[2013] JMCC Comm. 4

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2012 CD 00094

BETWEEN	**RBC ROYAL BANK (JAMAICA) LIMITED (formerly RBTT BANK (JAMAICA) LTD.)**	**1ST CLAIMANT**
AND	**RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED Formerly RBTT BANK LTD.)**	**2ND CLAIMANT**
AND	**DELROY HOWELL**	**DEFENDANT**

Mr. Emile Leiba and Ms. Gillian Pottinger instructed by DunnCox, Attorneys-at-Law for the Claimants.

Mr. Douglas Leys Q.C. and Mr. Conrad George instructed by Hart Muirhead Fatta, Attorneys-at-Law for the Defendant, appearing on the 6th December 2012 and 17th and 18th January 2013, when the matter was argued. Mr. Douglas Leys Q.C. instructed by Mrs. Marvalyn Taylor-Wright appearing on the 22nd February 2013, Notice of Change of

Attorney for the Defendant having been filed by Taylor-Wright and Company on the 14th February 2013.

IN CHAMBERS

HEARD: 6TH December 2012, 17th and 18th January 2013, and February 22nd 2013.

CIVIL PRACTICE AND PROCEDURE - APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT OF ACKNOWLEDGMENT OF SERVICE- DUTIES OF REGISTRAR- RULES 9.2(5), 9.3(1), 10.3(1), 12.4, 13.2 AND 13.3 OF THE CPR -TIME RUNNING IN THE LONG VACATION - WHETHER JUDGMENT IRREGULARLY OR REGULARLY ENTERED - WHETHER DEFENDANT HAS REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM - POINTS OF LAW AND CONSTRUCTION OF DOCUMENTS-COURT NOT TO CONDUCT MINI-TRIAL WHERE POINTS NOT STRAIGHT-FORWARD - LOAN AGREEMENTS - ALL MONEYS CLAUSE-GUARANTEE AND INDEMNITY-GUARANTOR NOT MERELY SURETY BUT PRIMARY OBLIGOR

Mangatal J;

[1] The application before me is an application to set aside a judgment entered in default of acknowledgement of service. The original application was filed on November 6, 2012. The Court file reveals that a request for entry of judgment was filed September 14 2012. However, the default judgment was not entered until the 6th November, 2012, the same date when the original application was filed. The claim form was served during the long vacation, i.e. on the 23rd of August 2012. An acknowledgment of service was filed on the 18th of October 2012 and a "Defence and Counterclaim" was filed on October 29 2012.

[2] The Amended Notice of Application filed November 26 2012, reads as follows:

> **"1. Judgment be not entered against the defendant herein, or if it has already been entered;**
>
> **2 Judgment herein be set aside;**
>
> **....."**

[3] The stated grounds of the application are as follows:

> **" 1. The Defendant gave the proceedings to his attorneys with instructions to deal with them, and due to an administrative error the acknowledgement of service was not filed within the specified time;**

2. The Defendant has a good defence to the claim herein;

3. That it is just to do so."

[4] On the 2nd of January 2013, after the matter had already commenced, the Defendant's Attorneys added another order to those previously sought, being an application that costs be awarded to the applicant. The grounds for this new aspect of the application were added on the basis that the judgment was irregularly entered, and were stated as follows:

> **"a. At the material time that the judgment in default of acknowledgment of service was purportedly entered, the applicant had filed a notice of application for court orders seeking inter alia the following relief, that the judgment not be entered against him,**
>
> **b. The amount claimed by the respondent conflicts with the evidence given and for this reason the default judgment is irregular and should be set aside.**
>
> **c. The respondents' failure to notify the applicant that it had obtained a judgment in default of acknowledgement of service, was an abuse of the process of the court and calculated to prejudice the applicant's promptness in having the same set aside.** (At the hearing, it was indicated that the Defendant would not be pursuing this aspect of the application).

[5]The application has been vigorously opposed and Affidavits have been filed by both sides.

