

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

[Unreported]

**No. 1638 of 2001**

**BETWEEN**

**S P MUSSON SON & CO LTD**

**PLAINTIFF COMPANY**

**AND**

**STEPHEN BURKE**

**FIRST DEFENDANT**

**EWART GRANT**

**SECOND DEFENDANT**

**PIERCE A RUDDER**

**THIRD DEFENDANT**

**ALLIED SERVICES LTD**

**FOURTH DEFENDANT**

**(All trading as Steve's Dry Cleaning)**

*Before the Honourable Madam Justice Maureen Crane-Scott, Judge of  
the High Court*

*[In Chambers]*

**2008: November 6**

**Mr. Michael Yearwood in association with Mr. Junior Allsopp for the  
Plaintiff**

**Mr. Alrick Scott for the First Defendant.**

**DECISION**

- [1] **Crane-Scott J:** By specially endorsed Writ of Summons filed on August 03, 2001, the Plaintiff instituted action against the First, Second, Third and Fourth Defendants claiming, *inter alia*, arrears of rent and outstanding electricity charges which the Plaintiff alleged to be due under a rental agreement made in writing on 18<sup>th</sup> January, 1994 between the Plaintiff as landlord and “the Defendants” as the tenant. The Plaintiff also alleged at paragraph 2 of its Statement of Claim that the Defendants were all collectively trading under the name “Steve’s Dry Cleaning.”
- [2] An Affidavit of Service sworn by Alphonsa Carew and filed on February 27, 2003 stated that the Writ of Summons had been served on the First Defendant on September 14, 2001, while service was effected on the Second, Third and Fourth Defendants on September 28<sup>th</sup>, 2001.
- [3] By the 28<sup>th</sup> February 2003, some 17 months after service was effected on the Defendants, no notice of intention to defend had been filed by or on behalf of any of the Defendants, and the Plaintiff duly applied for and obtained default judgment against all four Defendants.
- [4] Some 20 months later, on October 15, 2004, the Plaintiff applied for and obtained a Charging Order against 2 parcels of land and property each owned respectively by the First Defendant and by the Second Defendant.
- [5] On November 24, 2004, the First Defendant applied by Summons under the provisions of **Order 13 r. 10** of the **Rules of the Supreme**

**Court** for an order that the default judgment entered herein on the 28<sup>th</sup> day of February, 2003 and all subsequent proceedings, be set aside and that he be given leave to defend the action with costs to be taxed and paid by the Plaintiff.

**Basis of the application:**

[6] The two grounds on which the First Defendant seeks to have the default judgment set aside are that:

1) The First Defendant has a good defence to the action on the merits in that the First Defendant was not a party to the agreement pleaded at paragraph 3 of the Statement of Claim and that therefore the Plaintiff has no cause of action against the First Defendant; and

2) there was an irregularity in that the Writ of Summons was never served personally or otherwise upon the First Defendant contrary to **O 10 r. 1** of the Rules of the Supreme Court.

[7] When the Summons came on for hearing before the Court on October 19, 2007, Counsel for the First Defendant, Mr. Alrick Scott informed the Court that the irregularity ground (ground 2) had been argued unsuccessfully before *Cornelius J.* on April 20, 2006 and that the application would therefore be proceeding in relation to (ground 1) only.

**Legal submissions for and against the order:**

[8] *The case for the First Defendant:* Citing the decision of the Barbados Court of Appeal in the case of *Cheryl Clarke v. Ivan Hinds et al C.A. No. 20 of 2003*, Counsel for the First Defendant submitted that a defendant who wished to set aside a regularly entered default judgment was required (i) to show a good defence on the merits, that

- is a defence with a real prospect of success; and (ii) to explain the circumstances in which the default judgment came to be entered and any delay in applying to set the same aside.
- [9] Counsel for the First Defendant also stated, following *Cheryl Clarke's Case (cited above)*, that in exercising its discretion, the Court would be required to balance the prejudice to the parties which may result from setting aside the judgment or from allowing it to stand.
- [10] Turning to the merits of the First Defendant's defence to the action, Counsel for the First Defendant, Mr. Alrick Scott referred to the draft Defence annexed to the First Affidavit of Stephen Burke filed on March 2, 2005 in support of the application. He stated that the Plaintiff's action was for arrears of rents, electricity charges, collection charges and commissions alleged to arise out of an agreement contained in a letter dated January 18, 1994.
- [11] He submitted that the core of the First Defendant's defence was that he was not a party to the agreement sued on and consequently is not a proper party to the action.
- [12] Counsel for the First Defendant, referred to the letter dated January 18, 1994 and submitted that the question whether the First Defendant was a party to the agreement is to be determined by construing the letter with the object of determining the mutual intentions of the parties as expressed in the words used. He cited extracts from *Lewison "The Interpretation of Contracts", 2<sup>nd</sup> Edition*, para 1.03 in support of his submissions.
- [13] Referring to the actual wording of the letter, Counsel for the First Defendant then sought to construe specific words in the letter which he submitted clearly showed that the Plaintiff intended to contract, not

