

BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Jurisdiction

No. 302 of 2003

BETWEEN:

THERESA HAWKINS *Plaintiff*

AND

KENNETH HAYDEN ARTHUR *First Defendant*

ARTHUR CONSTRUCTION *Second Defendant*

INCORPORATED

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court (Ag.)

2003: October 30

Mr. David King, Q.C., Attorney-at-law of David King & Co. Attorneys-at-law for the Plaintiff.

Ms. Sharon Parris Attorney-at-law for the First and Second Defendants.

JUDGMENT

[1] This is an application by summons (the summons) filed on the 7th April, 2003 by the First and Second Defendants for an order that the judgment entered on 2nd April, 2003 be set aside and for consequential relief as outlined in the summons as follows:

1. That the judgment entered herein on the 2nd April 2003 be set aside;
2. That the Defendant be at liberty to defend this action by filing and serving its Defence on the Plaintiff written 14 days of the

date of the order;

3. That the Defendants do pay the costs thrown away.

[2] The First Defendant is and was at all material times the sole director of the Second Defendant company.

[3] The Second Defendant is and was at all material times a limited liability company incorporated and registered under the provisions of the **Companies Act Chapter 308 of the Laws of Barbados** with its registered office situate at Bush Hall Main Road in the Parish of Saint Michael in Barbados.

[4] The affidavit sets out the reasons for the non-filing of the defence namely: the request by the defendants' Counsel to the Plaintiff's Counsel for extension of time for filing the defence, the financial and, inter alia other difficulties of the Defendant, as they impacted on his inability to file a defence.

[5] The Writ as Sstatement of Claim in respect of which the judgment was entered was filed on the 14 day of February 2003 and the salient paragraphs of the Statement of Claim are as follows:

6. By an oral agreement made on or about the year 1985, the First Defendant agreed to rent from the Plaintiff the property situate at Bush Hall Main Road in the parish of Saint Michael in this Island as his residence at a monthly rent of the sum of \$500.00

7. It was an implied term of of the said tenancy that the First Defendant would not assign or sublet the said premises without the prior consent of the Plaintiff so to do.

8. It was an implied term of the said tenancy that the said rented premises would be used by the First Defendant for residential purposes only.

9. In breach of the implied term of the tenancy not to assign or sublet the said premises without the prior consent of the Plaintiff, the First Defendant assigned or sublet the said premises to the Second Defendant without first obtaining the consent of the Plaintiff so to do. The Plaintiff cannot give particulars of the said assignment or subletting until after discovery herein.

10. In breach of the implied term of the tenancy to use the said premises for residential purposes only, the First Defendant has permitted the Second Defendant to use the premises for commercial purposes, to wit, to carry on the operation of the business of the Second Defendant Company which includes use as the registered place of business of the said company and the storage of heavy duty construction and excavation equipment on the said premises.

11. By reason of the said breach of covenant by the First Defendant not to assign or sublet or to use or permit to be used the premises otherwise than for residential purposes by the First Defendant, the property has been damaged and the value thereof has been greatly diminished as a result of which the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

Major structural cracks on internal walls;

Major structural cracks of north wall of front office;

Broken decorative blocks in patio;

External cracks along north wall;

Discoloured external wall.

(Further and better particulars of loss and damage will be presented on or before the date of trial.)

12. By reason of the use and occupation of the said property by the Second Defendant the property has been damaged and the value thereof has been greatly diminished as a result of which the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

Major structural cracks on internal walls;

Major structural cracks on north wall of front office

Broken decorative blocks in patio;

External cracks along north wall;

Discoloured external wall;

Discoloured soil due to oil stains.

13. By reason of the said breach of covenant by the First Defendant to keep the rented premises in tenable repair, the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

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(Further and better particulars of loss and damage will be presented on or before the date of trial.)

14. The First Defendant has failed and/or refused to pay the monthly rent of the said property since the month of December 1995.
15. By letter dated the 18th day of February 2000, the Plaintiff through her Attorneys-at-Law informed the First Defendant that the arrears of rent due and owing on the said property is the sum of \$22,500.00.
16. The First Defendant through his Attorney-at-law has acknowledged the debt owing to the Plaintiff in arrears of rent of rent and has made a part payment of the arrears of rent in the sum of \$9,500.00.