[6] The following rules of the Civil Procedure Rules 2002, ("the CPR") , come into play in this application:

> **Filing acknowledgment of service and consequence of not doing so**
>
> **9.2 (1) A defendant who wishes-**
>
> **(a) to dispute the claim; or**
>
> **(b) to dispute the court's jurisdiction,**
>
> **Must file at the registry at which the claim form was issued an acknowledgment of service in form 3 or 4 containing a notice of intention to defend and send a copy of the acknowledgment of service to the claimant or the claimant's attorney-at-law....**
>
> **..**

(4) However the defendant need not file an acknowledgment of service if a defence is filed and served on the claimant or the claimant's attorney-at-law within the period specified in rule 9.3.

(5) Where a defendant fails to file either an acknowledgment of service or a defence, judgment may be entered against that defendant if Part 12 allows it.

The period for filing acknowledgment of service

9.3 (1) the general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form.

.....

(4) A defendant may file an acknowledgment of service at any time before a request for default judgment is received at the registry out of which the claim form was issued.

…

The defendant –filing defence and the consequences of not doing so

10.2 (1) A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5)....

....

(5) Where a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered against that defendant if Part 12 allows it.

Conditions to be satisfied- Judgment for failure to file acknowledgement of service

12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if-

(a) the claimant proves service of the claim form and particulars of claim on that defendant;

(b) the period for filing an acknowledgment of service under rule 9.3 has expired;

(c) that defendant has not filed –

(i) an acknowledgment of service; or

(ii) a defence to the claim or any part of it;

(d) where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and

(f) (where necessary) the claimant has permission to enter judgment.

.....

"Cases where court must set aside judgment

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 were not satisfied; or

(c) the whole of the claim was satisfied before judgment was entered.

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

Cases where court may set aside or vary default judgment

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 defence, as the case may be.....

THE DEFAULT JUDGMENT

[7] The judgment reads as follows:

"The Defendant, not having entered an Acknowledgement of Service to the action herein IT IS THIS DAY ADJUDGED THAT:-

The 1st and 2nd Claimant recover the sum of US$33,466,480.82 and J$24,000.00 plus interest on the principal sum of US $28, 031,933.93 at the rate of 9.25% p.a. (per diem rate of US$7,103.98) from the date of Judgment to the date of payment."

APPLICATION TO SET ASIDE JUDGMENT ON THE BASIS THAT IT WAS IRREGULARLY ENTERED-RULE 13.2 OF THE CPR

[8] In relation to this aspect of the application, it was argued by Mr. Leys Q.C., on behalf of the Defendant, that, based upon the fact that the Defendant had filed his Defence as at October 29, 2012, and that the Defendant's Notice of Application for Court Orders dated and filed on November 6, 2012, sought, amongst other relief, that judgment not be entered against him, the Registry pursuant to Part 12.4 of the CPR had no authority to enter Judgment in Default of Acknowledgement of Service. By filing his Defence, and Notice of Application for Court Orders, the Defendant had evinced a clear intention to defend the claim. It was argued that the Registry/Registrar arrogated unto itself/ herself a judicial power, which was ultra vires Part 12.4 of the CPR. In addition, it was argued that the Defendant has a fundamental constitutional right guaranteed by section 16(2) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011,** as well as a basic common law right to a fair hearing within a reasonable time. It was submitted that the CPR cannot be interpreted in such a manner as to confer on the Registrar an administrative power to deny the Defendant a hearing where he has filed an application that judgment not be entered because he has a good defence.

[9] Alternatively, it was argued that in light of the Notice of Application, in particular that aspect seeking that if the judgment had not already been entered, it should not be entered, the Registrar should "have stayed her hand", and not enter judgment until the application was heard by a judge. Reliance was sought to be placed on the decision of my brother Sykes J. in **Issa v. Jamaica Observer**, JM 2009 SC 67 and other authorities.

