

BARBADOS

[Unreported]

Suit No: 876 of 2007

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

BETWEEN

G4S SECURITY SERVICES (B'DOS) LTD

formerly known as

SECURICOR (BARBADOS) LIMITED - PLAINTIFF

AND

PALM BEACH HOTEL (CAYMAN) LTD - 1st DEFENDANT

SANDY BAY CLUB LTD - 2nd DEFENDANT

**Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.,
Judge of the High Court (ag)**

2007: October 22

December 10

**Mr. Barry L. V. Gale, Q.C. in association with Miss. Karen A. Perreira
for the Defendant/Applicants**

**Miss. Faye F. Finisterre of Messrs. Clarke, Gittens & Farmer for the
Plaintiff/Respondent**

DECISION

[1] **Crane-Scott J:** This is an application by the Defendant companies brought by Summons filed August 13, 2007, for an order under **Order 19, r. 9** of the **Rules of the Supreme Court** that

- “1. The Judgment entered herein by the Plaintiff against the Defendants be wholly set aside.
2. The Defendants be at liberty within fourteen (14) days to file a Defence in the action;
3. That the registering and enforcement of the judgment be stayed until the final hearing and determination of the appeal and;
4. The costs of this application be costs in the cause.”

The Defendants’ affidavits in support:

- [2] The application is supported by two affidavits both filed on August 13, 2007 by Mr. Barry L.V. Gale, Q.C. (hereinafter “Mr. Gale”) and Miss. Karen A. Perreira, (hereinafter “Miss. Perreira”) respectively, the two attorneys-at-law on record for and on behalf of both Defendants herein.
- [3] In her affidavit, Miss. Perreira sought to explain, *inter alia*, the reason why no defence was filed by the Defendants following the filing by her on July 4, 2007 of an Acknowledgment of Service indicating that the Defendants intended to defend the matter and contest the proceedings.
- [4] Miss. Perreira’s affidavit explained that the parties had been in negotiations between June 29, 2007 and July 26, 2007 and that

numerous correspondence had passed between them in relation to a settlement of the matter.

- [5] She also deposed that during the negotiations, the Defendants had been of the understanding that no further steps needed to be taken to file a defence on behalf of the First and Second Defendants unless negotiations had broken down.
- [6] According to Miss. Perreira's version of events, upon becoming aware that the Plaintiff's attorney-at-law was appearing before the Deputy Registrar of the Supreme Court on July 26, 2007 to obtain a default judgment, Miss. Perreira also appeared before the Deputy Registrar and explained to the Deputy Registrar that the basis for the Defendants not preparing a Defence was due to the negotiations between the parties and the possibility of an out-of-court settlement.
- [7] Miss. Perreira indicated that she also applied to the Deputy Registrar for leave to file a Defence but that her application had been refused and judgment in default entered in favour of the Plaintiff. She deposed at paragraphs 10 to 14 as follows:

“10. That based on the said negotiations the Defendants were of the understanding that no further steps need be taken to file their defence unless negotiations broke down as both parties had expressed a strong intent to settle.

11. That at the hearing on the 26th day of July 2007 for a default of Defence, I as attorney-at-law for the Defendants attended the Registrar and reported to the Court that notwithstanding an Acknowledgment was filed in the proceedings no Defence was filed on the basis of ongoing negotiations and I made an application on behalf of the defendants for leave to file a Defence within seven (7) days of the date of the hearing.

12. That the Attorney-at-law for the Plaintiff argued that she was contacted by Mr. Barry L.V. Gale, QC who informed her that he will not acknowledge service but file a defence and negotiate a settlement prior to the 26th day of July which was the date scheduled for the Default.

13. That while I could not report on the conversation Mr. Gale had, as I was not present, I did indicate to the Registrar that the basis for not preparing a Defence was in relation to the negotiations and the possibility of settlement.

14. That the Registrar refused to grant leave to the Defendants to file a Defence within seven (7) days and thereafter ordered judgment in favour of the Plaintiff.”

[8] On the issue of the merits of the defence, Miss. Perreira’s affidavit simply stated that the Defendants have a good Defence to the merits of the claim. She referred to the draft Defence exhibited to her affidavit which is proposed to be filed on behalf of the Defendants if leave of the Court is obtained.