PARTICULARS OF PAYMENT

13th March 2000

\$2,500.00

29 th June 2000	2,000.00
29 th July 2000	3,000.00
1 st September 2000	<u>2,000.00</u>
-	
Total payment made	<u>\$9,500.00</u>
-	

17. In spite of repeated requests, the First Defendant has failed and/or refused to pay the Plaintiff the balance of the arrears of rent on the said property.

PARTICULARS OF BALANCE OF ARREARS OF RENT

December 1995 to 31 st March 2000	
@ \$500.00 per month	\$22,500.00
Less payment made by the	
First Defendant	<u>9,500.00</u>
-	
Total arrears of rent	<u>\$13,000.00</u>

By a Notice to Quit dated the 18th day of February 2000, the Plaintiff duly determined the tenancy with effect from the 31st day of March 2000 yet the First Defendant has failed and/or refused to vacate the said premises.

AND THE PLAINTIFF CLAIMS

Against the First Defendant:

- (1) Arrears of rent in the sum of \$13,000.00
- (2) Mesne profits at the rate of \$500.00 per month from the 31st day of March 2000 until possession be delivered up;

Against the First and Second Defendants jointly and severally:

- (3) Possession of the said premises;

(4) Damages;

(5) Interest;

(6) Costs.

The judgment which the Defendants seek to set aside is in the following terms:

DEFAULT JUDGMENT

NO DEFENCE having been filed by the First Defendant and Second Defendant herein IT IS THIS DAY ADJUDGED:

That the First Defendant do:

1. Pay to the Plaintiff the arrears of rent in the sum of \$13,000.00;
2. Pay to the Plaintiff mesne profits at the rate of \$500.00 per month from the 31st day of March 2000 until delivery up of possession of the property situate at Bush ahall Main Road in the parish of Saint Michael in this Island.

That the First Defendant and Second Defendant do:

3. Deliver up possession of the property at Bush Hall Main Road in the parish of Saint Michael in this Island;

AND IT IS FURTHER ADJUDGED that the First and Second Defendants do pay the Plaintiff damages at the rate of 8% per annum from the date of Judgment with costs to be taxed.

[6] The summons is supported by an affidavit filed 7th April 2003 and sworn by the First Defendant and exhibited to it is a draft defence and counterclaim.

[7] The affidavit sets out the reasons for the non-filing of the defence namely: the request by the defendants' Counsel to the Plaintiff's Counsel for extension of time for filing the defence, the financial and, inter alia, other difficulties of the Defendant, as they impacted on his inability to file a defence.

[8] The material paragraphs of the draft defence and counterclaim are as follows:

1. The Defendant denies that he entered into the said agreement on or about 1985 but states that he entered into an agreement from on or about 1974.
2. Paragraphs 7 and 8 of the Statement of Claim are denied. The Defendant states that pursuant to the Agreement made between himself and Mr. Lesley Wilkinson he was given permission to operate a business from the said premises.

3. Paragraph 9 of the Statement of Claim is denied. The Defendant states that it had permission to assign and/or sublet the said premises.
4. Further, the Defendant states that at the date it commenced payment of rents to the Plaintiff the Defendants were already in occupation of the said premises, with the Second Defendant conducting business thereon.
5. The Defendant denies paragraph 10 of the Statement of Claim and states that the said permission given by the First to the Second Defendant was not in breach of any agreement.
6. The Defendant denies paragraph 11 of the Statement of Claim and states that any damage done to the property was not due to the assignment or sublease or permission to use the property other than for residential purposes. The defendants deny that the value of the property has been diminished in this regard.
7. The Defendant denies paragraph 12 of the Statement of Claim and denies any allegation of loss and damage.
8. The Defendant admits paragraph 13 of the said Statement of Claim but states that at the inception of the tenancy the wall of the said property had internal and external cracks.
9. The Defendants further state that the said internal and external cracks were repaired twice by the said Lesley Wilkinson and the Defendants themselves have repaired the said cracks internally and externally on two occasions.
10. Further the Defendant repaired the roof and the ceiling of the said property which had sustained damage due to leakage, and fair wear and tear.
11. The Defendant denies the allegations in paragraphs 14 and 15 of the Statement of Claim.
12. Paragraphs 16, 17, 18, 19 and 20 of the Statement of Claim are admitted.
13. Save as in hereinbefore expressly admitted, the Defendants deny each and every allegation contained in the Statement of Claim as if the same was set out and traversed *seriatim*.
14. Further or alternatively the Defendant will rely upon his counterclaim herein by way of set off in extinction or diminution of the way of the Plaintiff's claim.