[10] In a further alternative argument, Mr. Leys argued that the Judgment is also irregular because the Defendant was only served with the Particulars of Claim on the 23rd of August 2012. The submission continues: "This was during the long vacation. It is an accepted fact that time does not run during the long vacation. The court resumed from its long vacation on September 17, 2012. In paragraph 2 of the Claimant's skeleton argument it is contended that

the Application for default judgment was made on September 14, 2012. Time would only commence running then. The Application for Default judgment was therefore premature at the time it was made."

[11] The Defendant contends that the Judgment is also irregular because the amount claimed by the Claimants conflicts with the affidavit evidence given as well as with the amount stated in the letter of commitment. The Defendant referred to and relied upon the cases of **Caroil Transport Ltd. v. Petrojam Ltd.** C.A. No. 41/2001 and **Badaloo v. Bryan** (1989) 26 J.L.R. 372. At page 3 of the **Badaloo** decision, Campbell J.A., sitting in our Court of Appeal, confirmed that the Master had power to set aside a consent order without the agreement of the parties, where the order had not been perfected. At page 3, the learned Judge of Appeal stated:

> **"The default judgment, apart from not being justified nor entered in good faith, was also irregular on the face of it. It was for a sum which, due to error in summation, was in excess of the sum of the itemised debit claims. The Respondent was thus 'ex debito justitiae' entitled to have it set aside (see Anlaby v. Praetorius (1888) 20 Q.B.D. 76, and Hughes v. Austin (1894) 1 Q.B.D. 667."**

[12] I must confess that initially, when I had looked at Rule 12.4(c) (ii) and its reference to the Defendant not having filed a defence to the claim, the language had appeared ambiguous to me. It had seemed arguably wide enough to include a reference not just to a defence filed in accordance with Rule 9.2(5), and Rule 9.3(1), (defence filed within 14 day period from date of service, being the time for acknowledging service) but also a reference to a defence filed under Rule 10.3. (1)- i.e. 42 days from the date of service. This would have been significant in the present case because the Defence having been filed on October 29 2012, was filed within 42 days (given that time did not run during the long vacation, and therefore calculating 42 days not from the date of service on the 23rd of August 2012, but from the beginning of the Michaelmas Term on the 17th September 2012-see Rule 3.3(a) of the CPR).

[13] However, the decision of our Court of Appeal in Supreme Court Civil Appeal No. 108/2007, **Bar.John Industrial Supplies Ltd v. Honey Bee Fruit Juice Ltd.** [2011] JMCA Civ. 7, cited by Mr. Leiba on behalf of the Claimants, suggests that the Court has interpreted Rule 12.4(c)(ii) 's reference to a "defence" as being limited to a defence filed within the 14 day period as contemplated in Rule 9.2(5) and Rule 9.3(1). In **Bar.John**, no Acknowledgement of Service was filed but a defence had been filed within the time specified in Rule 10.3(1). Counsel for the Defendant had argued that since a Defence was filed within the time specified in Rule 10.3(1), it

was properly filed, and therefore that Rule 12.4(c) prohibited the entry of judgment for failure to file an acknowledgment of service. However, the Court rejected that argument, and held that the judgment in default of acknowledgement of service was properly entered. In delivering the judgment of the Court, Hibbert J.A.(Ag), at paragraphs 16 and 17 stated the following:

> **"[16]. The court agrees that where a defence is filed in the absence of an acknowledgment of service, as is permitted by rule 9.2 of the CPR, the time for filing the defence is not within 42 days after service of the claim form as is stated in rule 10.3(1). Instead, the period for filing the defence is within 14 days of the service of the claim form, as stated by rules 9.2(5) and 9.3(1). Since the defence was filed out of time, we agree that the judgment in default of an acknowledgment of service was regularly and properly entered.**
>
> **[17] The appellant, having failed to show that the judgment was improperly entered, cannot therefore rely on the provisions of Rule 13.2(1) which could only assist if any of the conditions in rule 12.4 was not satisfied."**

[14] It appears to me, that although the Court of Appeal did not expressly say so, by holding that the default judgment in **Bar. John** was regularly entered; the Court has held that the reference to a 'defence' in Rule 12.4(c) (ii) means a defence filed in accordance with Rule 9.2(5) and Rule 9.3(1). In other words, if no acknowledgment of service or defence is filed in the period within 14 days after the date of service of the claim form, then a defence filed within 42 days of the date of service of the claim form, does not prevent the entry of the judgment in default of acknowledgment of service.

