BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/00098

BETWEEN:

EARL HODGE

Respondent/Claimant

-and-

ALBION HODGE

Applicant/Defendant

Appearances:

Mr Malcolm Arthurs of O'Neal Webster for the Applicant/Defendant
Dr Joseph S. Archibald Q.C. and Mr Duane Jn Baptiste of J.S. Archibald & Co. for the Respondent/Claimant

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2007: November 21
2008: March 12

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** This is an application by the Defendant to set aside the judgment in default of defence ("the default judgment") obtained by the Claimant on 19 June 2007. The application is made pursuant to Part 13.3 of the Civil Procedure Rules 2000 ("the CPR"). It identifies four (4) grounds namely:

1. The Defendant has a real prospect of successfully defending the claim as appears from the evidence in support of this application;

2. The Defendant has a good explanation for failing to file a defence in the time presented by the CPR;

3. The Defendant has applied to the Court as soon as reasonably practicable after finding out that the judgment has been entered; and

4. It is in the interest of the overriding objective of the CPR that judgment be set aside.

[2] For all intents and purposes, the grounds are merely a reproduction of the factors identified in CPR 13.1 which the Court ought to consider in determining whether or not to set aside a regularly obtained default judgment.

The background

[3] On 1 May 2007, the Claimant instituted these proceedings alleging that the Defendant owed him the sum of $1,916,656.00 being the amount due by the Defendant to the Claimant on account stated between them dated 19 September 2005; interest and costs. The Claim Form and Statement of Claim were personally served on the Defendant on either 16 or 17 May 2007[1]. On 31 May 2007, the Defendant filed an Acknowledgement of Service which indicated his intention to defend the claim. The time limited for filing the defence was either 14 or 15 June 2007.[2]

[4] The Defendant failed to file a defence within the time limited for doing so. On 19 June 2007, the Claimant applied for and obtained judgment in the sum of $1,919,165.60 which included legal practitioner's fixed costs on issue. The default judgment was served on the Defendant on 3 July 2007.

[5] On or about 9 July 2007, the Defendant retained the law firm of O'Neal Webster. On 16 July 2007, the Defendant applied to set aside the default judgment which was regularly obtained. The application was supported by an affidavit of the Defendant sworn to on the same date.

[1] Affidavit of Service filed on 8 June 2007 says 16 May 2007 while the Defendant says that he was served on 17 May 2007. No issue was taken regarding this seeming disparity.
[2] This is due to the different dates when service was said to have been effected on the Defendant.

CPR 13.3

[6] CPR 13.3 (1) deals with cases where the court may set aside or vary default judgments. It states:

> "If rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –
>
> a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
>
> b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
>
> c) has a real prospect of successfully defending the claim."

[7] The present application to set aside is made pursuant to CPR 13.3. The use of the word "may" in CPR 13.3 connotes that the Court has a discretion whether to set aside a default judgment which was regularly entered. This was even the case prior to the advent of the CPR. In **Evans v Bartlam**[3], Lord Atkin stated:

> "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."

[8] In the exercise of such discretionary power, the Court has to have regard to all the factors stated in CPR 13.3 (1)[4].

Whether the Defendant acted as soon as reasonably practicable?

[9] The Defendant was personally served with the default judgment on 3 July 2007. The Notice of Application to set aside the default judgment was filed on 16 July 2007. In effect, there was a delay of 13 days.

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[3] **[**1937] A.C. 473 at page 480:

[4] Chastenet ets a Teissedre Bordinet Export v Stanley Leonaire trading as LNJ Trading Food Distributors Claim No. 566/1997 Saint Lucia, Judgment delivered on 8 April 2002. [unreported]

[10] Learned Queen's Counsel for the Claimant, Dr Archibald argued that a period of 13 days was far more time than was reasonably practicable to instruct Counsel to apply to set aside the judgment.

[11] Mr Arthurs, who appeared as Counsel for the Defendant argued that the Defendant acted with all reasonable promptness in contacting his firm and thereafter, the Defendant had to properly instruct counsel.

