

## Litigation - Cyprus

### Court rules on procedure for setting aside judgments

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#### Background

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#### Background

In *Fortis Bank SA v Aurum Capital Holdings Inc.*<sup>(1)</sup> the District Court of Nicosia ruled on the court procedure for setting aside judgments.

Order 17, Rule 10 of the Civil Procedure Rules allows a party to litigation to request that the court set aside a final judgment issued against it, and gives the court full discretion to set aside or amend a judgment when it deems that this would be just and fair. The wide scope of this provision has given rise to very significant and rich case law on this matter.

The principles that the court should apply in examining such applications have been analysed and set out in the judgments of the Supreme Court in *Phylactou v Michael*<sup>(2)</sup> and in *Patouri v Hellenic Bank Ltd.*<sup>(3)</sup>

#### Facts

In the present case, the court had before it an action that had been filed in August 2010 and served on the defendant in Dominica in the same month. The cause of action was interference with the email account of a natural person and fraudulent transfer of a monetary amount from that individual's bank account. The defendant failed to appear at the legal proceedings against it and in December 2010 the plaintiff obtained a final judgment for €50,000 against the defendant. The plaintiff immediately applied for enforcement in the form of a writ of attachment against the defendant's bank account in Cyprus.

Within the framework of the application for a writ of attachment, in late April 2011 the defendant appeared before the court and filed an application to set aside the final judgment issued against it. The main ground for the application was that the claimed amount had been transferred to the bank account of the defendant by the plaintiff following the signing of a contract between them. The defendant failed to present evidence in support of its allegations or to explain or justify its delay of seven months in appearing at the proceedings.

#### Decision

The first issue that the court considered was whether service of the proceedings had been duly carried out and successfully completed. From the plaintiff's evidence the court was satisfied that the plaintiff, after obtaining an order allowing it to serve the pleadings outside the jurisdiction by courier service, had arranged for delivery of the documents at the defendant's registered office in Dominica. The plaintiff also provided adequate evidence that the parcel had been received by an authorised person at the defendant's registered office. The defendant insisted that the parcel had never been received, without challenging the correctness of the address of its registered office in Dominica. The court concluded that the action had properly been served on the defendant.

The court then moved on to consider the other two conditions, receiving guidance from the existing case law. With regard to the delay, the court found that the defendant had failed to give an explanation for the delay of seven months, and interpreted this as absolute indifference on the defendant's part to the legal proceedings against it in Cyprus. The court went on to state that this behaviour could only be considered as contempt for the court procedure. With regard to the final condition, the court pointed out that the onus was on the defendant to prove that it had a *prima facie* case. Even though this obligation falls far short of fully proving the case, but is only to present sufficient evidence to satisfy the court that it has an arguable defence, the defendant failed to present evidence to support its allegation of a contractual relationship. The court therefore found that the defendant had also failed to meet the final condition. The court therefore dismissed the application to set aside the judgment.

#### Comment

It is a principle of the Cyprus legal system that each case should be examined on its own facts and that the court should exercise its discretion in each case according to those facts. Successful applications under Order 17, Rule 10 of the Civil Procedure Rules are extremely draconian against the litigant that obtains a final judgment in its favour and is just one step away from obtaining the fruits of its success. On the other hand, it is a constitutional right of every defendant to be able to state its defence in court proceedings; in the interests of justice, no defendant should be deprived of such a right. The court should therefore take the greatest possible care to balance these competing demands fairly.

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#### Endnotes

<sup>(1)</sup> Action 7064/2010, November 30 2011.

<sup>(2)</sup> (1982) 1 CLR 204.

<sup>(3)</sup> (2001) 1C CLR 2118.

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