[15] When the registry enters a default judgment, it is a purely administrative matter. It involves no consideration of the merits of the claim. I agree with Sykes J.' s analysis of the nature of the default judgment entered by the registry, as set out in his judgment in **Issa**, at paragraphs 76, 103 and 104. Sykes J. was there discussing Rule 12.5, which deals with judgments in default of defence. However, his observations are just as applicable to judgments in default of acknowledgment of service and Rule 12.4. Sykes J. there stated:

> **"76. This rule is very plain. Once the conditions, both positive and negative, have been met, the Registrar must enter judgment on the application of the claimant. There is no discretion here. It is simply a box-ticking exercise…**

103. …The request for default judgment was intended to be a simple, uncomplicated and speedy process. That is why it does not import any element of discretion. …

104. The design of the rule was deliberate. It eschewed any application of discretion(ary) with all of the potential difficulties that that can entail. The Rules Committee did not wish the Registrar to become embroiled in controversy over whether the discretion should be exercised in this way or the other…''

[16] The judgment in the **Issa** case does not support the Defendant's submission that because there was a pending application, particularly the application that if the judgment was not yet entered, that it should not be entered, and, that the Registrar should have "stayed her hand". This is because, as Sykes J. made clear in his judgment, at paragraph 103, the only application which could "stay the Registrar's hand", other than a Rule 9.6. (Disputing jurisdiction application), is an application to extend the time for filing a defence. However, it is clear that Sykes J. was speaking about the Registrar's hand being stayed in relation to entry of judgment under Rule 12.5, which is entry of judgment in default of defence and not about the staying of the Registrar's hand in relation to judgment in default of acknowledgment of service. Rule 12.5(e), speaks about the conditionality of a pending application for an extension of time to file a defence. Rule 12.4 has no equivalent, and nor does it have any sub-section that speaks to a pending application seeking that judgment be not entered posing any obstacle to judgment being entered in default of acknowledgment of service. Indeed, at paragraph 100 of his judgment in **Issa**, Sykes J. noted that Rule 12.5(e) does not speak to extension of time within which to file an acknowledgment of service. Rule 12.4 is also devoid of any mention of an extension of time within which to file an acknowledgment of service. Nor does it speak to any such application, or indeed, any other application, presenting an obstacle to the entry of judgment in default of acknowledgment of service. In **Issa**, Sykes J. had to consider what, if anything, was the effect of an application which was not an application for an extension of time to file defence (Rule 12.5(e)), on the entry of judgment under Rule 12.5. At paragraph 103, he stated his view, with which I agree, that it is not any and every application that can interfere with or affect the registrar's power, indeed, duty, to enter default judgment at the request of a qualifying claimant. In my judgment, the Defendant's pending application, including that seeking that judgment be not entered, posed no lawful impediment to the entry of default judgment by the Registrar in the instant case. My brother Sykes J. stated the matter this way:

"In this case before me much has been made of the application of October 18, 2005. To my mind nothing in the October 18 application followed the CPR. Let me make it clear that I do not accept the proposition that because the October 18 application was before the court that prevented the Registrar from entering default judgment. If this were possible then all a defendant would need to (do) is file any application of any kind and then claim that the Registrar cannot act. This would deprive the rule empowering the registrar to enter default judgment of all efficacy….."

