisfied. Mr. Peyrefitte had no cogent answer to the submissions advanced on behalf of the appellant, which were well founded. But the matter was further compounded because the judge took

into consideration a matter which she should not have. It was mentioned in paragraph 2 of this judgment and forms the basis on which she rested the grant of the application. She was, in my opinion, led astray by an argument of Mr. Peyrefitte that she should have regard to the amount of the judgment and the damages assessed, and the overriding objective to do justice, that is, to allow the respondent to defend the "massive" claims. That submission showed a misconception regarding the overriding objective.

5. As counsel for the appellant submitted below and Mr. Plemming, Q.C. maintained before us, the size of the award was not a consideration in the application to set aside the default judgment that was governed as previously noted, by the principles stated in Rule 13.3(1). The reference in Rule 1.1 to dealing with cases "*justly"* means ensuring as far as practicable that the parties are on an equal footing, saving expenses, and that cases are dealt with proportionate to "the amount of money involved", these are relevant factors at the case management stage of the proceedings – The size of the award was an entirely irrelevant consideration and as Mr. Plemming argued should have been disregarded. That error allows this court to interfere and set aside her decision. See the observations of Lord Diplock in *Hadmor Productions v. Hamilton [1983] A.C. 191*. Regrettably, the judge misunderstood the law and took into account matters, she should not have.

REFUSAL TO REINSTATE DEFAULT JUDGMENT UPON A FAILURE TO FULFILL CONDITION

6. The "unless order" from which this appeal stems was made on 18 January 2007 by Arana J:

> "THIS COURT DOTH ORDER that judgment in default of acknowledgement of service entered on the 20th day of July, 2006

by the claimant against the First Defendant be set aside on condition that the First Defendant to pay the Claimant costs in the sum of $105,487.50 by February 8th, 2007 and the defendants do file and serve their defence by February 12th, 2007".

This order was not complied with, the first respondent did not pay. The appellant accordingly applied for an order to vacate the order setting aside the default judgment. It was refused. We have not been vouchsafed the reasons or even a transcript of the proceedings.

7. Mr. Peyrefitte doubtless explained to the court below as he did to us that he had received a cheque in the amount of the costs payable but it arrived after the deadline had passed. He had however indicated to Mr. Williams, S.C. that he would pay the costs ordered so soon as the cheque was cleared.

8. The current rules do allow for "unless orders" which it is expected, will be complied with. There is no rule requiring an application to be made to activate the implicit sanction and inevitably in my view, the consequence ordered follows automatically upon breach. I did not understand Mr. Peyrefitte to be applying in this court for any relief nor did I understand on what basis he was supporting the judge's denial of the application. In my judgment no basis for relief has been shown and the decision of the judge was incorrect. The order should accordingly be set aside.

9. In the final result, the orders made below were set aside. We announced our decision that the appeal be allowed on 25 October 2007 and promised to put our reasons in writing. This is my contribution explanatory of the order made October last.

CAREY JA

MORRISON JA

10. This is an appeal against two orders made by Arana J in the Supreme Court as follows:

(a) an order dated 25 January 2007 setting aside a judgment in default of acknowledgment of service entered on 20 July 2006 by the Belize Telecommunications Limited ("BTL") against the Belize Telecom Ltd. ("the respondent"), on condition that (i) the respondent pay the appellant's costs in the sum of $105,487.50 by 8 February 2007 and (ii) the respondent file and serve its Defence by 12 February 2007; and

(b) an order dated 27 April 2007 refusing to vacate the above order and reinstate the judgment in default of acknowledgment of service upon the failure by the respondent to fulfill the condition to pay costs on which the judgment was set aside.

11. The Claimant in the proceedings before the Supreme Court was BTL but in May 2007 the undertaking of that company was transferred to the appellant, which thereafter carried on this appeal in its name.