[9] In his affidavit in support of the application, Mr. Gale outlined his involvement in the matter as attorney-at-law for the Defendants and gave his version of the circumstances which led to the entry on July 26, 2007 of a Judgment in default of Defence against the first and Second Defendants. He also stated his belief that the Defendants have a good defence to the Plaintiff’s claim. In particular, Mr. Gale deposed at paragraphs 8, 9 and 10 as follows:

“8. That I was at all times of the view and I understood Miss. Finisterre’s position to be that so long as the parties are negotiating I will not file a defence.

9. That I was led to believe that there was a good chance at settlement and the filing of a Defence was not necessary in furtherance of Court proceedings

10. That I have had a perusal of the Writ of Summons and matters supporting same and I verily believe that the Defendants have a good Defence to the Plaintiff's claim."

The Plaintiff's affidavit opposing the application:

- [10] An affidavit opposing the application to set aside the default judgment was filed on the Plaintiff's behalf on October 22, 2007 by the Plaintiff's attorney-at-law on record, Miss. Faye F. Finisterre of Messrs. Clarke, Gittens & Farmer (hereinafter "Miss. Finisterre").
- [11] In her affidavit, Miss. Finisterre gave her version of the events which led to the Plaintiff obtaining the default judgment against the First and Second Defendants on July 26, 2007. In particular, she deposed at paragraphs 3, 4, 5, 6, 7, 8, 9, 11 and 12 as follows:

"3. That I was contacted by Mr. Gale, Q.C. on June 29, 2006 and made a contemporaneous note of the conversation with Mr. Gale, QC. In that conversation, we discussed the possibility of negotiations, which it was apparent, both our clients had instructed was to be welcomed. I however also informed him that I had secured July 26, 2007 as a date for default judgment ("the date of hearing") so that we were working with a deadline. He informed me that he would not file an Acknowledgment but would be filing a Defence. A redacted copy of the telephone conversation note is attached hereto and marked "FF1".

4. That I was subsequently contacted by Miss. Karen Perreira on July 5, 2007. She informed me that she has conduct of the matter. I informed her that I had secured July 26, 2007 as a date for obtaining default judgment so that Miss. Perreira was at all times aware of my client's instructions and intention to

proceed to judgment. She informed me that she had on that date met with the client, the Defendants herein, to take instructions for the drafting of the Defence in this action. I made a contemporaneous note of the telephone conversation which I now exhibit hereto marked "FF2".

5. That I subsequently called Miss. Perreira's office on July 12, 2007 and instead of leaving her a message and to avoid the risk of miscommunication, I contemporaneously wrote her via electronic mail, inviting negotiations. A true copy of the said e-mail is exhibited hereto and marked "FF3".

6. That on July 16, 2007 at approximately 9:23 am., we received at our office, a facsimile from Miss. Perreira of a letter dated July 12, 2006 which concluded with the unilateral statement that should she not hear from me within seven days of July 12, 2007, she would prepare the Defendants' Defence to the suit.

7. That Miss. Perreira did not hear from me within seven days.

8. That negotiations continued when I responded on July 20, 2007 outlining counter-proposals. At that stage, costs as well as timelines were not agreed. I required a response by July 25, 2007 so as to be able to settle all matters and encapsulate the terms in a Consent Order for presentation to the Registrar on the date of the hearing.

9. That Miss. Perreira responded on July 24, 2007 with further counter-proposals as to costs and timelines which were unacceptable to the Plaintiff. Upon receiving instructions from my client on July 25, 2007, I wrote to Miss. Perreira informing her that we would be proceeding "as previously indicated", alluding to the application for judgment in default of pleadings.

11. There was never any or basis for any understanding that a Defence ought not to be entered by the Defendants within the prescribed time, or that the Plaintiff would abandon its

application for judgment in Default of pleadings being duly filed.