[17] I also reject the Defendant's submission that the fact that the Particulars of Claim were served on the 23rd of August 2012, during the long vacation meant that time did not run and therefore that the application for the default judgment was premature. Time fails to run during the long vacation only in respect of the time prescribed for the filing and serving of any statement of case other than the claim form or the particulars of claim contained in or served with the claim form-see Rule 3.5(1), as amended in November 2011. This means that whilst it is true that the time for filing a defence did not run, the time for filing an acknowledgment of service as set out in Rule 9.3(1) continued to run. The Claimants were fully entitled to file a request for default judgment on September 14 2012. Requests for default judgment are not statements of case, and are not caught by Rule 3.5(1).

[18] The Defendant's argument about the amount for which the default judgment was entered being irregular in my view also fails as a ground for setting aside. The Registrar simply entered judgment in accordance with the amount claimed in the request for default judgment which included interest that had allegedly accrued from the date of filing of the claim until the date of the request for default judgment. I agree with Mr. Leiba's submission that, since the claim includes a claim for interest, and interest had continued to run, then at different points in time, the total amounts alleged due would differ. There was no irregularity on the face of the judgment. I agree with Mr. Leiba that the present Rules, the CPR, do not require an Affidavit in proof of Debt. All that is required is a satisfaction of the requirements of Rule 12.4. I also agree that the Affidavit of Debt of Petti-Gay Williams, Vice-President of Corporate Banking for the 1st Claimant, filed October 22, 2012, could be filed merely in proof of an entitlement to commercial interest. There is no requirement under the Rules for any Affidavit to state the amount to which the Claimants were entitled to judgment. Where a claim is for a specified sum of money, and includes a claim for costs and interest at a specified rate, as in this case (see Rule 12.8), the Registry enters the judgment in default of acknowledgment of service for the sum specified,

(see Rule 12.10(1)(a), including the claim for interest and costs, once Rules 12. 4, 12.10(1)(a), 12.11 and 12.12 are satisfied.

[19] I am therefore of the view, that the aspect of the Defendant's application which was geared at having the judgment set aside as of right, as being irregularly entered, and hence entitling the defendant to an order for costs in his favour fails. I will now therefore go on to consider whether the judgment, being a regularly obtained judgment ought to be set aside as a result of the court's exercise of discretion upon the basis set out in Rule 13.3 of the CPR.

Rule 13.3 of the CPR-Setting Aside of Judgment Regularly Obtained

[20] As required by Rule 13.3, I have to consider the questions of whether the defendant applied to the court as soon as reasonably practicable after finding out that judgment had been entered, and also the question of whether he has provided a good explanation for the failure to file an acknowledgment of service. Whilst these are matters that the court must consider, the cardinal criteria is the issue of whether the Defendant has a real prospect of successfully defending the claim.

[21] In my judgment, it is clear that this application was made in a timely way. Indeed, it was made even before the Defendant could find out that judgment was entered. At the date of filing of the application, the Defendant did not know whether judgment had yet been entered, hence the wording of the application seeking as an alternative to the setting aside, that if the judgment had not yet been entered, that it not be entered. Indeed, the court file shows that the default judgment, (although a request was filed from the 14th September 2012), was not entered until the 6th November 2012, the very date when the Defendant's original application was filed.

[22] The defence in this case was filed within the time specified in Rule 10.3. However, the acknowledgment of service was not filed within 14 days of service of the claim form. It was not filed until the 18th of October 2012, which was over a month after the request for default judgment had already been filed. The reason advanced as to why the acknowledgment of service was late, is that, the Defendant's then Attorneys, Messrs.Hart, Muirhead, Fatta, due to an administrative error, did not file it in time. Whilst this is quite plausible, it does not really amount to a good explanation. I will therefore have to bear this in mind when I come to consider whether or not to set aside the default judgment.

[23] I now turn to a consideration of what I think is the fundamental consideration when the court is considering whether or not to set aside a judgment entered in default. A default

judgment by definition means a judgment entered without the defendant having had his case heard on its merits. The crucial question is the question of whether the defendant has a real prospect of successfully defending the claim. It is the Defendant's duty to so satisfy me.