12. At the conclusion of the hearing on 25 October 2007, the appeal was allowed, the orders of Arana J set aside and the judgment in default of acknowledgement of service entered on 20 July 2006 reinstated, with costs to the appellant to be agreed or taxed. It was also ordered that the sum of $105,487.50 be paid over by the respondent's attorney-at-law to the appellant's attorneys-at-law on or before 2 November 2007. These are my reasons for concurring in that decision.

13. This appeal concerns two issues arising under the provisions of the Civil Procedure Rules 2005 ("the CPR"), viz, (i) what are the circumstances in which a regular judgment obtained in default of acknowledgement of service or defence may be set aside; and (ii) what is the true meaning and effect of an "unless" order of the court. The underlying facts of the matter are largely undisputed and can accordingly be briefly stated.

14. On 26 May 2006 BTL filed an action against the respondent and two others seeking to recover substantial sums by way of damages for breach of contract and misrepresentation. The claim form and statement of claim were duly served on the respondent, but not on the other two defendants and on 20 July 2006 an order was made by the Supreme Court in favour of BTL against the respondent, in default of acknowledgement of service, whereby it was adjudged that the respondent pay to BTL $14,325,004.00 with interest at 6% per annum from the date of judgment until payment, and costs taxed and allowed at $105,487.50.

15. On 16 November 2006, the respondent applied to the Supreme Court to set aside the default judgment and at a hearing on 18 January 2007, after considering the affidavit evidence filed on behalf of the parties, Arana J found that the respondent had neither made its application to set aside the judgment as soon as reasonably practicably after finding out that it had been entered against it, nor had it provided a good explanation for the failure to file an acknowledgement of service. The learned judge nevertheless made an order on 25 January 2007 that the default judgment should be set aside on condition that the respondent pay BTL's taxed costs of $105,487.50 no later than 8 February 2007 and file and serve a defence to the claim no later than 12 February 2007.

16. While this court did not have the benefit of written reasons for having made this order from the learned judge, the transcript of the proceedings before her, which was made available to us, clearly reflects her findings of inordinate delay and no sufficient explanation, as well as her reason for making the order sought, which was as follows:

> "There only remains the question for this court whether the defendant has a reasonable prospect of successfully defending this claim. It appears from the defence that has been attached by the defendant which should in fact have been exhibited to an affidavit that the defendants are saying that they did not have an agreement with the claimants. If that is so, and if that is proven, then their defence would succeed. I believe that in fairness to the Applicants/Defendants they should be given an opportunity to ventilate their side of the story before the Courts, especially in the light of the gargantuan amount of damages that have been awarded to the claimants. I therefore rule that the application be granted and the default judgment be set aside."

17. In the event, the respondent failed to pay the taxed costs of $105,487.50 by 8 February 2007 (though a defence was filed as ordered by 12 February 2007) and on 9 February 2007 BTL applied for an order to vacate the first order on the ground of the respondent's failure to comply with this condition, and for an order that the judgment in default of acknowledgment of service dated 20 July 2006 be reinstated. On 18 April 2007, Arana J made a further order refusing this application, with the result that the order setting aside the default judgment remained in force. Again, there were no reasons given for this decision, though it may well be that Arana J was influenced by the fact that, although the costs were not in fact paid by 8 February 2007, there was evidence before her that the respondent's attorney-at-law had on that very date received from his client uncleared funds to make the payment.

18. This appeal was filed, with the leave of the judge, from both orders on 2 May 2007 on the following grounds:

> 1. The learned trial judge erred in law and misdirected herself in setting aside the judgment in default of acknowledgment of service entered into on the 20 July 2006 having found that the First Defendant failed to (i) apply to the Court as soon as practicable after finding out that the judgment had been entered and (ii) give a good explanation for the failure to file an acknowledgement of service;
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> 2. the learned trial judge erred in law, or alternatively erred in exercising her discretion under CPR 13.3(1), in finding that the First Defendant has a reasonable prospect of successfully defending the claim;
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> 3. the learned trial judge erred in law, or alternatively erred in exercising her discretion under CPR 13.3(1), by taking into account factors not prescribed in CPR 13.3(1); and
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> 4. the learned trial judge erred in law, or alternatively erred in exercising her discretion under CPR 13.3(1), by taking into

account a proposed defence of the First Defendant not exhibited to any affidavit required by CPR 13.4(3);

5. the learned trial judge erred and misdirected herself in refusing to reinstate Default Judgment on failure of First Defendant to fulfill the condition to pay costs.

