BARBADOS

[Unreported]

Suit No: CV1348 of 2006

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

BETWEEN

SAMANTHA ROCK - PLAINTIFF

AND

CARIBBEAN CREDIT BUREAU LTD - DEFENDANT

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

2007: October 16;
November 13

Miss. Jessica R. Ashby for the Applicant/Defendant
Mr. Stan O. Smith for the Respondent/Plaintiff

DECISION

[1] **Crane-Scott J:** This is an application by the Defendant company brought by Summons filed March 1, 2007, for an order under **Order 19, r.9** of the **Rules of the Supreme Court** that the Judgment in Default of Defence entered on the 10th day of October, 2006 and all further proceedings which issued thereon be set aside and that the Defendant be given leave to defend the action.

The Defendant's two affidavits supporting the application:

[2] The application is supported by two affidavits of Grady Thomas McIntosh Clarke ("Mr. Clarke") filed on behalf of the Defendant company on March 1, 2007 and April 17, 2007 respectively.

[3] In his first Affidavit filed on March 1, 2007, Mr.Clarke, a director of the Defendant company, sought to explain the reason why no action was taken by the Defendant company following the filing of the Acknowledgement of Service at the Supreme Court Registry on August 10, 2007. He deposed at paragraphs 7 to 10 as follows:

> "7. Shortly thereafter, I was faced with a number of personal tragedies; namely the deaths of a number of close family members in close succession as well as a sick daughter; all of which required me to leave Barbados for extended periods of time and as such I took a leave of absence from the Defendant company from August to October 2006 in order to attend to the same as well as to other personal matters.

8. Neither prior to nor during my leave of absence, did I have the opportunity to properly instruct an attorney-at-law or to arrange for legal representation in this matter and therefore no defence was filed on behalf of the Defendant company.

9. I am informed by attorney-at-law, Miss. Jessica R. Ashby and verily believe that on or about the 10th day of October 2006 the Plaintiff obtained judgment in default of a defence being filed on behalf of the Defendant company.

10. I am also advised by Attorney-at-Law Miss. Jessica Ashby and verily believe that the Defendant company have a good defence to the whole of the Plaintiff's claim and I make this affidavit in support of the Summons filed herein for an order that the judgment of the Court entered on the 10th day of October 2006 and all further proceedings which issued thereon be set aside and that the Defendant company be given leave to defend the matter."

[4] In his Supplemental Affidavit filed on April 17, 2007, Mr. Clarke further deposed that he was advised by Attorney-at-Law Miss. Jessica Ashby and verily believed that the Defendant company has a good defence to the whole of the Plaintiff's claim and stated that the Plaintiff was never employed by the Defendant as alleged by the Plaintiff. He referred to details of the Defendant's proposed Defence set out in the draft Defence exhibited to the said affidavit and marked "GTMC 1".

The Plaintiff's affidavit opposing the application:

[5] An affidavit opposing the application to set aside the default judgment was also filed on the Plaintiff's behalf on March 15, 2007 by the Plaintiff's attorney-at-law on record, Mr. Stan O. Smith.

[6] In his affidavit opposing the application, the Plaintiff's attorney-at-law sought, *inter alia*, to discredit the statement in paragraph 3 of the first affidavit of Mr. Clarke that the Plaintiff had been contracted by the Defendant company under a contract for services. According to Mr. Smith, paragraph 3 of the Defendant's statement "anticipates a defence to the Plaintiff's claim of constructive dismissal by describing the Plaintiff in terms characteristic of an independent contractor and not an employee of the Defendant."

[7] Attached to the said affidavit as exhibit "SOS 1" was a copy of a termination letter dated April 24, 2006 addressed to the Plaintiff which, in Mr. Smith's view, reveals the original and continued employment status of the Plaintiff as an employee of the Defendant company and strongly implicates the proposed defence of contract for services as "a contrivance".

[8] Mr. Smith also stated that more than seven months had expired between the date of the Defendant's acknowledgment of the Plaintiff's action and the application to set aside the default judgment. He expressed his belief that the Defendant's conduct in the action "was and continues to be contrived in aid of keeping the Plaintiff out

of obtaining an award for as long as can be done rather than conduct constituting a genuine defence of the action".

[9] Mr. Smith also stated his belief that any defence that could be made in the action would be unmeritorious and would fail and sought an order on behalf of the Plaintiff that the judgment in default of defence be allowed to stand and that the Defendant's application to set aside same be refused.