[24] This is a case that involves the interpretation of Loan Documents and Agreements entered into between the Claimants and Ocean Chino Limited and a Deed of Guarantee and Indemnity given by the Defendant to the Claimants. It involves the interpretation and meaning of an "all monies" clause in the Deed of Guarantee. In essence, the Claimants contend that in September 2005, a loan was made by them to Ocean Chino Limited ("the debtor") in the sum of US$20 Million evidenced by Loan Agreement and commitment letter. In April 2008 the Claimants again lent the debtor a further sum of US $14.5 Million, evidenced by commitment letter and Loan Agreement. The Defendant executed a Deed of Indemnity and Guarantee on April 28 2008. The Claimants say that the loans fell into arrears and the debtor has failed to pay the amounts due. The Claimants have appointed a receiver over the property of the debtor, i.e. the Hilton Hotel which was secured by a debenture in favour of the Claimants. The Claimants say that by virtue of the Deed of Guarantee and Indemnity the Defendant unconditionally and irrevocably guaranteed payment of the guaranteed indebtedness and promised to pay the Claimants forthwith on written demand all of the guaranteed indebtedness owing to the Claimants as and when those sums should become due and payable. The Claimants say that the Guarantee and Indemnity was issued by the Defendant, not merely as a surety, but also as a primary obligor. Despite written demand being made of him, the Claimants say that the Defendant has failed to pay up the amounts due.

[25] The Defendant argues that he has a real prospect of successfully defending the claim and relies upon the defence embodied in the Defence filed on the 29th October 2012, and as verified in the several Affidavits of Mr. Delroy Howell, the Defendant. It is the contention of the Defendant that the Claimants cannot enforce a claim under the Guarantee because of the fact that they have varied the interest rate with the debtor in a manner not contemplated by the Loan Agreements or the Guarantee. The Defendant argues that the Agreements clearly show that the interest to be paid on the loan by the debtor was predicated upon two separate components. There was firstly the fixed rate component, which was fixed throughout the life of the loan at 4.5%. The other component was the LIBOR component, and, Mr. Leys argued, depending on the fluctuations of LIBOR based on a six-month period, the debtor would have to bear the disadvantages of increases in LIBOR, and conversely, reap the benefits of decreases in LIBOR. The Defendant contends that this was a fundamental commercial arrangement on which he

issued the Guarantee and that if there were to be any material change to these arrangements he should firstly be notified and his agreement obtained before any such changes could be effected as regards his obligations under the Guarantee. Accordingly, the Defendant argued that having regard to the fact that LIBOR rates had decreased in a fundamental and material way during the relevant period, the interest rates having been increased by the Claimants during that time was in breach of the Agreements and Guarantee. Moreover that this was done without notification to him and he had not agreed to any alteration in the arrangements. The Defendant's Attorneys cited a number of authorities, including **Burnes v. Trade Credits Ltd.** [1981] 2 All E.R. 122, **Triodos Bank NV v. Dobbs** [2005] All E.R. 364, and **St. Micro Electronics NV Condor Insurance Company Limited** [2006] All E.R. (D) 72 (May), as supporting the proposition that a surety or guarantor will be released from a guarantee if there is a material or not insubstantial change to the underlying primary agreement in respect of which the guarantee was given, unless the surety has had notice of the change and has consented to it. Mr. Leys submits that a major issue requiring trial will be the meaning of the "all monies clause". He submitted that the construction of this clause cannot be ruled upon at this stage and requires a trial where the competing contentions can be fully aired and determined.

[26] The Defendant also relies upon the fact, which has not been challenged by the Claimants, that the debtor has filed suit in the Supreme Court against the Claimants claiming in respect of breaches of the Loan Agreements of the same nature as complained of by the Defendant in this claim.

