

IN THE SUPREME COURT OF BELIZE A.D. 2011

CIVIL APPEAL NO. 1

BETWEEN

**HENRY CHANEK
BELIZE WESTERN ENERGY LIMITED**

APPELLANTS

AND

AMOS WRIGHT

RESPONDENT

Mr. Estevan Pererra for appellants.
Mr. Ernest Staine for the respondent.

AWICH Chief Justice (Ag)

1.6.2011

JUDGMENT

Ex tempore

1. *Notes: Civil Practice and Procedure; an appeal from an order made by the Registrar refusing an application for an order to set aside default judgment; whether draft defence exhibited by the supporting affidavit is not part of the affidavit; whether application made promptly; good explanation for not filing defence in time; a defence with good prospects of success – R. 13.3 and 13.4.*

2. On 25.2.2011, a judgment in default of filing defence was entered against the two appellants/defendants, Henry Chanek and Belize

Western Energy Limited. The judgment was an interlocutory one for damages to be assessed. The claim was in negligence arising from a motor vehicle collision.

3. The two appellants/defendants applied for an order setting aside the default judgment. Their joint application was made under R 13.3 of the Supreme Court (Civil Procedure) Rules, 2005. They sought to show that they had good explanation for failing to file defence in time, and that they otherwise had a defence with real prospects of success. The application was presented to the learned Registrar who dismissed it on the ground, I understand, that the affidavit itself did not contain the grounds that would make the defence have good prospects of success, and it was not good enough that the grounds were in the draft defence exhibited by the affidavit supporting the application.

4. The relevant **Supreme Court (Civil Procedure) Rules, 2005**, are in **Part 13** 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 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.

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.”

5. **R. 13.4(3)** provides that the affidavit supporting the application “*must exhibit a draft of the proposed defence.*” In my respectful view, what is exhibited by an affidavit must be regarded as part of the affidavit. The proposed defence was part of the affidavit.

6. The weak points in the appeal; and must have been the weak points in the application before the Registrar, were two. First, when the second appellant received service of the claim form, the second appellant was aware that the first appellant was no longer in its employment. If the

second appellant therefrom experienced any difficulty in tracing him, the second appellant should have sought agreement of the respondent/claimant to extension of time to file defence. Parties may agree to extension of time up to 56 days – see **R.10.3(4), (5) and (6)**. If the respondent were unreasonably to refuse a request for extension of time, the second appellant would apply to court under **R.10.3(8)**, for extension of time by court.

7. Secondly, the second appellant did not have to wait for a copy of the default judgment to be sent by the respondent. Once the second appellant discovered from the respondent's attorney on 15.2.2011, that a default judgment had been entered, the second appellant could have gone to inspect the case file at the court Registry and made the application for an order to set aside the default judgment promptly. There was no need to wait for a copy of the default judgment from the respondent. The application for an order setting aside default judgment was filed only on 15.3.2011, after attorneys for the appellants had found out on 15.2.2011, that default judgment had been entered against them.
8. The appellants did not meet the requirements in **R. 13.3(1)(a) and (b)**. They did not make their application as soon as reasonably practicable after finding out that default judgment had been entered. They also failed to give a good explanation as to why they did not seek extension of time which would have made it possible to file defence in time.

9. In addition, I am not persuaded on the affidavits that there are good prospects for the defence to succeed.

10. The appeal of Henry Chanek and Belize Western Energy Limited, dated 5.4.2011, amended on 6.5.2011, is dismissed. Appellants will pay the costs of the appeal to the respondent.

11. Unless parties agree on the quantum of damages; evidence for assessment shall be by affidavits. Each party must file affidavit or affidavits within 21 (twenty one) days of today. Direction hearing will be on 14.7.2011 at 9:30 a.m. Any party wishing to cross-examine a deponent must serve notice of the intention to do so on the others by 8.7.2011. Date of hearing, if it will be necessary, shall be 4.11.2011 at 9:30 a.m.

12. **Delivered this Wednesday the 1st day of June 2011**
At the Supreme Court
Belize City

SAM LUNGOLE AWICH
Acting Chief Justice
Supreme Court