[12] A requirement that a defendant who seeks to have a judgment set aside must apply as soon as reasonably practicable after becoming aware that default judgment has been entered is in keeping with the overriding objective of the CPR that cases are to be dealt with expeditiously and justly.

[13] In **Chastenet ets a Teissedre Bordinet Export v Stanley Leonaire trading as LNJ Trading Food Distributors**[5], the Defendant took 4 ½ years before applying to set aside the default judgment. I held that such inordinate delay could not pass the test of "as soon as reasonably practicable" as required by CPR 13.3 (1) (a). In **Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v Antigua Commercial Bank**,[6] Thomas J. [as he then was], accepted that no specific time period is given in the rules and stated that reasonableness, therefore, deposes on the facts of the case. He then found that the period of 15 days between service of the judgment and the filing of the application to set aside the judgment was "as soon as reasonably practicable."

[14] In my judgment, the delay of 13 days between service of the judgment and the filing of the application to set aside the default judgment was reasonable. The Defendant has therefore satisfied the threshold requirement of CPR13.3 (1) (a).

Whether the Defendant gave a good explanation for his failure to file a defence

[15] The Defendant averred that he failed to file a defence in this matter because:

[5] Ibid 4.
[6] ANUHCV1997/0115, Judgment delivered on 13 August 2007.

i) The individual who was assisting him was in the middle of relocating his office;

ii) That a computer which was being used to prepare drafts of the relevant documents became inoperative;

iii) During the period when the defence should have been filed, the Defendant was in discussions with one of the Claimant's agents with a view to settling the claim.

[16] The Claimant contended that the reasons do not constitute a good explanation for failure to file a defence as there is no explanation as to what part the individual who was assisting the Defendant played in preparing the intended defence and that the defence and counterclaim contains no information of such a complex or obscure nature that it would be unavailable to the Defendant or his agents on account of a malfunctioning computer. I hasten to add that I agree with Dr Archibald QC that the Defendant should have requested a consensual extension of time for filing his defence or applied to the Court for such extension if there was a difficulty in preparing the defence.

[17] It was argued by Counsel for the Defendant that despite the clear procedural error on the part of the Defendant, the primary considerations at this time are the administration of justice and the merits of the proposed defence. He argued that the reasons for failing to file the defence are reasonable to grant the application if the court considers that there is real merit in the proposed defence.

[18] Even before the CPR, the Old Rules of Court gave an unconditional discretionary power to a Judge to set aside a default judgment. The Courts have laid down rules to guide them in the normal exercise of their discretion and also matters to which the Courts will have regard in exercising their discretion. One of the matters to which the Court should

have regard is the reason, if any, for allowing judgment and thereafter applying to set it aside.[7] Lord Russell of Killowen succinctly stated the principle when he said:[8]

> "The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, 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 But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance."

[19] It appears from **Evans v Bartlam** and the plethora of cases that have been decided under the Old Rules that even though both factors have to be considered, the major consideration is whether there are merits in the defence. Lord Wright in **Evans v Bartlam** stated at page 489:

> "In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.
>
> …the Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can, be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."

[20] The question is; 'have the Rules change the old position?" In England, it appears not. In **McDonald and Another v Thorn plc**[9], a letter before action was sent to the defendant's insurers on 6 October 1998, in respect of a traffic accident on September 25 inquiring if liability was disputed. The insurers sent a holding letter on 22 November which was acknowledged. Proceedings were served by post on the defendant on 9 January 1999.

[7] Evans v Bartlam [1937] A.C. 473 at 480.
[8] Evans v Bartlam at page 482.
[9] The Times Law Reports, October 15, 1999.

No reply having been received, judgment in default was entered on 29 January 1999 and a defence was filed on 3 February 1999.

[21] The Court of Appeal in **McDonald** approved the following principles:

a) while the length of the delay by the defendant must be taken into account, any pre-action delay is irrelevant;

b) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but it is not always a reason to refuse to set aside;

c) **the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done** [emphasis added]; and

d) any prejudice (or the absence of it) to the Claimant also has to be taken into account.

