JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 3/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	**KEN SALES & MARKETING LIMITED**	**APPELLANT/ DEFENDANT**
AND	**JAMES & COMPANY (A FIRM)**	**RESPONDENT/ CLAIMANT**

Ms. Carol Davis for Appellant

Audel Cunningham and Oswald James
instructed by James & Co., for Respondent

14th 15th 16th November & 20th December 2005

HARRISON, P.:

This is an appeal from the judgment of Norma McIntosh, J. on 6th January 2005 refusing to set aside a judgment entered on 22nd November 2004 in default of acknowledgement of service. We heard the arguments herein on 16th November 2005 and dismissed the appeal with costs to the respondent to be agreed or taxed. These are our reasons therefor.

The appellant company was represented by the respondent firm (respondent) in a suit No. HCV 1404/03 Ken Sales vs Reliance Group of

Companies. The appellant paid to the respondent's attorneys-at-law costs of $302,000.00 (reduced from $480,116.31).

The appellant and respondent then signed on 26th September 2003 a contingency fee agreement authorizing the respondent to act on behalf of the appellant. Clause 2 read:

> "2. A contingency fee in the amount of FIVE (5%) PERCENT of any amount recovered from those amounts demanded by Reliance Group Ltd. and/or Gordon Tewani in respect of the said mortgages and demand loan."

Under the contingency fee agreement the respondent by letter dated 10th June 2004 claimed a sum of US$35,000.00, on the basis that through negotiations the original sum demanded by the Reliance Group had been reduced by US$700,000.00 which represented the amount "recovered".

Endorsed on the said letter was a notation by the appellant:

> "As discussed we are selling the Slipe Road Properties and as soon as same is finalized we will submit payment from the proceeds. (Sgd.) K. Biersay 17/6/04."

The payment was not made. Letters of demand dated 30th July 2004 and 23rd August 2004 were sent to the appellant.

The respondent filed the instant suit on 24th September 2004 claiming the sum of US$35,000.00 pursuant to the said agreement.

One Beresford Richards by affidavit dated 28th September 2004 swore that he served the appellant on 25th September 2004 by handing the Claim Form to Ken Biersay, managing director of the appellant.

No acknowledgement of service was filed after the 14 days of service of the claim as required by rule 9.3(1) of the Civil Procedure Rules 2002. Judgment in default was consequently entered on 22nd November 2004 against the appellant and Ken Biersay.

On the 24th November 2004 the appellant filed a Notice of Application to set aside the default judgment on the ground that:

> "(The Default judgment (was) irregular, as the Claim form and particulars of claim were not served on the 2nd Defendant."

and also that:

> "... there are good reasons why the acknowledgement of service and the Defence were not filed on time and the Defendants both have good Defences to the matter herein."

The appellant relied on the affidavit of Ken Biersay dated 24th November, 2004.

On 6th January 2005 before Norma McIntosh, J it was argued by way of the said affidavit by the appellant that "on or about October 2004 the claim form and particulars were delivered to the office of his company at 113 Constant Spring Road, Kingston 10" and not brought to his attention "until towards the end of October 2004." He stated that the respondent "failed to provide legal services agreed" and that he "had to pursue on my own negotiations for purposes of settling the matter."

The learned judge found that the appellant was properly served, that the endorsement by the respondent on the letter dated 10th June 2004 was an

acceptance of the fees claimed and that there was no good reason for not filing the acknowledgement of service in time.

The learned judge in accordance with the provisions of rule 13.3(1) found that there was no good explanation for the failure to file an acknowledgement of service to the claim form and on an assessment of the defence found that the appellant had "no real prospect of successfully defending the claim."

Before us, the appellant did not challenge the finding of the learned judge that the service was not irregular. Counsel Miss Davis argued principally that:

(1) There was a good reason why the acknowledgement of service and defence were not filed in time.

(2) The application to set aside the default judgment was made as soon as was reasonably practicable that is, promptly; and

(3) There was a good defence in that:

(a) no amount was "recovered", which was the condition rendering the fees being payable
(b) the agreed procedure to send the bill to an "independent costs man," if challenged, was not employed and
(c) the appellant's endorsement on the letter dated 10th June 2004 should not be read as an acceptance of the charges, but an agreement to pay "some fees", and the appellant did not then have independent advice.

In upholding a preliminary objection this Court refused the appellant's application to argue that the said agreement was in breach of the rule against champerty and therefore void and unenforceable and also that the agreement was "unfair

and unreasonable" in view of section 21 of the Legal Profession Act. This was on the basis that these points were not argued before Norma McIntosh, J whose judgment was being challenged.

Rule 13.3(1) empowers a court to set aside a judgment in default entered regularly, only if, the defendant –

(1) applies to the court promptly

(2) gives a good explanation for the failure to file an acknowledgement by service or a defence and,

(3) has a real prospect of successfully defending the action.

These conditions have to be satisfied, in that, the court must consider them cumulatively, and only if, proven, will the court exercise its discretion to set aside the judgment.

Under the old rules, the prime emphasis was placed on the defendant having a good defence. Even if the explanation for the failure to file the acknowledgement was not prompt or the explanation was unsatisfactory, the good defence would predominate, and influence a court greatly in setting aside a default judgment. The approach of the court as was established by Lord Atkin in ***Evans v. Bartlam*** [1937] A.C. 473 as to setting aside judgment by default, at common law is significant. Where there was no determination of the case on its merits a court would always lean towards setting aside a judgment entered due to a procedural breach. Note also ***Vann v. Awford*** [1986] Times L.R. 23/4/86; (1986) 130 SJ, where even a lie told by the applicant did not deter the court

from setting the judgment aside where a good defence existed. In the case of ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.*** [1986] 2 Lloyd's Rep. 221 where the defendant deliberately allowed judgment to be entered by default, the Court of Appeal took that into account in assessing the justice of the case, and because, in addition, no defence with any reasonable prospect of success was shown dismissed the appeal against a refusal to set aside the default judgment.

Under the new rules of 2002, the provisions are required to be interpreted more strictly.

In the instant case we agree with counsel for the appellant that the application was made promptly. Default judgment was entered on the 22nd November and the application was filed on 24th November, 2004.

On the evidence of the managing director of the appellant, the claim was brought to his attention "towards the end of October, 2004." He delayed until "in or about early November 2004" to take the said claim form to his attorney-at-law, who due to "inadvertence and certain procedural problems in office," did not file the acknowledgement of service up to 22nd November 2004. We do not regard this as "a good explanation for failure to file an acknowledgment of service" in time.

Furthermore, we agree with Norma McIntosh, J on her provisional assessment that the endorsement on the letter dated 10th June 2004 is properly construed as an acceptance of the fee charges.

The words "... we will submit payment..." are not in anyway conditional and are quite unqualified. In order to accept as valid, the submission of counsel for the appellant, one would have to, as we intimated to counsel, read into the appellant's endorsement the words "part payment" or "some payment". This is impermissible.

The appellant, on the defence put forward, has no real prospect of success. See ***Swain v. Hillman*** [2001] 1 All ER 91.

We therefore, concluded that the appellant had not satisfied all the provisions as required by Rule 13.3(1) and therefore we held that the order of the learned judge could not be faulted. Consequently, the appeal was dismissed with costs to the respondent to be agreed or taxed.