12. That it would not be just in the circumstances to set aside the judgment entered for the Plaintiff in this action.”

The Defendants’ legal submissions:

- [12] At the hearing, Counsel for the First and Second Defendants, Mr. Gale submitted that the application was being made under **Order 19 r. 9** of the Rules. He informed the Court that the Defendants’ application was supported by two affidavits filed on August 13, 2007 by himself and Miss. Perreira respectively.
- [13] Mr. Gale submitted that the application was one which involved the exercise of the Court’s discretion. He referred the Court to two decided cases in which the relevant guidelines for the exercise of the Court’s discretion are discussed. See *Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. Inc (“The Saudi Eagle”)* [1986] 2 *Lloyd’s Rep.* 221 and *Allen v. Taylor* [1992] *P.I.Q.R.* 255.
- [14] Referring to the affidavit of Miss. Perreira filed in support of the application, Mr. Gale submitted that it was wrong for the Deputy Registrar to have refused the application which had been made on behalf of the Defendants for a short extension of time to enable them to file their Defence.
- [15] He submitted that it was well known by Counsel on both sides that the Plaintiff’s claim was being disputed and that the Defendants were maintaining that they had a defence in this matter. He submitted further that both parties through their respective Counsel had openly acknowledged that a negotiated settlement of the matter was desirable given the differences between the parties.

- [16] Counsel for the Defendants, Mr. Gale then observed that it was unfortunate that the affidavit of Faye Finisterre opposing the application had only been filed on the same day fixed for the hearing of the application. He noted that the Defendants' supporting affidavits had been filed since August 13, 2007 and dealt with issues to which Miss. Finisterre could have responded much earlier, even if she needed to take instructions from her client. Mr. Gale stated that although he did not accept some of what was stated in the Plaintiff's affidavit, he nonetheless felt that the application could still be dealt with without the necessity for his filing an affidavit in response.
- [17] Referring to his affidavit filed in support of the application, Mr. Gale submitted that it had been established that the parties were negotiating for a settlement and that the negotiations continued right up until July 25, 2007, that is, right up until the day before the date fixed for the default hearing before the Registrar.
- [18] Mr. Gale then examined the various paragraphs of Miss. Perreira's affidavit. Referring to paragraph 12, he took issue with Miss. Finisterre's submission to the Deputy Registrar that Mr. Gale had, in a telephone conversation with Miss. Finisterre, informed her that he would not acknowledge service but file a defence and negotiate a settlement prior to 26th July, 2007 which was the scheduled date for the Default judgment. Mr. Gale contended that this did not accord with the facts since an Acknowledgment of Service had in fact been filed on behalf of both Defendants on July 4, 2007.
- [19] Mr. Gale contended that the Deputy Registrar would have had before her at the default hearing, an Acknowledgment of Service filed on behalf of both Defendants, together with representations of Counsel

- that the parties were in negotiations. In those circumstances he submitted, time should have been given to the Defendants to file their Defence.
- [20] Turning to paragraph 3 of Miss. Finisterre's affidavit, Mr. Gale stated that he did not recall having had a conversation informing Miss. Finisterre that he would not file an Acknowledgment of Service as alleged.
- [21] On the contrary, Mr. Gale submitted that the Court file clearly showed that an Acknowledgment of Service had been filed on behalf of both Defendants on July 4, 2007 and the appropriate box had been ticked indicating that both Defendants intended to contest the proceedings.
- [22] Mr. Gale contended that Miss. Finisterre had not taken issue with the submissions outlined in paragraph 11 of Miss. Perreira's affidavit which Miss. Perreira had made to the Registrar on July 26, 2007 about the negotiations which had been ongoing between the parties for settling the matter out of Court.
- [23] He submitted that paragraph 11 of Miss. Finisterre's affidavit did not accord with the facts. According to Mr. Gale, the parties were negotiating for a settlement. The negotiations had broken down the evening before the date fixed for the default hearing and that it was understood that it was only if negotiations broke down that a defence would have been filed.
- [24] Mr. Gale argued that the Plaintiff had not shown that it would suffer an injustice if the Judgment were set aside. He referred to the draft Defence which had been exhibited to Miss. Perreira's affidavit and submitted that the draft Defence shows that there are real issues to be resolved between the parties at the trial.