SET OFF AND COUNTERCLAIM

15. By way of Counterclaim the Defendants repeat paragraphs 1 to 14 of its Defence.
16. The Defendants state that there was a term implied in the tenancy agreement made between it and the said Mr. Lesley Wilkinson and subsequently adopted by the Plaintiff that the Plaintiffs were under a duty to repair the said premises.

17. The Defendants state that the said Mr. Lesley Wilkinson and the Plaintiff breached their duty under the provisions of the Property Act Cap. 236 of the Laws of Barbados by failing to carry out their statutory duty with regards to repair to and/or the said property.
18. The Defendants had to carry out several repairs to the said building and incurred expense and loss.
19. The Defendant has failed and/or neglected to pay the Defendants for the expenses and loss incurred for the repairs and renovations carried out.

PARTICULARS OF LOSS

For carrying out electrical works to residence, rewiring and installing plugs, circuits and lights including upgrade of panels and earth box	\$1,500.00
Repairs to doors, ceiling and roof	<u>6,566.43</u>
TOTAL	<u>\$7,866.43</u>

20. The Plaintiff claims and is entitled to interest on the said sums pursuant to the provisions of the Companies Act Cap. 308 of the Laws of Barbados.

AND THE PLAINTIFF claims:

- a. The sum of \$7,866.43
- b. Interest thereof as aforesaid
- c. Legal Costs
- d. Such further or other relief that the court thinks fit.

Submissions

- [9] In support of her application to set aside the judgment, Miss Parris, Counsel for the Defendants, submits that, at this state of proceedings, the Court does not look to the merits of the case but to see if there are triable issues. She submits further that the Defendants' defence and counterclaim reveal a triable issue with respect to the cracks in the home, the subject matter of the lease, which led to the suit. (See paragraphs 11 and 12 of the draft defence and counterclaim).
- [10] Mr. King on the other hand submits that neither the affidavit nor the Defendants' draft Defence and Counterclaim disclose any basis for the Court to exercise its discretion in favour of the Defendants to overturn the judgment.
- [11] He notes that the Defendants admit in the draft defence the items claimed by the Plaintiff in paragraphs 1, 2, and 3 of the judgment sought to be set aside, namely:
 - (1) Arrears of rent
 - (2) Mesne profits

(3) Delivery up of possession of the property.

- [12] He submits further that there isn't anything to preclude this Court from leaving the matter of damages to be assessed as ordered in the summary judgment.
- [13] According to Counsel, the affidavit and draft defence do no more than challenge the quantum of damages claimed which is the purpose of assessment.
- [14] He submits further that the Defendants admit to having a duty to keep the premises in tenable repair, the extent of that duty is a question for assessment of damages.
- [15] He refers to paragraphs 12 and 14 of the draft Defence where the Defendants admit to executing repairs and similarly paragraph 18, Where items 1 to 14 of the draft defence are repeated.
- [16] The only issue he contends is how much damage was done and how much the Defendants are liable for. He further submits that there is no basis in the draft defence or affidavit for this Court to disturb the judgment. He relies on **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co, Inc. 1986 2 Lloyd's Reports 221** to urge that the Court has a discretion to ascertain if the defence has merits to which the Court should pay heed as a matter of common sense. He opines that there is not merit in the proposed defence.
- [17] He submits further that on the assessment of damages the parties must bring to Court evidence supporting the quantum one side claims to be entitled to receive or the other claims not to be obliged to pay. He further submits that there is no likelihood of the Defence or counterclaim succeeding. In summary he submits: (1) that the judgment ought not to be disturbed; (2) alternatively, that the judgment ought not to be disturbed as to items 1, 2 and 3 thereof.
- [18] Miss Parris admits that the Court has power to set aside part of the judgment – This is also conceded in the affidavits filed in support where certain admissions are made. Her submission is that the entire judgment ought to be set aside or at least as to those aspects thereof which are not admitted.
- [19] This Court has observed that:

It is clear and conceded that the judgment obtained was regularly obtained. There has been default on the part of the Defendant but the time frame in the opinion of this Court, for the purposes hereafter contained is not an outrageous one - Counsel did write for an extension of time to file the Defense and explained through her client's affidavit in support of the application to set aside the judgment, the reasons for not filing the Defense. There was no response to this letter.