The Defendant's legal submissions:

[10] At the hearing, Counsel for the Defendant, Miss. Jessica Ashby submitted that the application was made on the footing that there is an arguable defence on the merits and that the Defendant has a real prospect of successfully defending the Plaintiff's claim. She contended that the Plaintiff's allegation regarding the relationship between the parties is erroneous.

[11] Referring to the draft Defence annexed to the affidavit of Mr. Clarke filed on April 17, 2007, Miss. Ashby submitted that the Defendant company was taking issue with the Plaintiff's allegation that the relationship between the parties was based on a contract of service. According to her, the Defendant's position was that the relationship between the parties was founded instead on a contract for services.

[12] Citing the English Court of Appeal case of ***J H Rayner (Mincing Lane) Limited et al v. Federative Republic of Brazil [1999] WL***

1019541 Miss. Ashby submitted that once a defence on the merits to the requisite standard is identified, it must take some special feature for the Courts to conclude that the default judgment should stand.

[13] Turning to the period which had elapsed between the entry of the default judgment on October 10, 2006 and the date of the application to set aside the judgment on March 1, 2007, Miss. Ashby referred the Court to dicta in ***Rayner's case*** which clearly stated that the passage of time alone would not preclude a Defendant having a judgment in default set aside.

[14] Counsel for the Defendant also submitted that O 19 r. 9 gives the Court a discretionary power to set aside any judgment where there has been no determination on the merits. The House of Lords case of ***Evans v. Bartlam [1937] A.C. 473*** and the Privy Council case of ***Strachan v. The Gleaner Co Ltd and anor [2005] 1 W.L.R. 3204*** were cited as authority for this proposition.

[15] In concluding, Miss. Ashby submitted that the judgment in default in this case should be set aside on the ground that (i) there is an arguable defence on the merits with a real prospect of success; and (ii) the judgment in default obtained under O. 19 r. 3 was not an adjudication of the matter on its merits, neither was it entered by consent and consequently the Court should exercise its discretion to set same aside.

The Plaintiff's legal submissions:

[16] Counsel for the Plaintiff, Mr. Smith referred to a dictum in Lord Atkin's speech in ***Evans v. Bartlam*** *(cited above)* to the effect that while an appellate Court will not normally interfere with the exercise of a judge's discretion except on grounds of law, yet if it sees that on other grounds his decision will result in injustice being done, the appellate court has both the power and the duty to remedy it.

[17] Mr. Smith submitted that the Defendant in this case would suffer no injustice if the Court were to refuse to set aside the default judgment. He contended that the Plaintiff's termination letter dated April 24, 2005 exhibited as "SOS 1" to the affidavit of Stan Smith filed on March 15, 2007, establishes that the Plaintiff was an employee of the Defendant company. The letter, he asserted, effectively destroys the Defendant's argument that the default judgment should be set aside.

[18] Mr. Smith then sought to analyze the wording of the said letter and to place interpretations on the words and the language used in the letter which, in his view, supported the Plaintiff's case that she was employed by the Defendant company under a contract of employment. He further submitted that the letter illustrated that the draft Defence was contrived and that there would be no injustice in refusing the Defendant's application.

[19] He contended that certain statements made on behalf of the Defendant company in the said letter suggested the presence of the control factor

which is indicative of an employment relationship. He cited a passage from **Professor Stacey Ball's** text, ***Canadian Employment Law*** (2002) at ***para: 3:10.2*** dealing with the indicia of control and the circumstances in which a person could be found to be in an employment relationship.

[20] In closing, Mr. Smith submitted that the Supplemental affidavit of Mr. Clarke filed on April 17, 2007 and his assertion that the Defendant company has a meritorious case was destroyed at its root by the letter signed by the acting CEO of the Defendant company and that no injustice would arise if the Defendant's application to set aside the default judgment were refused.

Miss. Ashby's arguments in rebuttal:

[21] In response, Counsel for the Defendant, Miss. Ashby submitted that in an application to set aside a default judgment, the standard which was required to be met to satisfy the Court is very low. She contended that all that a Defendant needed to show is a prima facie defence on the merits. She added that the depth of that defence was a matter for substantive trial on the merits. As regards the points raised by Counsel for the Plaintiff in relation to the letter and his interpretation of the substance of the letter, she submitted that these were matters for determination at the substantive trial on the merits.

