

because an application for striking out the Claimant's claim was made (iii) The Applicant has a real prospect of successfully defending the claim; (3) Affidavit used by the Claimant to support request for default judgment was irregular and not in the proper form. (This third ground was added on the day of the hearing).

3. The Application to set aside the judgment is supported by an affidavit by the Applicant, Mr. Lionel Banner sworn to on 12th September, 2008. He deposed that the Statement of Claim which was filed on the 28th day of April, 2008 was served on him on the 29th day of April, 2008. That on receipt of the Claim he engaged the services of Attorney-at-law, Hubert Elrington and on the 9th day of May, 2008, he caused to be filed and served an acknowledgement of service.
4. At paragraph five he deposed that after he informed his attorney of the facts of the case he was advised by his attorney that this case was not a claim in trespass, but a land dispute in which he was claiming that the land in question belonged to himself and his brothers and sisters, whilst Maggie Perez, the Claimant was claiming that the same land belonged to her.
5. Mr. Banner further deposed that he was advised by his attorney that both parties were asserting the right to be in immediate possession of the land in dispute, as owner in law and in equity, and that the Court would have to decide which claim was the better claim in law and in equity .
6. Mr. Banner deposed that he was further advised by his attorney that under the Civil Procedure Rules, this claim had to be brought using a Fixed date Claim Form, and could not be brought by a General claim form as was done by the Claimant. Further, that an application had to

be made to the Court to have the claim form struck out as being contrary to the rules and an abuse of process.

7. Mr. Banner stated that he noted on the attachment to the Claim Form that a defence had to be filed within 28 days of the service on him of the Statement of Claim and he drew this to the attention of his attorney who advised him that since the action commenced using the wrong claim form he did not intend to file a defence, but would instead apply to the Court to have the Claim Form struck out as being an abuse of process.
8. Mr. Banner deposed that counting from the 30th day of April, 2008, the 28 days for the filing of the defence expired on the 27th day of May, 2008. Two days later on the 29th day of May, 2008, a Default Judgment was entered in this action against him. On the 4th day of June, 2008, his attorney filed in the Supreme Court an application to strike out the claim as being an abuse of process of the Court, and a violation of the rules governing the making of such claim.
9. Mr. Banner deposed at paragraph 13 of his affidavit that at the time the Judgment in Default was entered he was not served with a copy thereof as provided for by the rules, and his attorney was not served with a copy of the Default Judgment and that his attorney had no knowledge of the Default Judgment at the time he filed and served the application to strike out the statement of claim.
10. Mr. Banner stated that on discovering that a Default Judgment had been entered against him, his Attorney advised him that it would be best, in all circumstances, to file an application to set aside the Judgment in Default of Defence. The said application was filed and served on the 28th day of July, 2008. He said that there were then

two applications before the Court made by him, the first on the 4th day of June, 2008 and the second on the 29th day of July, 2008.

11. Mr. Banner deposed that a Defence could not properly have been filed under the rules of the Supreme Court because of the nature of the claim and that filing a defence would only have aggravated the abuse of process. Further, the Application to strike out the claim form did not have to be made in 28 days as the Claimant could have gotten no right or rights by using the wrong claim form and so he was entitled to bring this action for striking out the claim form on the 4th day of June, 2008.
12. Mr. Banner deposed that because the two applications raised substantially the same legal issues his Attorney decided with the leave of the Court to withdraw the application to strike out the claim and instead proceed with the Application to set aside the improperly obtained Judgment in Default of Defence.
13. Mr. Banner further deposed at paragraph 7 of his affidavit that his Attorney has informed him that the affidavit used by the Claimant to obtain the Default Judgment is not in the prescribed form and that this is another and separate ground for asking that the Judgment in Default be set aside. Further, if the Claimant had served Notice of the Default Judgment on him or his Attorney, in the manner provided for by the rules, the application to strike it out would have been much earlier.
14. Mr. Banner deposed that he had been advised by his Attorney that he has a good defence to the claim and that his defence stands a good chance of succeeding. See Exhibit "L.B.3" for a copy of Draft Defence.

Submissions by Mr. Elrington for Applicant

15. Mr. Elrington submitted that this matter should not be in trespass but a matter for possession of land. He further submitted that the Claimant should be ordered to substitute the general claim form with a fixed dated claim form.