The Law

- [20] The jurisdiction of the High Court to set aside a judgment in default of defence is contained in Order 19 Rule 9 of the **Rules of the Supreme Court**.
- [21] The power is a discretionary one and is exercised upon the principles which the courts have devised as a means of guiding themselves. Lord Atkin in the celebrated case of **Evans v Bartlam 1937 AC. pg. 479 et seq.** said:

"I agree that both rules, Order XIII., r. 10, and Order XXVII., 15, give a discretionary power to the judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously 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."

- [22] Similarly, **Sir Roger Ormrod** in **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. (The Saudi Eagle) 1986 2 Lloyd's Reports 221 at 223** noted:

"...General indications to help the Court in exercising the discretion" (per **Lord Wright at p. 488**) can be extracted from the speeches in **Evans v. Bartlam, [1937] A.C. 473**, bearing in mind that "in matters of discretion no one case can be authority for another" (ibid. p. 488):

- (i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;

(ii) the Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms “unconditional” and the Court should not “lay down rigid rules which deprive it of jurisdiction” (per Lord Atkin at p. 486);

(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;

(iv) the primary consideration is whether the defendant “has merits to which the Court should pay heed” (per Lord Wright at p. 489), not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown “merits” the Court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication [ibid. p. 489] and per Lord Russell of Killowen at p. 482].

(v) Again as a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about that the defendant ... found himself bound by a judgment regularly obtained to which he could have set up some serious defence [per Lord Russell of Killowen at p. 482].

[23] Apart from the English Authorities, the local case of **. W. A. Bryan & Co. Ltd v. Mildred Caroline Herbert** where **Inniss J.** was adjudicating an application by summons to set aside a judgment regularly obtained, cited with approval the decision of **Lord Wright** in **Evans v Bartlam 1937 AC. 473 pg. 489.**

“... that the primary consideration in deciding whether or not a judgment should be set aside is whether the defence “has merits to which the Court should pay heed.” If merits have been shown the courts will not prima facie desire to let a judgment pass on where there has been no proper adjudication.”

[24] **Inniss J.** also considered the relevant portions of the judgment in the **Saudi Eagle** quoted before the court where the view was expressed that, in order to arrive at a reasonable assessment of the justice of the case, the court must take a provisional view of the probable outcome if the judgment were to be set aside and the defence developed.

[25] In this regard the submissions of Mr. King regarding the Defendants’ rights of set off to and his Counterclaim are worthy of analysis. He submits that the Defendants may be able to have these issues dealt with by the Court at the assessment of damages stage of proceedings. This submission, in the opinion of this Court, fails to take into account that the Court cannot assess damages for the Defendants or consider whether the Defendants are entitled to a set off and/or Counterclaim at the assessment stage of proceedings unless the Court has previously adjudicated on the set off and Counterclaim.

[26] If the Defence and Counterclaim are not heard at trial, this Court is of the opinion that the Defendants will be debarred from having a set off and counterclaim considered thereafter because there would not have been an adjudication on the merits of the set off and Counterclaim.

[27] It must be remembered that the Counterclaim is in itself a cause of action. The Court simply cannot entertain a trial on these grounds at the assessment of damages stage.

[28] In addition, the court must ensure that all relevant matters between the parties are adjudicated at the same time so as to avoid duplication of evidence, wasted time and costs.

Time

[29] The writ was filed on the 14th February, 2003 and served on the 18th February, 2003 on the Defendants. The Acknowledgment of service was filed on 20th February, 2003 and judgment entered on 2nd April, 2003 but only filed on the 8th April, 2003 some 6 to 7 weeks after acknowledgment. The summons to set aside was filed 7th April 2003 prior to the filing of the Default judgment which was obtained on 2nd April, 2003. This apparent anomaly can be explained by the lapse of time between the obtaining of the judgment and filing of the same. No point was taken in relation to this.