with the First Defendant, but with a single entity, namely, “*your Company*”.

- [14] According to Mr. Scott although the letter had been addressed to Steve’s Dry Cleaning (Attn: Antonio Rudder), the First Defendant’s name was not recorded in the letter at all, either as a party or otherwise. In addition, the letter had been addressed to a registered business name which had no legal personality recognized by law. He contended that by simply addressing the letter to Steve’s Dry Cleaning could not make the First Defendant a party to the contract. Furthermore, that the draftsman of the letter knew that the First Defendant was one of the registrants of the business name and that ownership of the business name could not be imported into the contract when the letter itself gave no such indication.
- [15] Referring to the first paragraph of the letter, Mr. Scott submitted that the Plaintiff’s letter of January 18, 1994 had clearly identified the party to the contract. The letter did not identify an individual or individuals but clearly speaks of a single entity, namely the Steve’s Dry Cleaning company as the party to which it was contracting. He submitted that the only company associated with Steve’s Dry Cleaning is Allied Services Limited, which, he submitted, is denoted on the application form for registration of business name as the corporate entity which would be trading as Steve’s Dry Cleaning.
- [16] Counsel for the First Defendant referred to the first affidavit of Stephen Burke and submitted that the agreement of January 18, 1994 should be construed against the background of a pre-existing contractual relationship between the Plaintiff and Allied Services Limited which dated back to 1985 when Allied Services Limited had

leased space in the Plaintiff's premises on Bay Street, St. Michael for purposes of its dry cleaning business. The letter of January 18, 1994, he pointed out, was merely a further agreement between the Plaintiff and Allied Services Limited for additional space for office purposes within the same building.

- [17] In the alternative, Counsel for the First Defendant argued that if the letter of January 18, 1994 was found to be ambiguous then in keeping with the *contra proferentem* canon of construction, it should be construed against the Plaintiff and given the meaning most favourable to the First Defendant.
- [18] Counsel for the First Defendant then made submissions in relation to the circumstances surrounding the 20 month delay between the date of the entry the default judgment and the date of the First Defendant's application to set it aside. He referred to the explanation set out in paragraphs 11 to 19 of the second affidavit of Stephen Burke filed on June 13, 2005 in which the First Defendant stated that he only became aware of the existence of the default judgment in February 2004 when he was informed that an application was scheduled for hearing before the Registrar of the Supreme Court.
- [19] According to the First Defendant, in early March 2004 he, along with the Second and Third Defendant in their capacity as three directors of the Fourth Defendant, met with the Plaintiff's attorney-at-law and acknowledged that the debt was due from the Fourth Defendant and made arrangements to pay the same to the Plaintiff.
- [20] The First Defendant also states that as the debt due to the Plaintiff from the Fourth Defendant was never in dispute and the Fourth Defendant was always committed to paying the same, he did not seek

independent legal advice regarding the proceedings which had been instituted in February 2004. Further, he deposes that he never realized that he would have been held personally liable for the debts of the Fourth Defendant and had assumed that he had been joined in the action as a matter of procedure since he was a director of the Fourth Defendant.

[21] Given the above explanation, Counsel for the First Defendant contended that despite the 20 month delay between the date of the entry the default judgment and the date of the First Defendant's application to set it aside, in real terms the application was only made 9 months after the First Defendant became aware of the judgment against him. This period of delay, he urged, should not be regarded as excessively inordinate.

[22] The case for the Plaintiff: Counsel for the Plaintiff Mr. Michael Yearwood stated that while he could not dispute the principles which had been referred to by Counsel for the First Defendant and which were well settled, he was, however, disputing the application of the principles in relation to the First Defendant.