16. Learned Counsel submitted that the court has an unfettered discretion to set aside default judgment. He further submitted that the Court has two options to set aside, that is, if the judgment is regular or irregular. That the regular judgment is one entered in strict compliance with the rules as provided under Rule 13.3 (1). He submitted that the irregular judgment must be set aside as of right as provided under Rule 13.2.

17. Mr. Elrington submitted that because the wrong claim form was used to commence the proceedings the default judgment obtained was irregular and should be set aside as of right. He submitted that if the claim is for possession of land then the wrong claim form was used as a fixed dated claim form was required by law. That in such case where a Fixed Date claim form is used a default judgment cannot be obtained under Rule 12.2.

18. Learned Counsel further submitted that even if the Claim Form used in this case is correct, the default judgment should be set aside as of right because the order for the default judgment was not served upon the Defendant or his attorney in accordance with Rule 42.6(1). He said that the Defendant has not to date received a copy of the order or notice of the application for the default judgment and that the Defendant only became cognizant of the order when he received the

application made by the Claimant for the assessment of damages and for costs.

19. Mr. Elrington submitted that the affidavit of Gregory Young which was relied on in the application for default judgment is not in the proper form as there is no statement showing on whose behalf the affidavit was filed and who would rely on the affidavit at the hearing. He referred to the case of Action No. 555 of 2003 **Atlantic Bank Limited v. Novelos Bus Line Limited et al.** and submitted that the judgment should be set aside for this reason.

Submissions by Mr. Sylvester for Claimant/Respondent

20. Mr. Sylvester referred to '**The Caribbean Civil Court Practice**' at Chapter 11 page 130 which deals with Setting Aside/Varying Default Judgment which states: *"It should be noted that there are significant differences in relation to the wording of CPR 13 in the Caribbean and the wording in the equivalent rule in England .. and care must be taken if considering any English authority on setting aside default judgment. Under the English equivalent, the court (now) has a wider discretion"*.
21. Learned Counsel submitted that the **Novelos case** supra cited by Mr. Elrington was before the new **Civil Procedure Rules** came into force. That the courts is constrained by what is actually in the Civil Procedure Rules, specifically in **Part 13**. Further learned counsel submitted that while the part of the affidavit was not filled out showing on whose behalf it was filed, the substance of the affidavit clearly shows that the affidavit relates to service of the Claim Form and Statement of Claim. Mr. Sylvester further submitted that the **Novelos case** supra can be distinguished from the case at hand as in that case

there was denial of service. In the case at hand there is no issue of service as there was acknowledgement of service by the Defendant. He submitted that there is no breach of **Rule 12.5** and therefore the Defendant cannot rely on **Rule 13.2 (1)**. He submitted that the conditions were satisfied under **Rule 12.5** as an acknowledgement of service has been filed by the Defendant against whom judgment is sought.

22. Mr. Sylvester submitted that the rule that is applicable in this case is **Rule 13.3** of the **Supreme Court (Civil Procedure) Rules, 2005** and that the three conditions under this rule has to be satisfied conjunctively before the Court can set aside default judgment. In support of his argument, Learned Counsel referred to '**The Caribbean Civil Court Practice**' at page 131 where it is stated that "**Barbados CPR 13.3; EC CPR 13.3; Jamaica CPR 13.3; Trinidad and Tobago CPR 13.3** provide that in a case where the court may (as opposed to must) set aside a default judgment then the court may only set aside if the defendant:

(1) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;

(2) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be ; and

(3) has a real prospect of successfully defending the claim

These conditions are conjunctive. Each must be satisfied before the court may set aside."

23. Mr. Sylvester further referred to the case of **Kenrick Thomas v. RBTT Bank Caribbean Ltd. (Formerly Caribbean Banking Ltd.)** (St. Vincent and the Grenadines) (Civil Appeal No. 3 of 2005) where Barrow JA stated that: "*The appellant submitted that this provision (rule 13.3) specifies three conjunctive pre-conditions for setting aside. The*

submission is sound. "Only if" can only mean that if the three matters are not present then the court may not set aside a default judgment."