[22] In **J.H. Rayner (Mincing Lane) Limited and Others v Federative Republic of Brazil**[10], the Court of Appeal held that it has in so many cases found misconduct or deliberate decisions taken by defendants leading to default judgments being entered, but, where there is a defence shown on the merits, it still will set aside judgments in default.

[23] Thus, it seems to me that once a defence on the merits to the requisite standard is identified, it must take some very special feature for the court to conclude that the default judgment should not be set aside. The Court may impose terms, and even stringent terms but normally it will set aside the judgment. The Court of Appeal reiterated that the major consideration is whether there is a defence on the merits.

[10] (1999) TLR 15 October 1999.

[24] This position that the major consideration on an application to set aside is whether the defendant has shown a real prospect of success is fortified by the learned authors of the White Book on Civil Procedure 2003[11] where they state:

> "The discretionary power to set aside is unconditional. The purpose of the power is to avoid injustice. The major consideration on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other compelling reason why the judgment should be set aside or he should be allowed to defend the claim. The defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with Pt. 12: this is not something which the court will do lightly."

[25] It is important to note that the wording of the CPR in England and Wales is slightly different from our Rules in that the English Rules do not expressly state that the court should consider whether the defendant gave a good explanation for the failure to file an acknowledgment of service or a defence as the case may be.

[26] I now turn to some cases decided under our CPR. In **Chastenet** [supra], I noted that:

> Under Part 13.3, the Court has to take ***all three factors*** into consideration before setting aside a Default Judgment. The Court must not only look to see if there was a real defence to the claim but is obliged to take into account whether the person seeking to set aside the Defence had made the application promptly and give a good explanation for his failure to file an acknowledgement of service or a defence as the case may be."

[27] In **Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v Antigua Commercial Bank**, Thomas J. took a similar view when he declared that the defendant has not satisfied the conjunctive requirements of CPR 13.3 (1). He observed that while the defendant has a real prospect of defending the claim successfully, this must be balanced against the lack of a good explanation for the failure to file a defence and the prejudice to the Claimant.

[28] Unquestionably, under our CPR, all three factors have to be taken into consideration to determine whether a judgment should be set aside and this has to be balanced with the

[11] Volume 1 Part 13 paragraph 13.3.1

prejudice that might obtain if judgment is or not set aside. However, I do also believe that the principal consideration on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim.

[29] In the instant case, three reasons were given for the delay. First of all, I agree with Dr Archibald QC that the defence and counterclaim do not contain any information of a convoluted or obscure nature that would be unavailable to the Defendant without his computer. However, the other two explanations appear reasonable. There has been no denial of the Defendant's allegation that there were discussions between him and an agent of the Claimant with a view to settling this matter. It is a practice, albeit a bad one which the court must not countenance, that when parties are negotiating settlement, they often neglect to observe the time strictures set down in our rules. However, I am of the view that this explanation of settlement is not unreasonable. It follows therefore, that the Defendant has given a good explanation for the delay.

[30] In addition, the period for filing the defence expired on 15 June 2007. Default judgment was entered on 19 June 2007. So, the delay was a mere 4 days as submitted by the Defendant or 5 days, as submitted by the Claimant. In either case, it was not unjustifiably protracted. For my part, I do not think that the Claimant will suffer any prejudice if the judgment is set aside and the matter heard on its merits. The Defendant will be condemned in costs which is already a punishment. I will add that a judgment of $1,916,615.00 is not a judgment to be taken lightly especially since no explanation or basis for the manner in which the claim arises had been given by the Claimant.

[31] Having found that the Defendant has satisfied the Court of the two threshold requirements prescribed in CPR 13.3 (1) (a) and (b), he still has the burden of convincing the Court that he has a real prospect of defending the claim in order to persuade the Court to set aside a regularly obtained default judgment.