[23] Referring to the letter of January 18, 1994 containing the agreement on which the Plaintiff's action was based, Mr. Yearwood submitted that the Plaintiff was well aware that "Steve's Dry Cleaning" is a registered business name. He drew attention to the affidavit in response of Ian Donovan which had been filed on June 10, 2005 and to the copy of the Application for registration of the business name (Exhibit "ID 1") which had been filed with the Corporate Registry in 1984 and which, he said, listed Stephen Burke as one of the 4 applicants/owners of the business name.

- [24] Counsel for the Plaintiff also submitted that having regard to the provisions of the *Registration of Business Names Act, Cap. 317*, it was not permissible for a single corporation to register and carry on business under a business name which does not consist of its true corporate name. Additionally he argued, having regard to the definition of “firm” in section 2(1) of the Act, registration was only permissible if the corporation carries on a business for profit under a partnership with one or more individuals or with one or more other corporations.
- [25] As the business name had been registered in conformity with the Act, Mr. Yearwood contended that the ownership of the business name “Steve’s Dry Cleaning” had been settled by what was stated on the form and consequently the 4 persons listed on the form must be taken as the persons who, in partnership, own and operate the business under the business name “Steve’s Dry Cleaning”.
- [26] Mr. Yearwood submitted further that where persons carry on business in partnership, it was well established that one partner is competent to bind the others. Accordingly as the letter of January 18, 1994 setting out the terms of the agreement had been signed by Mr. P. Antonio Rudder, it was capable, he submitted, of binding and did bind the other 3 partners to the business.
- [27] The fact that the Plaintiff’s letter of January 18, 1994 had used the expression “*your Company*” was, in Mr. Yearwood’s view, completely consistent with a reference to the partnership carried on by the 4 Defendants under the name “Steve’s Dry Cleaning”. Additionally, the fact that the Plaintiff had in the letter referred to “Steve’s Dry Cleaning” as a company, could not, he submitted,

change the character of the business from a partnership to that of a registered company.

- [28] Counsel for the Plaintiff also submitted that the First Defendant's defence was without merit having regard to the exhibits attached to the affidavit of Ian Donovan filed on June 10, 2005. He referred in particular to the letter dated June 6, 2000 in which Mr. P. Antonio Rudder had acknowledged the outstanding amount of \$35,526.60 and had offered to pay the sum of \$5,000.00 per month to clear the amount due. According to Mr. Yearwood the letter was a clear acknowledgment of the debt. Further, he contended, since Mr. Rudder had used the word "we" when making the offer, the offer to settle had been made on behalf of all 4 Defendants as operators and partners of the business "Steve's Dry Cleaning." In closing, Counsel for the Plaintiff submitted that the First Defendant's case for setting aside the default judgment was weak and that the First Defendant had failed to establish that he had a defence with a real prospect of success.

### **Discussion**

- [29] On February 28, 2003 the Plaintiff obtained a default judgment against all four Defendants pursuant to **O. 13** on the basis that the Defendants had failed to give notice of intention to defend. **O. 13 r. 10** provides that the Court *may*, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of the Order.
- [30] The precise nature and scope of the Court's discretion to set aside a regularly obtained judgment has been judicially considered in numerous decided cases. [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.; *Bank of Nova Scotia v*

*Emile Elias & Co Ltd [1995] 46 WIR 33; Cheryl Diana Patricia Clarke v Ivan Hinds and Neville Edwards Civil Appeal (cited above).]*

[31] 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.

[32] 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.*]

[33] In the case of *Cheryl Diana Patricia Clarke v Ivan Hinds and Neville Edwards Civil Appeal (cited above)*, 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.”*

[34] 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.”*

[35] Against the foregoing background, the Court in the exercise of its discretion turns to consider firstly, whether the First Defendant has established that he has an arguable defence with a real prospect of success which ought to go for trial; and secondly, the circumstances surrounding how the First Defendant came to be bound by the default judgment to which he could have set up some serious defence and whether there was any undue delay or lapse of time in applying to set aside the judgment which would prevent the exercise of the Court’s discretion in the first Defendant’s favour.

[36] (i) Has the First Defendant established an arguable defence with a real prospect of success?: As appears from paragraphs 2 to 5 of its Statement of Claim filed herein on August 3, 2001, the Plaintiff’s claim against the First Defendant is for arrears of rent, electricity charges, debt collection charges and commissions due pursuant to an agreement in writing made on or about January 18, 1994 between the Plaintiff as landlord of the one part and the First, Second, Third and

Fourth Defendants collectively trading as “Steve’s Dry Cleaning” as tenant of the other part.