- [25] He stated that the Defendants were alleging that the Plaintiff had not performed certain aspects of the verbal agreement which had been entered into between the parties in or around November 2004. According to Mr. Gale, during the negotiations the parties were trying to resolve what was due in the circumstances.
- [26] Mr. Gale then referred the Court to relevant extracts from the **Supreme Court Annual Practice 1999 Volume I** outlining the nature of the Court's discretionary power to set aside a regular judgment. He invited the Court to make an order in terms of the Summons. He also submitted that it was quite improper for the Plaintiff to have pressed for a default judgment knowing full well that the parties were in negotiations and that the Defendants were maintaining that they had a good defence and intended to file a defence if negotiations broke down.
- [27] Mr. Gale submitted that the Plaintiff had elected to register a judgment, to incur costs and to bring the Defendants before the Court on this application which he considered to be an unnecessary waste of Court time.
- [28] He referred to the power of the Court under **Order 62 r. 8(1)** of the Rules to disallow costs as between Miss. Finisterre and her client where it appeared that costs had been improperly incurred or even although properly incurred, had proved fruitless. He indicated that while he was not suggesting that the Court should make a personal costs order against Miss. Finisterre, he was nonetheless urging the Court to order that costs of the application be costs in the cause.
- [29] Regarding the merits of the defence and at the Court's request, Mr. Gale referred the Court to paragraphs 5 to 10 of the Statement of

Claim which he said, contained the main allegations against the Defendants. According to Mr. Gale, the Plaintiff's allegations had been answered in paragraphs 4 to 8 of the draft Defence which, in his view, established a good defence to the Plaintiff's claim.

The Plaintiff's legal submissions:

- [30] Counsel for the Plaintiff, Miss. Finisterre stated that there was no Acknowledgment of Service on the Court file when the parties were before the Deputy Registrar on July 26, 2007. She agreed that a reading of all the affidavits filed by both parties confirmed that the parties were all amenable to an out of Court settlement of the matter. Miss. Finisterre submitted that the parties are in disagreement about the effect of the negotiations on the ongoing Court proceedings.
- [31] She expressed the view that "without prejudice" negotiations take place in one arena, while the conduct of the suit continues in another arena. In her view, the conduct of the suit is only affected by "without prejudice" negotiations once settlement is reached.
- [32] Referring to paragraph 8 of her affidavit, Miss. Finisterre advised the Court that her intention, had a settlement been reached, was to encapsulate those terms in a consent order and place same before the Court. According to her, it was always her understanding that a Defence would have been filed by the Defendants. Miss. Finisterre contended that in circumstances where she had indicated that she was willing to negotiate and had in the same conversation, indicated that she had obtained a date for a default judgment, she could not see how the Defendants' attorneys had come to believe that she had abandoned one arena in preference for another.

- [33] In response to Mr. Gale's submission that he did not prepare a Defence until negotiations had broken down, Miss. Finisterre submitted that a Defence should have been prepared in any event. She submitted further that the Defendants were given ample opportunity to file a Defence, they had not done so and judgment was duly entered.
- [34] Referring to the Rules, Miss. Finisterre submitted that a Defendant has fourteen days from filing an Acknowledgment of Service to file a Defence. She pointed out that the Acknowledgment in this case was filed on July 4, 2007 and the Defendants had still not filed their Defence a full three weeks after filing the Acknowledgment of Service.
- [35] Counsel for the Plaintiff, Miss. Finisterre submitted that the Judgment in Default of Defence had not been wrongly entered. Responding to Mr. Gale's submission that the Plaintiff was aware that the Defendants had a Defence which they wanted to file, Miss. Finisterre submitted that this was not disputed. Where the parties differed, she said, was in relation to whether filing of a Defence and negotiating a settlement were mutually exclusive.
- [36] Referring to the merits of the draft Defence, Miss. Finisterre submitted that it would not be just for the default judgment to be set aside. She submitted that at the very least, the Defendants' draft Defence clearly establishes the Defendants' indebtedness to the Plaintiff on a quantum meruit basis.