Ground 1

19. Part 13 of the CPR, so far as it is relevant, is in the following terms:

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.

(2) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.

13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence.

13.5 If judgment is set aside under Rule 13.3, the general rule is that the order must be conditional upon the

defendant filing and serving a defence by a specified date.

20. It is common ground that the default judgment in this case was not irregularly obtained and therefore did not fall within Rule 13.2, under which the court has a mandatory obligation to set aside default judgments in that category. The applicable rule is therefore is Rule 13.3, which sets out the pre-conditions to the exercise of the court's discretion to vary or set aside a regularly obtained default judgment.

21. Mr. Plemming QC submitted that the clear effect of Rule 13.3(1)(a), (b) and (c) is that before the court can exercise its discretion to set aside a default judgment under this rule, the defendant must satisfy all three pre-conditions. This was clear, he submitted, as a matter of language, from the use of the conjunctive "and" linking Rule 13.3(1)(b) to (c) and, as a matter of inference, from the limiting words "only if" before the itemization of the pre-conditions. It followed, if this submission was accepted, that Arana J having found that pre-conditions (a) (no inordinate delay), and (b) (a "good explanation") had not been established, it was not thereafter open to her to set aside the default judgment on the basis either of a positive finding in respect of (c) (a real prospect of a successful defence), or for any other reason.

22. Mr. Peyrefitte referred us to Rule 1.1.2(c)(i) ("Dealing justly with the case includes … dealing with the case in ways which are proportionate to … the amount of money involved") and submitted on the basis of this that it was open to the court on an application to set aside a default judgment to take into account the amount of the judgment. In the light of the fact that "and" can sometimes be taken to mean "or", he submitted further, and therefore the word "and" at the end of Rule 13.3(1)(b) should therefore be read disjunctively and not conjunctively. In a brief reply, Mr. Plemming QC

submitted that the concept of the overriding objective cannot be used to rewrite the rules.

23. There can be no question, in my view, that the appellant is plainly entitled to succeed on this ground. I agree with Mr. Plemming QC that the requirement of Rule 13.3(1) is that all three pre-conditions be satisfied before the court can exercise its discretion to set aside a regularly obtained default judgment. Stroud's Judicial Dictionary of Words and Phrases (7th edition, page 128), to which we were referred by Mr. Plemming, indicates that the word "and" "has a generally cumulative sense, requiring the fulfillment of all the conditions that it joins together, and herein it is the antithesis of or". Although the learned editor of Stroud's does go on to make the point that "and" may sometimes, "by force of a context", be used as "or" (a point embraced by Mr. Peyrefitte), the context in which it appears in Rule 13.3(1)(b) in fact points the other way, particularly in the light of the clear statement by the rule makers that, save in the case of a judgment irregularly obtained, the court may set aside a default judgment "only if" the specified conditions are satisfied on the defendant's application.

24. It may be of interest to note that this interpretation of the rule is entirely in keeping with the approach taken by the courts in both the Eastern Caribbean and Jamaica with regard to identically worded rules. In **Luke v Alexander** (Claim No. DOMHCU 2001/0161, judgment delivered 28 October 2002), Rawlins J (sitting in the High Court of Justice of Dominica) observed that Rule 13.3(1) of the Eastern Caribbean Court Civil Procedure Rules 2000 "sets out 3 conditions, which are conjunctive, that are to be satisfied if the Court is to be moved to exercise its discretion to set aside a judgment entered in default" (paragraph 7). And in **Lewis v Dunn** (Suit No. CL. 2001/L098, judgment delivered 20 May 2004), a case from Jamaica, Sykes J (Ag) (as he then was) concluded, after a close

examination of Rule 13.3(1) of the Jamaican Civil Procedure Rules 2002, that "all three conditions are necessary conditions that must be met."