24. Learned Counsel submitted that the application to set aside the default judgment is dated 28th May, 2008 and the judgment came to the attention of the Defendant on 7th July, 2008. He submitted that the 21 days delay in filing could be considered reasonable. As for the second condition, learned Counsel submitted that there is no good explanation as to why the Defence was not filed. Learned Counsel submitted that Form 1-A puts the Defendant on notice as to what he has to get done. That the issue as to whether the matter should have been brought by a Fixed Date Claim Form could have been dealt with at Case Management. And for the third condition he submitted that the Defendant has no prospect of success as the Claimant has a Lease Fiat which grants her ownership of the land in question, that is Blocks 20 and 21 situated in Lemonal Village.

25. Mr. Sylvester further submitted that the Defendant is alleging that his father and not him who has been in open and exclusive possession of the land in question for over 50 years, yet there is no evidence of application made for letters of administration filed or granted or that steps have been taken to apply to the Court for title under the **Law of Property Act, Chapter 190** by way of open peaceful possession. Learned Counsel also relied on the case of **Harrison August Sr. v. Oswald Patten, Claim No. 571 of 2004 (Supreme Court Action)** to show that a person cannot claim ownership by open possession through someone else.

Determination

26. The principles governing the setting aside of default judgments are governed by **Rules 13.2 and 13.3** of the **Supreme Court (Civil Procedure) Rules 2005** which provides as follows:

“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 acknowledgment of service, any of the conditions in Rule 12.4 was not satisfied; or

(b) in the case of judgment for failure to defend, any of the conditions in Rule 12.5 was not satisfied.

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

“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 acknowledgment 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.”

27. Mr. Elrington relied on three grounds in his application to set aside the judgment obtained. The first ground is that the Applicant has a right to set aside Judgment in Default of Defence as a result of irregularity “*ex debito justitia*”. Learned Counsel submitted that the matter should not be in trespass but a matter for possession of land and therefore a fixed date claim form should have been used instead of a general claim form and therefore the matter should be set aside as of right as provided under Rule 13.2. It is my considered view, that since the Claim made is for trespass and not possession of land the General Claim Form used was correct. It is for the Defendant to plead as he has done in his draft Defence that he has a right to possession of the land and that he is not trespassing. The Claimant has come to the court armed with a Minister’s Lease Fiat and pleaded that she has been in possession of the land since 1987. I find that the General Claim Form used to commence the action is not an irregularity as submitted by Mr. Elrington and therefore the claim cannot be set aside as of right on this basis as provided for under Rule 13.2.
28. The question for the Court is whether there has been any irregularity as provided under Rule 13.2. An acknowledgement of service was entered by the Defendant but there was a failure to file a Defence. To determine whether there was an irregularity under this rule the court has to look at whether the conditions under Rule 12.5 were satisfied.

29. Rule 12.5 provides for conditions to be satisfied when entering judgment for failure to defend as follows:

“12.5 The court office must enter judgment for failure to defend at the request of the claimant if –

(a) the claimant proves service of the claim form and statement of claim; or

(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and

(c) the period for filing the defence and any extension agreed by the parties or ordered by the Court has expired; and

(d) the defendant has not –

(i) filed a defence to the claim “

30. I agree with Mr. Sylvester that Rule 12.5 (b) and (c) have been satisfied as an acknowledgment of service has been filed by the Defendant against whom judgment is sought. There is no dispute about this fact and further that the period for filing the defence had expired when the judgment was entered. This alone is sufficient to satisfy the conditions to enter judgment as Rule 12.5 (a) is disjunctive.
31. But, for sake of completeness I will also look at Rule 12.5 (a) which speaks of proof of service. Also, Mr. Elrington's third ground which was added on the day of the hearing that the affidavit used by the Claimant to support the request for default judgment was irregular and not in the proper form can be conveniently dealt with under this ground. The affidavit of Gregory Young sworn to on 29th April, 2008 shows that

on 29th of April, 2008 he served Lionel Banner with the Claim Form and Statement of Claim. The top right hand corner of the affidavit clearly shows that it was filed on behalf of the Claimant. At the same top right hand corner there are some omissions in relation to the initials and surname of the deponent and the date the affidavit was sworn as provided for by Rule 30.2 (e). But, the substance of the affidavit itself has the name and signature of the deponent and the date the affidavit was sworn. Further, it is the practice in Belize to file affidavits without marking the top right hand corner of the affidavit especially when there are no exhibits. Also, in Belize the back sheet of the affidavit is rarely marked as provided by the said Rule 30.2 (e).