Real Prospect of successfully defending the claim

[32] CPR 13.3(1)(c) requires the Defendant to show that he has a real prospect of successfully defending the claim. There is a superfluity of legal authorities in relation to the manner in which the courts have interpreted the phrase "real prospect of successfully defending the claim." The case of **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc** [12] reflects the standard for establishing a real prospect of successfully defending the claim. At page 224, Sir Roger Ormrod, in delivering the judgment of the Court said:

> "The real question is whether it is a "'prima facie" defence (per Lord Atkin in *Evans v Bartlam* at p. 480), a "serious" defence (per Lord Russell of Killowen at p. 482) or has merits to which "the Court should pay heed" (per Lord Wright at p. 489)."

[33] Moore-Bick J in **International Finance Corporation Utexafrica S.p.r.l**[13] applied the test set out in the Saudi Eagle case. At page 1363, he opined:

> "The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying it is hopeless, whereas to say that the case has a realistic prospect of success suggests something better than that it is merely arguable. That is clearly the sense in which the expression was used in the *Saudi Eagle* and, in my view, it is also the sense in which it was used in Rule 13.3.1(a). There are good reasons for that. A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside. In my view, therefore, Mr Howard is right in saying the expression "realistic prospect of success" in this context means a case which carries a real conviction."

[34] In **ED & F Man Liquid Products Ltd v Patel and Another**[14] Potter LJ held that the only significant difference between the provisions of CPR 24.2 (which deals with summary judgments in England and Wales) and 13.3 (1), is that

> "…under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy

[12] [1986] 2 Lloyd's Rep. 221
[13] (2001) CLC 1361
[14] [2003] EWCA Civil 472

the court that there is a good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3 (1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under CPR 24.2".

[35] These principles have been adopted and applied by our courts. See: **Ferguson v. Volney**[15] **and Luke v. Alexander**[16]and **Addari v Addari**.[17]

The proposed defence

[36] The Claimant claims the sum of $1,916,656.00 being the balance due from the Defendant to him. He stated that between 2003 and 2004, he advanced sums amounting $2.0 million to the Defendant and for that sum to be repaid on demand. He admitted that the Defendant has paid the sum of $83,344.00 in 11 payments.

[37] The Defendant is of the view that he has a real prospect of successfully defending the claim and has a good counterclaim against the Claimant. According to the Defendant, in 2003, he and the Claimant entered into a joint venture for the purchase of boats for use as ferries and barges. The investment vehicle was to be Caribbean Maritime Excursions Incorporated and although the Claimant was not vested with any interest in this company, he was always expected to get a return on his investment and to share equally in profits from the joint venture. He added that by virtue of that agreement, the Claimant invested $2.0 million by periodic payments during 2003 and 2004.

[38] The Defendant stated that the boats were purchased but each of them had some difficulties resulting in them being incapable to operate in BVI waters. He asserted that the joint venture was fraught with difficulties as a result of the boats that were purchased, and, additionally, the Claimant attempted to alter the original agreement so that he could obtain greater than 50% share in the profits. According to the Defendant, it was eventually agreed that the Claimant would be repaid his original investment by way of

[15] 2001 E.C.S.C.J 190
[16] 2002 E.C.S.C.J 88
[17]Claim Number 2002/0388, Antigua and Barbuda, Judgment delivered on 5 February 2004.

monthly instalments of $8334.00. He denied it was agreed that in the event of default of the monthly payment, the total sums due and owed to the Claimant would be repayable on demand. He asserted that even if this was agreed, the Claimant has not demanded the money and filing a suit is not a demand. Nonetheless, he admitted that the sum of $108,342.00 is due and owing to the Claimant and not $1,916,656.00.

[39] Learned Counsel for the Defendant, Mr Arthurs succinctly submitted that there was a clear agreement between the parties as to how any sums due and owing were to be repaid and the Defendant maintained that there was no default clause in the agreement which made the total sum due and payable upon the failure to pay any of the agreed sum in default of the payment of the monthly sum or that the sum is payable on demand.

[40] The Claimant's case is that the sum was advanced to be repayable upon demand.

[41] Dr Archibald argued that the Defendant is asking the Court to conclude that there was an oral agreement entered into between the parties in September 2005 that the said sums should be repaid in monthly installments of principal only in the amount of $8,334.00. This, he says, involves the assertion that the parties have agreed that the Defendant would have an interest free use of the Claimant's $2.0 million over a 20-year period and there was no provision for any consequence if the Defendant defaulted in repaying any of the monies. He submitted that no documentation or receipt has been produced which is capable of supporting the conclusion that the Claimant entered into such unusual commercial arrangement or indeed to show any agreement as to the method of repayment of the loan.