[22] Miss. Ashby noted that Counsel for the Plaintiff had not submitted, and was in no position to submit that the Plaintiff would suffer any

injustice if the judgment were to be set aside and the Defendant were given leave to defend. She contended on the contrary, that it would be the Defendant company which would suffer injustice if the application were refused in that the company would be liable to be relieved of substantial sums which would become due to the Plaintiff as damages without having had the benefit of having the points of conflict between the parties fully ventilated at a trial.

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

[23] O. 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.

[24] The precise 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.

[25] It has been held that the policy which underlies the Court's discretion 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*** *(cited above)*]

[26] The 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]*** *(cited above)*.]

[27] The nature of the discretion conferred by the rule has been described by **Lord Wright** in ***Evans v. Bartlam*** *(cited 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 debitio justiciae once the facts are ascertained."*

[28] Again, in rejecting an argument advanced in ***Evans v. Bartlam*** *(cited above)* that before the Court or a judge could exercise the power conferred by Order XIII, r. 10 to set aside a judgment signed in default of appearance the applicant was bound to prove (a) that he had some serious defence to the action and (b) that he had some satisfactory explanation for his failure to enter an appearance to the Writ, **Lord Russell of Killowen** stated:

> *"My Lords, Order XIII., r. 10, in its terms is unfettered by any conditions, and purports to confer upon the Court or a judge full power to set aside a judgment signed in default of appearance, and if thought fit to impose such terms, as a*

> *condition of the setting aside, as may be just. It was argued by counsel for the respondent that before the Court or a judge could exercise the power conferred by this rule, the applicant was bound to prove (a) that he had some serious defence to the action and (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence or (what amounts to the same thing) to the exercise of the judicial discretion. For myself I can find no justification for this view in any of the authorities which were cited in argument; nor if such authority existed, could it be easily justified in the face of the wording of the rule. It would be adding a limitation which the rule does not impose."*

[29] 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*** *(cited above)*]

[30] It appears that 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. See ***Bank of Nova Scotia v Emile Elias & Co Ltd [1995] 46 WIR 33***

where the Barbados Court of Appeal 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.

[31] 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.***]

[32] In the case of ***Cheryl Diana Patricia Clarke v Ivan Hinds and Neville Edwards Civil Appeal No. 20 of 2003*** the Barbados Court of Appeal in its Judgment delivered on June 4, 2004, stated:

> *"[18] Although in most cases the primary consideration in exercising the discretion is whether the defendant has a case with a real prospect of success, we are of the view that there will be cases in which, irrespective of the merits, it will be a correct exercise of the discretion not to set aside a default judgment because of delay and the lapse of time between the judgment and the order setting it aside."*

[33] Similarly, in ***Dipcon Engineering Services Limited v Gregory Bowen and The Attorney General of Grenada***, Privy Council Appeal No. 79

of 2002 the Privy Council in its judgment delivered on 1 April 2004, stated:

> *"Of course, the merits of the proposed defence are of importance, often perhaps of decisive importance, upon any application to set aside the default judgment. But it should not be thought that it is only the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them will also be material…Important too will be any delay in applying to set aside the default judgment and any explanation for this also."*

[34] The following note taken from the Supreme Court Annual Practice, 1988 Volume I at page 130 is also of assistance with respect to the practice in relation to an application to set aside a default judgment which is regularly obtained:

> **"13/9/5** **Regular judgment**- If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits *(Farden v. Richter (18889) 23 Q.B. D. 124*. "At any rate where such application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., ibid. p.129, approving *Hopton v. Robertson [1884] W.N. 77*….
>
> For the purpose of setting aside a default judgment, the defence on the merits which the defendant is required to show need only disclose an arguable or triable issue. *(Drayton Gift-ware Ltd. V. Varyland Ltd. (1982) New L.J. 558*; arguable case which ought to go for trial.
>
> On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false.

Vann v. Awford (1986) The Times L.R. April 23 1986 CA."

Exercise of the Court's discretion:

[35] Against the foregoing background, I turn to consider the Defendant's application in this case and in particular, to a consideration of (i) how it came about that the Defendant/applicant company found itself bound by a default judgment regularly obtained to which it could have set up some serious defence; and (ii) whether any useful purpose would be served by setting aside the judgment and more specifically, whether the Defendant has established that it has 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?:

[36] The circumstances surrounding how the Plaintiff was able to obtain a regular judgment in default of defence against the Defendant company are set out in the first affidavit of Mr. Clarke filed herein on March 1, 2007 and highlighted at paragraph [3] above.