Mr. Gale's arguments in rebuttal:

- [37] In rebuttal, Mr. Gale stated that he could not understand how negotiations for a settlement could be viewed in isolation from the

actual court proceedings. The Plaintiff's view of the matter, in his view, ignores reality since negotiations impact on time-limits and the Rules of the Supreme Court.

[38] He contended that the Plaintiff had conceded (i) that the Registrar was aware that an Acknowledgment of Service had been filed prior to her entering the default judgment; (ii) the Plaintiff knew that the Defendants had a defence to the action, and (iii) knew that the Defendants intended to defend the action. He pointed out that despite this knowledge, the Plaintiff persuaded the Registrar to enter a default judgment.

[39] Mr. Gale referred the Court to an extract from the **Supreme Court Annual Practice, 1999 Volume I** relating to **Order 3** and the Court's attitude to time-limits.

Miss. Finisterre's further argument in rebuttal:

[40] In further rebuttal, Miss. Finisterre reiterated that time-limits in the Rules are rules to be observed. She submitted that just as a litigant ought not to take advantage of failure to observe time-limits, a party should not take advantage of settlement negotiations and ignore the time-limits set by Rules of Court.

Nature and Scope of the Court's discretion under O.19 r. 9:

[41] **Order 19 r.9** provides that the Court *may*, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

[42] The nature and scope of the Court's discretion under Rules of Court to set aside a regularly obtained judgment has been judicially considered in numerous decided cases.

- [43] The policy which underlies the discretion which has been given to Courts to set aside or vary a default judgment is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. [See per **Lord Atkin** in **Evans v. Bartlam**, [1937] **A.C. 473**]
- [44] Courts have jealously guarded their power to set aside a regularly obtained judgment where there has been no determination on the merits, even to the extent of refusing to lay down rigid rules to govern the exercise of their discretion. [See **Strachan v. The Gleaner Co Ltd and anor** [2005] **1 W.L.R. 3204.**]
- [45] The nature of the discretion conferred by the rule has been described by **Lord Wright** in **Evans v. Bartlam** (*above*) in the following terms:

“It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another. As **Kay L.J.** said in **Jenkins v. Bushby** [1891] **1 Ch. 484 at 495**, “the Court cannot be bound by a previous decision, to exercise a discretion in a particular way, because that would be in effect putting an end to the discretion.” A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained.

- [46] While the Court undoubtedly has an unfettered discretion under Order 19. r. 9 to set aside a regularly entered default judgment and has a latitude of individual choice according to the particular facts and circumstances of each case, it is generally accepted that in exercising

the discretion conferred by the rule, a Court could not fail to consider both (a) whether any useful purpose would be served by setting aside the judgment, and (b) how it came about that the applicant found himself bound by a judgment regularly obtained to which he could have set up some serious defence. [See per **Lord Russell of Killowen** in **Evans v. Bartlam** (*above*)]

[47] The primary and most important consideration for the Court in exercising its discretion will invariably be whether or not the Defendant has a serious defence with a real prospect of success. The Barbados Court of Appeal has held that in order to set aside a default judgment a defendant must show not merely that it had an arguable case but that its defence had merits to which the court should pay heed. [See **Bank of Nova Scotia v Emile Elias & Co Ltd** [1995] 46 WIR 33]

[48] In appropriate cases, the Court may also have to consider whether, notwithstanding the merits of the defence, it will be a correct exercise of the Court's discretion not to set aside the default judgment due to the delay and the lapse of time which has taken place between the judgment and the application to set it aside. [See **Evans v. Bartlam** [1937] A.C. 473; **Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc, (The Saudi Eagle)** [1986] 2 Lloyd's Rep. 221, CA. **Cheryl Diana Patricia Clarke v Ivan Hinds and Neville Edwards** [Unreported] Civil Appeal No. 20 of 2003 June 4, 2004; and **Dipcon Engineering Services Limited v Gregory Bowen and The Attorney General of Grenada**, Privy Council Appeal No. 79 of 2002]

Exercise of the Court's discretion:

[49] Against the foregoing background, I turn to consider (i) how it came about that the Defendants in these proceedings found themselves bound by a default judgment regularly obtained to which they could have set up some serious defence; and (ii) whether the Defendants have established that they have an arguable case with a real prospect of success which ought to go for trial.