[42] Dr Archibald vigorously argued that the mere fact that the Claimant accepted periodic payments of $8,334.00 during the particular period is of course equivocal. He argued that it is equally consistent with repayment of a debt payable in full upon demand, or payable by installments in default of payment of one of which the entire amount would fall due, or payable by some other arrangement.

[43] The learned authors of Chitty on Contract,[18] state:

> "Where money is lent without any stipulation as to the time of repayment, a present debt is created which is in general repayable at once without any previous demand; but where the promise was to pay a sum "on request" the request is part of the contract, and must be proved, and no action arises until the request is made."

[44] In **N. Joachimson (A Firm Name) v Swiss Bank of Corporation**[19] (relied upon by Dr Archibald), the question that the Court of Appeal had to determine is not relevant to the issue in this case. The question was whether in the case of money to the credit of a current account with a banker, there is in existence an actual demand as an ingredient in the cause of action? The Court of Appeal held that an actual demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action.

[45] Of relevance, the Court of Appeal held that it is well-established that in the ordinary case of money lent, the debt that constitutes the cause of action arises instantly on the loan. Atkin LJ approved the following passage of Parke B in **Walton v Marshall**,[20]

> "It is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due."

[46] The circumstances resulting in advancement of the loan as condensed by the Defendant is not denied by the Claimant. The Claimant alleged that the sum was repayable on demand. The Defendant says quite the opposite. Of course, there is bound to be room for conflict when there is not even a written agreement as in the present case. However, there is some evidence that there may have been an agreement between the parties that a monthly payment of $8,334.00 is to be paid to liquidate the sum advanced by the Claimant to the Defendant. The Claimant produced receipts of 11 such payments and has admitted receiving these payments.

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[18] Twenty-first edition, Volume 2 page 423 at paragraph 762.
[19] [1921] K.B. 110
[20] 13 M. & W. 458

[47] The Claimant's evidence in this claim is very imprecise. The statement of claim gave no explanation or basis for the manner in which the claim arose. Had it not been for the Defendant, this Court would have been faced with insurmountable hurdles. The Defendant has shed some light in the matter. It does appear however, that the Defendant, by his assertions, has a real prospect of successfully showing that there was a gentleman's agreement which prima facie, established a monthly repayment schedule which was accepted by the Claimant.

[48] What can be gleaned from the above authorities is that if a debt is due and owing and there was no agreement that a demand has to be made, then the law does not require that any demand or notice needs to be given except in the case of a banker and a customer, but if it is to be paid on demand, then a demand has to be made. The Claimant contended that the money was to be repaid on demand. He has not indicated whether he made a demand prior to filing the claim but relied on a dictum in **N. Joachimson v Swiss Bank Corporation** that *"in most cases in which the question is likely to arise, even if a demand is necessary to complete the cause of action, a writ is a sufficient demand."* Therefore, says the Claimant, the filling and service of the Claim Form and Statement of Claim is sufficient demand.

[49] The position in the present case is quite different from the above authorities. I have already found that the defendant has a realistic prospect of successfully showing that the parties agreed that he would repay the sum in monthly installments. Here, it appears that there is a clear stipulation as to time for repayment. The assertion that the money was lent to be repaid on demand is inconsistent with the monthly payment that appears to have been paid by the Defendant to the Claimant. A default clause stating that in default of payment, the installments the entire sum becomes due and payable is more consistent with the evidence.

[50] The mind-boggling question remains whether there was a default clause in the oral agreement? Dr Archibald persuasively argued that that would amount to an unusual commercial arrangement if the Court were to accept the Defendant's case. I go further to

assert that it is even more unusual for two businessmen, like these parties, to have entered into a $2.0 million oral agreement. Certainly, there is more to this relationship than 'meets the eye'.