[27] Another attack on the claim which the Defendant seeks to mount is that the Claimants have by their actions significantly diminished the security and that a surety has the right to call for securities held by the creditor for the guaranteed debt in the same state and condition as they were when they were originally received by the creditor.

[28] In paragraph 8 of her Affidavit filed November 28 2012 Ms. Williams indicates that the Bank reversed the rate of interest increase for the period December 2008 to February 2009, to 7.14%, in part because of the concerns raised by the Defendant. In paragraph 6 of that same Affidavit I found it interesting to note that Ms. Williams had stated that the "Bank made a decision in November 2008 that, as of December's loan payment, the interest rate that would be applied was 9.25% instead of LIBOR + 4.50% owing to a concern that Libor did not actually reflect the Bank's cost of funds in the prevailing market conditions". The Bank's interpretation of

their powers under the Agreements to vary the rate of interest is diametrically opposed to that proffered by the Defendant.

[29] It is true, as Mr. Leiba argues in his written submissions, that the Defendant has not denied that the debtor received the sums claimed by the Claimants as having been loaned. It is also true that the Guarantee names the Defendant as a primary obligor. The law is clear that the Defendant must demonstrate that he has a real prospect of successfully defending the case, as opposed to a fanciful one- see **Swain v. Hillman** [2001] 1 All E.R. 91, and **Three Rivers District Council v. Bank of England (No. 3)** [2001] 2 All E.R. 513, the latter having been cited by Mr. Leiba. Both of those cases dealt with summary judgment applications and not applications to set aside a default judgment. However, in both types of application, the question of whether there is a real prospect of defending the claim arises for consideration. As stated in those well-known cases, at paragraph 95 of the latter, this test is designed to eliminate cases which are not fit for trial at all. It is not meant to eliminate trial where there are issues that should be investigated at trial. The judge is not meant to be conducting a mini-trial on a hearing of an application to set aside a default judgment. At paragraph 158 of the **Three Rivers** case, Lord Hobhouse indicated that the judge is required to undertake an exercise of judgment. In discussing Part 24 of the English Rules dealing with Summary Judgment, the learned Law Lord stated:

> **"Under RSC Order 14 as under CPR Pt 24, the judge is making an assessment, not conducting a mini-trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters...."**

[30] In my judgment, 'the bottom line' is that the Defendant has raised a number of issues of law, including the construction of contractual documents and their meaning in the context of this case, that are not straight-forward. These points require full, detailed and mature argument that can best take place at trial. In my judgment, the Defendant has demonstrated that he has a real prospect of successfully defending the claim. This is the most important consideration. Therefore, although I have to take into consideration the fact that the Defendant has not provided a good explanation for not filing the acknowledgment of service on time, this is but a factor to be taken into account in deciding how to exercise my discretion. I also take into account the fact that there has been no time lapse between entry of judgment and the

application to set aside. There has therefore been no delay by the Defendant personally, or on that score. All told, the Defence raised cannot be said to be fanciful. As stated by Lord Hobhouse at paragraph 158 of **Three Rivers**, "the criteria is not one of probability; it is absence of reality." There is no absence of reality here. In all the circumstances, it would not in my judgment be just or fair to allow the default judgment which has taken place without a consideration of the merits of the claim, to remain in place.

[31] I therefore make the following orders:

(a) The judgment entered in default of acknowledgment of service is set aside pursuant to Rule 13.3 of the CPR.

(b) Costs thrown away and costs of the application to the Claimants to be taxed if not agreed. Application by Claimants for immediate taxation of costs is refused.

(c) This order is conditional on the Defence filed October 29 2012 being re-filed and served by March 1 2013.

(d) The Counterclaim embodied in the document headed "Defence and Counterclaim" filed October 29 2012 is to be re-filed and served as an Ancillary Claim in accordance with Part 18 of the CPR, by March 1 2013.

(e) Case Management Conference set for April 23 2013

f) Defendant's Attorneys-at-Law to prepare, file and serve the formal order.