25. As Mr. Plemming QC very helpfully pointed, out Rule 13.3(1) of the English Civil Procedure Rules, in contrast, gives to the English court a discretion whether to set aside a default judgment **either** on the ground that the defendant has a real prospect of successfully defending the claim **or** on the basis of "some other good reason". It may also be of interest to the profession in Belize to note that, in Jamaica Rule 13.3(1), in identical terms to our rules, was in 2006 amended to conform with the current English rules after a number of judicial decisions to the same effect as **Lewis v Dunn** (supra).

26. In the instant case, therefore, the learned judge fell into error, having expressly found that two of the three pre-conditions in Rule 13.3(1) had not been satisfied, when she nonetheless proceeded to set aside the default judgment on the basis that one of them had been met.

Ground 2

27. In support of this ground, Mr. Plemming QC pointed out in his skeleton argument that, on the application to set aside the default judgment, the respondent provided the court with no information as to the merits of its prospects of successfully defending the claim, either in the proposed defence found among the papers filed with the application on 16 November 2006, or in the affidavit evidence filed in support, which dealt exclusively with the question of service. The proposed defence itself amounted to no more than a denial of all the allegations in the claim form (it was, as Mr. Williams SC had put it in the proceedings before the judge, "a merry-go-round of denial"), in breach of Rule 10.5(4), which requires that denials in a defence be supported by stated reasons.

28. Save for his reference to the overriding objective, Mr. Peyrefitte made no specific response to this, or indeed any other, ground. Which is just as well, as Mr. Plemming's point on this ground is, it seems to me, quite unanswerable. The requirement of Rule 13.3(1)(c) is that the defendant must show "a real prospect of successfully defending the claim." The burden of proof on an application under this rule lies squarely on the defendant "to satisfy the Court that there is good reason why a judgment regularly obtained should be set aside" (per Potter LJ in **ED & F Man Liquid Products Ltd v Patel & Anr [2003] EWCA Civ. 472**, at paragraph 9, a case cited by Mr. Plemming), and it is therefore for the defendant to show that the proposed defence has a realistic, as opposed to a fanciful, prospect of success (see per Lord Woolf MR in **Swain v Hillman [2001] 1 All ER 91, 92**). Or, to put it another way, "the defence sought to be argued must carry some degree of conviction." (see Potter LJ in **ED & F Man Liquid Products Ltd v Patel & Anr**, supra, at paragraph 8, applying the approach of the Court of Appeal in **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.** [1986] 2 Lloyd's Rep 221).

29. Although it is clearly no part of the court's duty to conduct a mini-trial on untested affidavit evidence at this stage (see per Lord Woolf MR in **Swain v Hillman**, supra, at page 95, in the context of a summary judgment application), the court can nevertheless subject the material put forward by the defendant to some analysis to see whether there is any real substance in the factual assertions made "particularly if contradicted by contemporary documents" (per Potter LJ in **ED & F Man Liquid Products Ltd v Patel & Anr**, supra, at paragraph 10).

30. In the instant case, neither the affidavit evidence nor the proposed defence filed by the respondent provided a basis upon which it could be concluded that the defendant had any real prospect of defending the

claim. The language used by the learned judge in her ruling on this point (see paragraph 16 above) demonstrates clearly, in my view, that she did not address this question of whether the defendant had any real prospect of success with anything approaching the rigour required by the rules and the authorities. Indeed, her comment that "It appears … that the defendants are saying that they did not have an agreement with the claimants", can only be justified by a highly indulgent reading of the proposed defence, which was, in breach of the rules, laconic in the extreme.