[37] According to the evidence, the reason advanced for the inaction by the Defendant company following the filing of the Acknowledgement of Service at the Supreme Court Registry on August 10, 2007, was due to the fact that, Mr. Clarke (a director and the Chief Executive Officer of the Defendant company) had taken a leave of absence from the Defendant company between August and October 2006 to attend to a number of personal tragedies and other personal matters requiring his absence from Barbados for extended periods.

[38] According to Mr. Clarke, neither prior to nor during his leave of absence, did he have the opportunity to properly instruct an attorney-at-law or arrange for legal representation and accordingly, no defence was filed on behalf of the Defendant company.

[39] Mr. Clarke was not cross-examined on his affidavit, nor have the facts deposed to in the first affidavit of Mr. Clarke been disputed by the Plaintiff. Accordingly, the reasons for the Defendant's failure to file its defence within the time required by the Rules are accepted by the Court.

[40] The Court has observed that the Summons to set aside the default judgment was filed on March 1, 2007, which is just under five months after October 10, 2006 when the Plaintiff obtained its Judgment in Default of Defence.

[41] It has not escaped the Court's attention that it was only on April 17, 2007 (following the filing on March 15, 2007 of the affidavit of Stan O. Smith opposing the application) that the Defendant sought to file the Supplementary Affidavit of Mr. Clarke setting out the merits of its proposed defence.

[42] The Court is of the opinion that until the filing of the Defendant's Supplementary affidavit on April 17, 2007, it is doubtful whether the Defendant's first affidavit could *by itself* have been regarded as an affidavit of merits since it merely recited the deponent's belief that the

Defendant company has a good defence to the whole of the Plaintiff's claim without condescending to the details of such defence.

(ii) Has the Defendant established an arguable case which should go for trial?

[43] In the light of the Defendant's Supplementary affidavit filed on April 17, 2007 and sworn by Mr. Clarke which seeks to set out the merits of the Defendant's case, I must now consider whether any useful purpose would be served by setting aside the judgment, and more specifically, whether the Defendant has established that it has a serious defence with a real prospect of success which ought to go for trial.

[44] Perusal of the Statement of Claim filed herein on July 27, 2006 reveals that the Plaintiff's case against the Defendant is that by reason of the matters outlined in paragraphs 1 to 4 of the Statement of Claim she was constructively dismissed by the Defendant company who she alleges was her employer. Central to the Plaintiff's case is the issue whether an oral agreement entered into between the parties on or about April 10, 2005 created a relationship of employer/employee under of contract of service.

[45] It is obvious from paragraphs 2 to 9 of the draft Defence exhibited as "GTMC 1" to the Supplemental Affidavit of Mr. Clarke that the Defendant intends to join issue with the Plaintiff on the following issues:

(a) the Plaintiff's allegation in paragraph 2(a) that the oral agreement made on or about April 10, 2005 was a contract for services and created an employer/employee relationship between the parties. [N.B. This allegation is denied by the Defendant in paragraph 2 of the draft Defence. The Defendant instead will contend that the Plaintiff was hired and was operating under a contract for services.]

(b) the Plaintiff's allegation in paragraph 2(b) that in June 2005 the Defendant promoted the Plaintiff to the post of Head of Barbados Operations. [N.B. This is denied by the Defendant in paragraph 3 of the draft Defence. The Defendant will seek to establish that as opposed to being offered a promotion, the Plaintiff was requested to temporarily assume additional responsibilities with respect to the Head of Barbados Operations function of the Defendant company and further, that the monthly amount of $3,500 was not a salary, but a monthly retainer to be payable on presentation by the Plaintiff of invoices in respect of management services rendered to the Defendant company.]

(c) the allegation in paragraph 2(c) of the Statement of Claim that there were express terms of the agreement between the parties. [N.B. This allegation is not admitted by the Defendant in paragraph 4 of the draft Defence and the Defendant will put the Plaintiff to proof of this allegation at the trial.]

(d) the allegation in paragraph 3 of the Statement of Claim that the Defendant discontinued the Plaintiff's post and offered her a

new assignment under a differently named job title at less pay.[N.B. This allegation is not admitted by the Defendant in paragraph 5 of the draft Defence and the Defendant will obviously put the Plaintiff to proof of this allegation at the trial.]