(i) How did the default judgment come to be regularly entered?:-

[50] The circumstances in which the Plaintiff was able to obtain a regular judgment in default of defence against the Defendants are set out in three affidavits filed by the legal representatives for both parties which are outlined at paragraphs [2] to [11] above.

[51] Viewed in its totality, the Court finds that the state of the evidence is that while there is general agreement between the Defendants and the Plaintiff on some matters, both versions differ very substantially in relation to what effect the settlement negotiations which commenced on June 29, 2007 would have had on the legal proceedings and the time-limits set out in Rules of Court for the filing of a Defence.

[52] On the one hand, Mr. Gale and Miss. Perreira appear to have believed that an understanding had been reached between themselves and Miss. Finisterre that so long as the parties were in negotiations, it would not be necessary to file a Defence.

[53] On the other hand, Miss. Finisterre's position was that there was never any understanding that a Defence ought not to have been filed by the Defendants within the prescribed time, or that she would not have been proceeding on July 26, 2007 to enter a judgment in default of pleadings.

- [54] Having regard to the state of the evidence and in particular to the absence of cross examination and the absence also of any independent evidence which would have added weight to one version over the other, the Court is unable to come to any conclusion other than that a unfortunate misunderstanding occurred between all three attorneys as to whether the Defendants should have filed a Defence in the action until after it was clear that the settlement negotiations between the parties had completely broken down.
- [55] The misunderstanding aside, it is not in dispute that the negotiations only finally broke down on July 25, 2007, that is, on the day immediately before the date fixed for the default hearing before the Registrar.
- [56] It is also not disputed that negotiations having broken down, the Defendants' legal representative appeared before the Deputy Registrar on 26th July, 2007, the date fixed for the default hearing and applied for leave to file a defence.
- [57] Given that both parties were present before the Deputy Registrar on July 26, 2007, it is indeed regrettable that the Defendants' application for leave to file a defence was refused and that an opportunity was not afforded the Defendants at that time to file their defence.
- [58] Having regard to **Order 32 r.17 (b)**, the Registrar has power to entertain applications for time to plead. In the particular circumstances of this case, the Court is of the view that there is no good reason why Miss. Perreira's application made at the default hearing for leave to the Defendants for time to plead should have been refused.
- [59] Based on the evidence, it is clear to the Court that at the default hearing on July 26, 2007, the Deputy Registrar would have been

aware of the following facts, namely (i) that an Acknowledgment of Service giving notice of intention to defend had been filed on behalf of the Defendants; and (ii) that the parties had been in settlement negotiations which had only finally broken down on the evening immediately before the date fixed for the default hearing.

[60] In the particular circumstances of this case, the Court finds that it was wrong for the Deputy Registrar at the default hearing on July 26, 2007 to have refused leave to the Defendants to file their Defence.

(ii) Do the Defendants have an arguable case which should go for trial?:-

[61] In the light of the draft Defence annexed to Miss. Perreira's affidavit and to the opinion evidence of both Mr. Gale and Miss. Perreira that the Defendants have a good defence to the Plaintiff's claim, the Court is also required to consider whether any useful purpose would be served by setting aside the default judgment, and more specifically, whether the Defendants have established that they have a serious defence with a real prospect of success which ought to go for trial.

[62] Examination of the Statement of Claim filed on May 27, 2007 reveals that by reason of the matters outlined in paragraphs 5 to 12 of the Statement of Claim and pursuant to written agreements between the parties the Plaintiff's case is that (i) the First Defendant is indebted to the Plaintiff in the sum of \$129,652.93 together with interest thereon and (ii) the First and Second Defendants are jointly and severally indebted to the Plaintiff in the sum of \$26,574.83 together with interest thereon.