Ground 3

31. Mr. Plemming's submission that, by having regard to "the gargantuan amount of damages" awarded to the claimant as a factor entitling the respondent to be heard in defence to the claim, the learned judge clearly took into account an irrelevant matter, is, in my view, equally unanswerable. Neither the size of the claim nor of the judgment is one of the factors enumerated in Rule 13.3(1) and ought not therefore to have attracted the judge's attention as a relevant factor.

Ground 4

32. Rules 13.4(1)(2) and (4) require that an application to set aside a default judgment must be supported by evidence and that the defendant's affidavit in support "must exhibit a draft of the proposed defence." In this case, it was submitted, neither of the affidavits filed on behalf of the respondent referred to the merits of the proposed defence, with a view to showing a real prospect of a successful defence, nor was a draft of the

proposed defence exhibited, as required by the rules. Arana J herself recognized this by her comment that the proposed defence "should in fact have been exhibited to the affidavit", but she obviously did not think that this omission was sufficiently grave to prevent her giving the application to set aside consideration on such merits as there might have been. As a result, the appellant contended in this court, the learned judge erred in law, or in the exercise of her discretion under Rule 13.3(1), "by taking into account a proposed defence … not exhibited to any affidavit, as required by CPR 13.4(3)."

33. In my view, this ground must also succeed. Given the significance that the rule attaches to the defendant having a real prospect of successfully defending the claim, affidavit evidence speaking specifically to the merits of the claim, as well as the proposed defence, are critical to a proper judicial assessment of the application to set aside. The requirement that the proposed defence be exhibited to the affidavit is stated in mandatory terms ("must exhibit") and is to be so treated by courts hearing such applications. The affidavit evidence must, in my view, vouchsafe the contents of the draft proposed defence, as a consequence of which it is not enough to produce a draft unconnected to the affidavit evidence (as was done in this case).

Ground 5

34. This ground relates to the second order made by Arana J refusing the appellant's application to reinstate the default judgment upon the non-fulfillment of the condition that the respondent pay the taxed costs to the appellant by 8 February 2007. Mr. Plemming QC submitted that the learned judge's original order was in substance an "unless order", with the consequence that once the condition on which it depended had not been

satisfied, and no relief had been sought from the court, the implicit sanction in the order for non-compliance took effect. Mr. Peyrefitte told this court that the learned judge had been informed by him at the hearing that the cheque sent to him by his client to satisfy the order had been cleared and that he was prepared to pay it over, but that it was Mr. Williams SC's position, on behalf of the appellant, that he was not prepared to accept it at that obviously late stage.

35. This ground of appeal must, in my respectful view, succeed as well. As was confirmed by the Court of Appeal in England in **Marcan Shipping (London) Limited v Kefalas [2007] EWCA Civ 643** (judgment delivered 17 May 2007), it has long been the position, both before and after the CPR (in England and in Belize) came into effect, that a failure to comply in any material respect with an unless order results in the sanction becoming effective without any further order of the court, though this is naturally subject to the jurisdiction of the court, pursuant to Rule 26.8, to grant relief by extending time for compliance.

36. At the hearing before Arana J on 18 April 2007, the appellant was in my view fully entitled to an order (if, indeed, any further order was in fact required) reinstating the default judgment as a consequence of the non-fulfillment by the respondent of the condition as to payment of the taxed costs within the prescribed time.

37. These are my reasons for concurring in the order made on 25 October 2007, allowing the appeal and reinstating the judgment in default of acknowledgement of service entitled on 20 July 2006, with costs to the appellant to be agreed or taxed. The further order for payment over of the sum of $105,487.50 to the appellant's attorneys-at-law related to the taxed costs on the entry of the default judgment. This amount, which as already noted was in the possession of the respondent's attorney-at-law (see

paragraph 34) plainly represents moneys due to the appellant in any event.

MORRISON JA

MOTTLEY P

I agree.

MOTTLEY P