32. I therefore, disagree with Mr. Elrington's submission that the affidavit does not show on whose behalf it was filed and the judgment should be set aside for this reason as in the case of **Novelos** supra. The affidavit does show on whose behalf it was filed and further there was acknowledgment of service by the Defendant in this case unlike the **Novelos** case supra where there was a denial of service. I find that the affidavit was not irregular and that there was proof of service as provided by Rule 12.5 (a).

33. Mr. Elrington also made alternative arguments under ground 1 that even if the Claim Form used is correct, the default judgment should be set aside as of right because the order of the default judgment was not served upon the Defendant or his attorney in accordance with Rule 42.6(1). I agree with Mr. Sylvester that Form 1-A puts the Defendant on notice as to what he has to get done. The said Form clearly shows at the bottom in bold writing the following: "REMEMBER THAT IF YOU DO NOTHING, JUDGMENT MAY BE ENTERED AGAINST YOU WITHOUT ANY FURTHER WARNING". The Claimant is not caught by

surprise as to consequences of not filing a Defence. I find that the issue of service of the Default Judgment is not an irregularity as the Defendant was served with the Claim and thereafter judgment was obtained after the stipulated time for filing the defence.

34. The second ground which is in three parts is that (i) The Applicant discovered the default judgment on Monday, 7th July, 2008 (ii) The Applicant did not file a Defence because an application for striking out the Claimant's claim was made (iii) The Applicant has a real prospect of successfully defending the claim. It can be seen from this ground that the Applicant is also seeking to set aside the default judgment pursuant to Rule 13.3(1). This is when a judgment is obtained regularly.

35. The evidence of Mr. Banner is that he discovered the default judgment sometime after the 9th July. See paragraph 12 above. There is no dispute about this and Mr. Sylvester submitted that the 21 days delay in filing the application to set aside could be considered reasonable. I agree with Counsel's submission taking into consideration the whole of the evidence and find that the first condition under rule 13.3(1) has been satisfied.

36. On the second condition, Mr. Banner's evidence is that he did not file a defence because an application for striking out the Claimant's claim was made on 4th June, 2008. This application was later withdrawn. See paragraph 12 above. Mr. Banner's evidence is that the Statement of Claim was served on him on the 29th April, 2008. In accordance with the rules and the instructions filed with the Claim Form the Applicant had

28 days to file his Defence. Mr. Banner was aware of this requirement as can be seen by his evidence and also had knowledge that the 28 days would expire on 27th May, 2008. The Applicant chose not to file a Defence based on instructions by his attorney that this would be an abuse of the process though in this application he is seeking to do the very same thing, that is to file a Defence. Further, he has chosen to withdraw his application to strike out which further shows his uncertainty as to his way forward. Also, from the evidence it can be seen that when the application to strike out was made the 28 days for filing the Defence had already expired.

37. The Applicant has shown a total disregard for the rules and has launched attacks from all corners in order to file a Defence which he was reluctant to do in the first place as he said that it would be an abuse of process. In my view, the Applicant has not given a good explanation for failure to file a defence and therefore has failed to satisfy the second condition of Rule 13.3 (1).
38. As for the third condition, I agree with Mr. Sylvester that that the Applicant has not shown that he has a real prospect of successfully defending the claim. I further agree with Mr. Sylvester's submission that the Applicant cannot claim ownership by open possession through his father. There is no evidence by the Applicant that he has succeeded to the estate of his father. See the **Harrison August** case supra. I find that there was failure to satisfy this condition.
39. I further agree with Mr. Sylvester's submissions that these three conditions in Rule 13.3 (1) are conjunctive. Learned Counsel relied on '**The Caribbean Civil Court Practice**' and also quoted from the case of **Kenrick Thomas** supra. I must add that Belize has its own authority on Rule 13.3 (1). See the Court of Appeal case of

Belize Telecommunications Limited v. Belize Telecom Limited et al.
(Civil Appeal No. 13 of 2007) at paragraph 23 where Justice Morrison states that the word “and” “has a generally cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of “or”.

40. I find that since all three pre-conditions have not been satisfied the court cannot exercise its discretion to set aside a regularly obtained default judgment.
41. For all these reasons, the application to set aside the default judgment is dismissed with costs to the Claimant/Respondent to be agreed or taxed.

Dated this 21st day of January, 2009

MINNET HAFIZ
SUPREME COURT JUDGE