[63] Having regard to paragraphs 4 to 8 of the draft Defence exhibited with Ms. Perreira's affidavit, the Defendants intend to join issue with the Plaintiff on the following issues:

- (a) Re: the Plaintiff's allegation in paragraphs 5 and 6 of the Statement of Claim that the agreement between the parties for the provision of security guard services at the Amaryllis Beach Resort and the Sandy Bay Beach Club respectively are contained in the Amaryllis Static Guarding Services Agreement and the Sandy Bay Static Guarding Services Agreement respectively. [N.B. In paragraph 4 of the draft Defence, the Defendants propose to contend instead that the agreements between the parties were verbally made in or around December 2004 and are evidenced in writing through correspondence which passed between the parties.]
- (b) Re: the Plaintiff's allegation in paragraph 7 of the Statement of Claim that the Plaintiff provided the services as agreed. [N.B. This allegation is denied in paragraph 5 of the draft Defence and particulars are given of specific instances in which the Plaintiff breached the agreements by failing to provide the service as agreed.]
- (c) Re: the Plaintiff's allegations in paragraphs 8, 9 and 10 of the Statement of Claim that the Defendants have failed to pay finance charges due on the Plaintiff's unpaid invoices for services rendered to the Defendants in accordance with two Credit facilities Agreements entered into between the Plaintiff and the Defendants. [N.B. This allegation is denied in paragraph 6 and 7 of the draft Defence. The Defendants also

allege that the amounts are not due by reason of a failure of consideration by reason of the Plaintiff's failure to provide the services contracted for. Further, the First Defendant intends to allege that the contract with the Plaintiff was terminated on October 19, 2006.]

- (d) Re: the Plaintiff's allegations in paragraphs 11, 12 and 13 of the Statement of Claim that the Defendants is indebted to the Plaintiff in the amounts set out therein. [N.B. The amount of the indebtedness is expressly denied in paragraph 8 of the draft Defence on the basis that the consideration had wholly failed by reason of the Plaintiff's failure to adequately render the services as agreed.]

[64] The Court is of the view that the proposed draft Defence satisfactorily establishes that there are serious issues between the parties to be tried which have merit and can only be determined by a full trial of the issues. Specifically, the draft Defence raises issues relating to the alleged non-performance by the Plaintiff of the agreement to provide guarding services and a consequent failure of consideration under the contracts. The Court is satisfied that if this issue is established at the trial, it will provide the Defendants with a complete defence to the Plaintiff's claims.

[65] In the result, having regard also to the misunderstanding which occurred between the parties' legal representatives which led to the Plaintiff obtaining a regular judgment in default of defence against the Defendants on July 26, 2007, the Court is satisfied that its discretion under **O. 18 r. 9** to set the default judgment aside should be exercised in the Defendants' favour.

- [66] Before finally disposing of the matter, the Court has asked itself whether any injustice would be done to either of the parties if the default judgment were to be set aside and the Defendants were granted leave to defend the action. On the one hand, the Court finds that setting aside the default judgment in this case would merely operate to postpone the issue of the Defendants' indebtedness to the Plaintiff until a Court is in a position to hear all the facts and make a final determination of the competing interests in the case. In short, while the exercise of the discretion in the Defendants' favour would result in an obvious inconvenience to the Plaintiff, the Court is satisfied that this would neither be unfair to, nor work an injustice on the Plaintiff.
- [67] On the other hand, the Court is satisfied that unless the default judgment is set aside and the Defendants are given leave to defend, a substantial injustice would be done in that the Defendants would be liable to pay the amounts claimed in circumstances in which the Defendants' liability to the Plaintiff on the merits has never been tried and determined before a court of law.
- [68] The Court is also inclined to the view that costs of the application should be costs in the cause inasmuch as it is not disputed that the settlement negotiations had only broken down on the evening immediately prior to the date of the default hearing. The current proceedings would also have been completely unnecessary had Counsel for the Plaintiff not pressed for entry of the default judgment before the Deputy Registrar on July 26, 2007 and further, had been prepared to support the Defendants' application for leave for a short extension of time to file its Defence.

Disposal:

- [69] In the result, it is hereby ordered that the Judgment in default of Defence obtained before the Deputy Registrar on July 26, 2007 and all further proceedings which issued thereon (including the Registration of the Judgment on August 3, 2007) be set aside and that the Defendants be given leave to file their Defence to the action within seven (7) days.
- [70] Costs of the application will be costs in the cause.

**Maureen Crane-Scott
Judge of the High Court (ag)**