(e) the allegation in paragraph 4 of the Statement of Claim that she refused to sign a written contract and refused to work under a differently named job title at less pay. [N.B. This allegation is not admitted by the Defendant in paragraph 6 of the draft Defence. According to the draft Defence, the Defendant evidently proposes to establish that the Plaintiff submitted a doctor's certificate to the Defendant on or about April 25, 2007 and thereafter performed no further work for the Defendant company. It is evident that the reference to the production of a doctor's report issued in the year 2007 is a typographical error and that the certificate which the Defendant intends to produce if the matter proceeds to trial would most probably have been issued in the year 2006.]

(f) the allegation in paragraph 5 of the Statement of Claim that the Plaintiff was constructively dismissed.

[N.B. This allegation is expressly denied in paragraph 7 of the draft Defence.]

(g) the claims to loss of earnings in paragraph 6 and 7 of the Statement of Claim that the Plaintiff incurred. [N.B. The Plaintiff's claims for unpaid commissions and unpaid salary are

not admitted and expressly denied in paragraphs 8 and 9 of the draft Defence.]

[46] In his submissions opposing the application outlined at paragraphs [16] to [20] above, Counsel for the Plaintiff, Mr. Stan Smith urged the Court to regard the Defendant's proposed Defence as a "contrivance". He laid great store on the letter of termination dated April 24, 2006 (exhibit "SOS 1") attached to the affidavit of Stan Smith filed on March 15, 2007. According to him the letter establishes that the Plaintiff was an employee of the Defendant company. The letter, he asserted, effectively destroys the Defendant's argument that the default judgment should be set aside.

[47] With all due respect to the arguments advanced by Counsel for the Plaintiff and his analysis of the Plaintiff's letter of termination, it is clear to the Court that the Plaintiff's case hinges on the legal effect of an oral arrangement between the parties which was concluded sometime in April 2005 when the relationship between the parties is said to have commenced.

[48] The proposed Defence clearly highlights the many issues at stake in the case which, in the Court's view, can only fairly be determined by a full trial of the issues. It is not for this Court at this interlocutory stage to pre-judge the issues, nor to make a final determination of the question as to whether in fact and at law the Plaintiff was an employee or a private contractor.

[49] The Court is aware that there is a wealth of legal authority from many jurisdictions setting out the principles and tests which the common law has developed over the centuries to determine whether a person is employed under a contract of service or a contract for services. Each case will turn on its own peculiar facts and ultimately it will be for the Court at the substantive trial to make the final determination.

[50] The Plaintiff's letter of termination coming as it does one year after the Plaintiff's engagement with the Defendant company, is not conclusive of the issue and is only one of the matters which will ultimately have to be examined by the Court in determining whether in fact the Plaintiff was an employee of the Defendant company under a contract of service or a private contractor under a contract for services as the Defendant claims.

[51] The Court is satisfied that the draft Defence annexed to the Defendant's Supplemental Affidavit of merits has satisfactorily established that there are triable issues. In short, there is an arguable case which will provide a complete defence to the Plaintiff's claim, which cannot be resolved at this interlocutory stage and which ought properly to go to a substantive trial.

[52] The Court is also satisfied that the delay and lapse of five months which has occurred in this case between the obtaining of the default judgment and the Defendant's application for an order setting it aside

is not so egregious a delay as would preclude the Court from exercising its discretion in the Defendant's favour.

[53] Finally, the Court has asked itself whether in setting aside the default judgment and granting leave to defend, any injustice would be done to either of the parties. On the one hand, the Court finds that setting aside the default judgment in this case, would simply operate to postpone the issue of liability until a Court is able to hear all the issues and finally determine the competing issues at stake in the case. The exercise of the discretion in the Defendant's favour, while an obvious inconvenience to the Plaintiff, would, in the Court's view, not be unfair nor work an injustice to the Plaintiff.

[54] On the other hand, the Court accepts the argument of Counsel for the Defendant, Miss. Ashby that having established an arguable case, the Defendant would suffer injustice unless the judgment is set aside and the Defendant is given leave to defend. This is clearly because the Defendant would be liable to have to pay damages to the Plaintiff in circumstances in which the Defendant's liability to the Plaintiff on the merits has never been tried and determined before a court of law.

Disposal:

[55] In the result, it is hereby ordered that the Judgment in default of Defence entered on the 10th day of October, 2006 and all further proceedings which issued thereon is set aside and that the Defendant be given leave to defend the action.

[56] The Plaintiff is awarded her costs of the action to date in any event to be agreed or taxed.

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