[37] As clearly appears from his draft Defence exhibited as “SB1” to his first affidavit, the First Defendant:

- (i) denies that he was at the material time or any other time a tenant of the Plaintiff;
- (ii) while admitting the existence of an agreement dated January 18, 1994 for the rental of premises at Bay Street, St. Michael, specifically denies that he was a party to the said agreement or in any way entitled to the benefits or subject to the burdens of the same. The agreement he contends was between the Plaintiff and Allied Services Limited, the Fourth Defendant who was the tenant;
- (iii) denies that Plaintiff’s claims for arrears of rent, electricity charges, debt collection charges and commissions due pursuant to the agreement are due from him and contends that any monies owing to the Plaintiff are due from the Fourth Defendant.

[38] The merits of the proposed defence are further explained and amplified in the second affidavit of Stephen Burke filed herein on June 13, 2005.

[39] In support of his contention that the monies owing to the Plaintiff are due from the Fourth Defendant as the tenant and not from him, the First Defendant gave the incorporation history of the Fourth Defendant and deposes at paragraphs 3 and 4 of his second affidavit that the Fourth Defendant had been incorporated as a private limited

- liability company on May 23, 1984 specifically to own and operate the dry cleaning business called or styled “Steve’s Dry Cleaning”.
- [40] The Fourth Defendant was subsequently continued under section 352 of the *Companies Act, Cap. 308* and the First, Second and Third Defendants were its three directors. It appears that the Fourth Defendant was subsequently advised to register “Steve’s Dry Cleaning” as a business name under the *Registration of Business Names Act* and the business name was duly registered on August 3, 1984.
- [41] As appears from the affidavit of Ian Donovan and from the arguments of Counsel for the Plaintiff at the hearing, the Plaintiff’s case against the First Defendant is founded on the premise that since his name along with the names of the other three Defendants is listed on the application for registration of business name form (Exhibit “ID1”) filed at the Corporate Registry in connection with the operation of the business “Steve’s Dry Cleaning”, the Plaintiff is entitled to treat all four Defendants as operating in partnership and that consequently each partner is liable for the debts and liabilities incurred by the business. *[See paragraphs 24-27 above]*
- [42] At paragraph 2 of his second affidavit, Stephen Burke deposes that the business name application form (Exhibit “ID1”) does not state that the First Defendant is one of the owners of the business and that the Defendants should at most be regarded as mere registrants of the business name. Counsel for the First Defendant also argued that a registered business name has no legal personality recognized by law. *[See paragraphs 14-15 above]*

- [43] The proposed Defence of the First Defendant clearly highlights the several issues which are at stake in this action which are essentially whether the First Defendant was at the material time or any other time a party to the rental agreement of January 18, 1994 between the Plaintiff and Steve's Dry Cleaning and a tenant of the Plaintiff or whether as the First Defendant contends, the tenant was the Fourth Defendant who alone is liable for the arrears of rent and the other amounts claimed by the Plaintiff.
- [44] In the view of the Court, these issues can only fairly be determined at the substantive trial. 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 business name "Steve's Dry Cleaning" was operated in partnership by the First, Second, Third and Fourth Defendants as the Plaintiff alleges or by the Fourth Defendant alone as the First Defendant asserts.
- [45] The Court is satisfied that the First Defendant has satisfactorily established that there is an arguable case with a real prospect of success which could provide him with a complete defence to the Plaintiff's claim. These issues cannot be resolved at this interlocutory stage and ought properly to go to a substantive trial.
- [46] (ii) How did the default judgment come to be entered against the First Defendant and has the lapse of time been satisfactorily explained?: It is clear from the first affidavit of Stephen Burke filed herein on March 2, 2005 and from (ground 1) of the Summons filed on November 24, 2004, that the First Defendant has always contended that the default judgment was irregular in that it was entered against him in

circumstances in which he was never served with the Writ of Summons and accordingly, had no knowledge of the proceedings.

[47] Both parties are agreed that the irregularity issue was resolved before *Cornelius J.* who found that the Writ of Summons had been personally served on the First Defendant as stated by process server, Alphonza Carew in his affidavit of service filed herein on February 27, 2003. In the circumstances, this Court finds and accepts as a fact that the First Defendant was aware of these proceedings from as early as the 14<sup>th</sup> day of September, 2001 when the documents were served on him. Consequent also on the ruling of *Cornelius J.* in relation to (ground 1) the Court accepts that the default judgment was regularly entered against all four Defendants.