[30] Having regard to the above chronology of events, this Court cannot conclude that in these particular circumstances the length of time which elapsed in this case was unreasonable having regard to the decision in **Vann v Awford 1986; The Times 23** and **McDonald**

Farms Ltd. v Bico (unreported decision No 33 of 1993) where a judgment was set aside which was entered over a year after the writ was filed.

- [31] In **W. H. Bryan & Co. Ltd. v Mildred Caroline Herbert** (previously quoted) **Inniss J.** set aside a regular judgment entered 4 months after filing of the writ and where a further 3 months elapsed before the summons to set aside the judgment had been filed.
- [32] On the facts of this case, however, I find that there has been some delinquency but not undue delinquency and Counsel for the Defendants acted with a certain degree of promptitude in moving this Court to set aside the judgment.
- [33] In addition, there has been no allegation of prejudice to the Plaintiff occasioned by the Defendants' delay. Whether in the form of Counsel's submissions and certainly not in a counter affidavit from the Plaintiff since none was filed.
- [34] An issue of prejudice being occasioned to the Plaintiff if the judgment was to be set aside would certainly have been a major determining factor in deciding whether to set aside a judgment or not – (see **McDonald Farms Ltd v. Bico (No. 33 of 1993 unreported)**). However, this Court notes that prejudice must be established by evidence and not merely alleged.

Draft Defence

- [35] In the draft defence, the Defendants in paragraph 6, put in issue the question of the ability of the First Defendant to sublet and/or assign the tenancy. This, in the opinion of this Court, is an issue for trial and on which evidence would have to be led so that the Court can make a reasoned judgment thereon. Similarly, in paragraph 9 of the draft defence, the depreciation in value of the property is put in issue. Likewise there is a further denial in para 10 of the Defence and Counterclaim of the alleged loss and damage of the Plaintiff.
- [36] In spite of the admission in the draft Defence and Counterclaim that the repairs were done, (see paragraphs 12 and 13 of the Draft Defence and Counterclaim) the Court must have regard to the fact that the Defendants in paragraph 11 of the Draft Defence and Counterclaim alleged that the property had internal and external cracks at the commencement of the tenancy. These are all triable issues to which this Court must advert in exercising its discretion as aforementioned as a matter of common sense.
- [37] Paragraph 13 of the Draft Defence and Counterclaim also speaks to the alleged roof damage which the Defendants allege arose from fair wear and tear which is a well known exception to most leasehold arrangements dealing with damage to the leased property. The question whether damage to leasehold property arises from the tenant's default or whether it falls within the exception of fair wear and tear is a triable issue on which evidence ought to be led. This would involve an interpretation of the terms of the lease, and in this case, an analysis of the alleged oral arrangement between the parties to this action.
- [38] On a careful assessment of the Draft Defence and Counterclaim and the Statement of Claim, I am of the opinion, and I hold, that there are triable issues on these matters which ought to be ventilated at a full hearing, particularly with respect to general damages, so that the Defendants are not deprived of their legal right to a fair hearing.

Admissions

- [39] On the other hand, the Draft Defence admits certain material matters as pleaded in the Statement of Claim. The Defendants admit inter alia, paragraphs 16, 17, 18, 19 and 20 of the Statement of Claim dealing with the non payment of rent and the service of the notice to quit. Indeed they admit the amounts alleged in the Statement of Claim and the due determination of the tenancy by notice to quit.
- [40] In exercising my discretion I must also pay due regard to these matters.
- [41] Justice must be fair and impartial and with due regard to the rights of both Plaintiff and Defendants.
- [42] In view of such admissions, it would be pointless to disturb item 1, 2 and 3 of the judgment, and therefore I hold that these items of the judgment will stand.
- [43] With respect to the further order for the First and Second Defendants to pay damages to be assessed together with interest at 8% per annum from the date of judgment with costs to be taxed, I hold that this aspect of the judgment for general damages will be set aside so as to allow the First and Second Defendants to be heard on their defence and counterclaim.
- [44] In so doing, I make no determination on the substantive issues but merely hold that, in my opinion, the Draft Defence and Counterclaim disclose triable issues which relate to liability of the quantum of general damages sought.
- [45] The Defendants are to pay the Plaintiffs costs on the application jointly and severally to be agreed or taxed.

William J. Chandler

Judge of the High Court.