IN THE COURT OF APPEAL

OF

TRINIDAD AND TOBAGO

CA P-117/2018

THE CEPEP COMPANY LTD

APPELLANT

V

TORA BORA CONSTRUCTION & CONTRACTORS LIMITED

RESPONDENT

PROCEDURAL APPEAL

WEST COURT, PORT OF SPAIN

ON MONDAY, 4 TH JUNE 2018

PANEL:

JUSTICE OF APPEAL JAMADAR

JUSTICE OF APPEAL SMITH

JUSTICE OF APPEAL MOOSAI

APPEARANCES:

MR. E. PRESCOTT SC, MR. P. LAMONT instructed by Messrs Hove & Associates

MR. F.H. MASAISAI and MR. I JONES

on behalf of THE APPELLANT

MR. D RAMBALLY, MR. K. TAKLALSINGH

Instructed by Ms. D. Sankar

On behalf of the RESPONDENT

JUDGEMENT OF THE COURT OF APPEAL

JUSTICE OF APPEAL JAMADAR:

So, this is an Appeal against the decision of the judge concerning Part 13 the CPR. The Judge, in her reasons, her succinct reasons, correctly identified the relevant Rule, and that there are two hurdles to be crossed. Those are: One, a reasonable prospect of success, and that the Defendant acted as soon as reasonably practicable when he'd found out that the Judgement had been entered against it. And, she was correct in stating that these are conjoint requirements. That's at paragraph 4 of the Judgement.

On both grounds, the judge found that the Defendant had not discharged onus in satisfying either of the two limbs and, therefore refused to set aside the default judgement entered in this matter and give the Defendant an opportunity to defend the Claim.

We, by unanimous decision, disagree with the Trial Judge, and we find that she was plainly wrong on both limbs.

In relation to the first limb, which is a reasonable prospect of success, it is our view, having read the judge's reasons, that she did not ascribe proper weight to the actual Defence pleaded and supported in the affidavits of Ms. Achong and Mr. Eddy. In particular, what the Defendant has argued in its draft Defence is that the contract that was entered into, that is the root of this suit, is a contract that did not meet the legal requirements of a state company such as CEPEP. Further, that the Claimant knew. Ought to have known and was complicit insofar as it went along with a contract contrary to the legal and policy requirements, and participated in the issuance of a Completion Certificate with that knowledge that it was not a legally compliant certificate.

Insofar as the trial Judge focused on the State's errors, internal errors she described them as – CEPEP's, regrettably, her focus appears to have been distracted from the issue at hand, which is whether the evidence reveals a Defence with a reasonable prospect of success. In our opinion, the Defendant has, as a matter of law, on the evidence, done enough to raise a reasonable prospect of success on its Defence, and this is in relation to three particular aspects: One, the validity of the contract itself, per se; two, the bona fides and legality of the Completion Certificate itself; and three, the quantum meruit point, that is to say whether or not - - even if it was an enforceable contract - - whether the sums claimed are , in fact, due in the light of the work done and services provided.

On the question on the second limb which is, whether the Defendant acted as soon as reasonably practicable on discovering that the judgement had been entered? The facts are that the judgment was entered on the 12th January and no step was taken until 26th February. That is some six weeks. Six weeks is not inordinately long neither is it within the window where we presume promptitude. It, therefore, cries out for an explanation. In our opinion, what the Rule requires is an explanation that is reasonably practicable; meaning, there's a focus on action take with - - once one has knowledge of a default judgement, action taken that must be practical in its steps and reasonable in its standards.

What the evidence of Achong and Eddy describe is that even though there were attorneys on record who had entered an appearance, Messers Hobsons, at the time of this default Judgement, CEPEP was in a state of flux because of a change in governance. A state of flux in which the Board Members had not all been appointed and, therefore executive decsion making was hampered. This followed upon the outcome of the September General Elections in the country. In fact, discovering the default judgement on 12th January 2018, an inquiry was made and an investigation undertaken, and within a little over four weeks, new attorneys were appointed.

Given the nature of the Claim, given the circumstances raised in the Defence in relation to noncompliance with policy, the question of the legality of the Completion Certificate and also the discovery of whether the sums claimed on quantum meruit basis were due, a period of a month is not reasonably impracticable to get both attorneys retained, information collected and instructions given to facilitate an Application such as this, that has to be evidence based to set aside; the default judgement.

In those circumstances, and for the reasons given, the Appeal in this matter is allowed. The Orders of the Trial Judge are set aside; the default judgement entered on the 11th December 2017 is set aside. The Defendant is to file and serve its Defence and counterclaim on or before 29th June 2018.