[48] As is evident from the second affidavit of Stephen Burke filed herein on June 13, 2005, the First Defendant appears to have elected not to seek independent legal advice regarding to his exposure to personal liability in the action. Instead he took no action in the proceedings on the assumption that since the lease for the property at Bay Street was between the Plaintiff and the Fourth Defendant, he had merely been joined in the action by the Plaintiff as a matter of procedure having regard to his position as a director of the Fourth Defendant.

[49] Again, as clearly appears from paragraph 13 of his second affidavit, the First Defendant only recognized the need to seek independent legal advice in relation to the Court proceedings after his directorship of the Fourth Defendant ceased in September/October 2004 and after the Plaintiff had on October 15, 2004 obtained an order imposing a charge upon his property at lot 31 West Terrace, St. James.

- [50] Although the First Defendant was aware that legal proceedings had been instituted against him for some 17 months prior to the entry of a default judgment against the Defendants, the Court accepts the evidence of the First Defendant that the debt due to the Plaintiff was never in dispute and that the Fourth Defendant was always committed to paying the same.
- [51] While it is always a calculated risk for ant defendant to take no part in legal proceedings to which he has been made a party, the Court is satisfied that in this case having regard to a) the First Defendant's position as the managing director of the Fourth Defendant; b) his own peculiar knowledge of the circumstances in which the rental agreement of January 18, 1994 had been entered into; and c) his evidence that the Fourth Defendant was always committed to paying the amount due under the agreement, the First Defendant's decision not to take legal advice or to defend the proceedings though foolhardy, is nonetheless understandable.
- [52] The Court also accepts that the gravity of his personal situation only dawned upon the First Defendant in February 2004 when it first came to his knowledge that a default judgment had been entered against him and further that a charging order over property personally owned by him had been applied for.
- [53] A period of 9 months then elapsed between February 2004 and November 24, 2004 when the First Defendant applied by Summons to set the default judgment aside. During this period, as clearly appears from the second affidavit of Stephen Burke and from paragraph 17 to 19 of the affidavit of Ian Donovan, in or around March 2004, a lump sum payment of \$15,000.00 on account of the indebtedness was

proposed and accepted by the Plaintiff from the Defendants towards reduction of the outstanding amount. This clearly supports the First Defendant's affidavit evidence that the debt due to the Plaintiff was never in dispute and that the Fourth Defendant was committed to settling the amount due to the Plaintiff.

[54] The Court also accepts that after the First Defendant's directorship of the Fourth Defendant company came to an end in September/October of 2004, it would have been in his best interest to seek legal advice regarding his exposure to the debt and to have the default judgment set aside.

[55] Whilst it is desirable for applications to set aside default judgment be made without delay, the Court does not find that the period of delay in this case of 9 months between February 2004 when the First Defendant became aware of the Default judgment and November 2004 when the application to set it aside was filed was so inordinate as to merit the exercise of its discretion against the First Defendant.

[56] 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 against the First Defendant in this case, would simply operate to postpone the issue of whether the First Defendant is personally liable on the agreement of January 18, 1994 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 First 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.

[57] On the other hand, the Court accepts the argument of Counsel for the First Defendant, that the First Defendant would suffer substantial injustice unless the default judgment against him is set aside and he is given leave to defend. This is clearly because otherwise the First Defendant's property situated at Lot 31 West Terrace, St. James which is currently subject to the charging order would be liable to be sold in circumstances in which triable issues relating to First Defendant's personal liability to the Plaintiff for the debt have never been determined on the merits before a court of law.

**Disposal:**

[58] In the result, it is hereby ordered that the Judgment in default entered on the 28<sup>th</sup> day of February, 2003 be set aside insofar as it relates to the First Defendant together with all subsequent proceedings which issued thereon in relation to the First Defendant. In particular, paragraph (a) of the Charging Order made on the 15<sup>th</sup> day of October, 2004 against the property of the First Defendant is hereby discharged.

[59] The First Defendant is given leave to file his Defence to the action within 28 days of the date hereof.

[60] Costs of the application shall be costs in the cause.

**Maureen Crane-Scott  
Judge of the High Court**