[51] Dr Archibald QC relied on the case of **Citic Ka Wah Bank Ltd v Au King Wah**[21]. The facts of that case are simple. P granted D a term loan for the duration of 36 months. When D defaulted on the installments, P brought an action to recover the whole outstanding amount, relying on clause cl. 9 of the loan agreement which gave P an overriding right of repayment. D argued that cl. 9 was an onerous or unusual term and that the overriding right of repayment was repugnant to the personal installment loan contract and therefore unenforceable. The Court held that cl. 9 was not an unusual term. An overriding right of repayment was a fairly well-known right and could be seen in many ordinary banking and loan documents.

[52] Mr Arthur submitted that this case is not helpful. I agree. In **Citic,** there was a default clause referred to as an overriding right of repayment in default on the installments. There is conflicting evidence in the present case as to whether or not there was a default clause in the oral agreement. This evidence is given on affidavit and has not been tested by oral cross-examination. Indeed, it is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend. These are matters to be dealt with at the trial. However, on a provisional finding, I believe that the Defendant has a real prospect of successfully defending this aspect of the claim.

[53] In addition, it is not disputed that the Defendant last paid on 24 July 2006. That was for the previous month. He has not made any further payments since that date. On his own admission, he presently owes $108,342.00[22] to the Claimant. Due to a passage of time, that amount has now increased to $ 150,012.00[23]. He must pay that sum forthwith. The issue of whether or not the remaining balance from the sum of $1,919,165.60 is payable

[21] [2002]HKLRD (Yrbk) 32
[22] See paragraph 10 of his affidavit in support of application to set aside judgment filed on 16 July 2007.
[23] $8,334.00 x 18 months = $150,012.00.

on demand will be dealt with at trial. So also, will the question of the default clause. In the interim, I will set aside the default judgment in respect of the remaining balance.

[54] The issues to be dealt with at trial are indeed very narrow. I feel impelled to say to these parties that they should attempt to mediate their ostensibly uncomplicated dispute as it appears to me that there is an amiable relationship between them despite these proceedings. This relationship is impliedly epitomized in the counterclaim.

The Counterclaim

[55] The Defendant has filed a counterclaim in which he asserts that he was at all material times, the owner of premises known and described as Block No. 3037B Parcel No. 9/1/2 Road Town Registration Section. In April 2004, he and the Claimant agreed that the Claimant would rent certain parts of the said property at a rent of $7,400.00 per month. The Claimant paid the first month rent in April 2004 through his agent, Mr Floyd Penn and has since failed and neglected to pay the rent since April 2004. The Defendant claims the sum of $288,600.00 for arrears of rent for 39 months and requests that this is set off against the amount of arrears owed by the Defendant under the oral agreement.

[56] In his affidavit, the Claimant stated that he did not agree to rent the property from the Defendant. In addition, Chillin Café which is presently situated on that property is a business enterprise entirely owned and operated by his wife and any negotiations with the Defendant were carried out by her and on her behalf. His wife, Violet Delville swore to an affidavit in this matter. As is not uncommon, she has reiterated the assertions made by the Claimant. She indicated that she is the sole proprietor and operator of Chillin Café and that she and Mr Penn were initially engaged in negotiations with the Defendant to arrive at an agreement in respect of the rent.

[57] Mr Floyd Penn also swore an affidavit in these proceedings. I do not think it is worthwhile to deal with the counterclaim any further. It was mentioned in passing to demonstrate that the Claimant and the Defendant are not strangers to agreements, be it verbal or written.

[58] CPR 13.3 does not state that the Court, in the exercise of its discretion to set aside a default judgment, needs to consider whether the Defendant has a good counterclaim. This is for good reasons. If the default judgment is not set aside, that does not prohibit the Defendant from continuing with his counterclaim. If the default judgment is set aside, then the matter will go to case-management after pleadings are closed and at that stage, the Master or Judge in Chambers will consider whether there is a nexus between the counterclaim and the claim along with the other matters stipulated in CPR 18.10 (1). As it presently stands, it is premature for this Court to determine whether the Defendant has a good counterclaim.

Conclusion

[59] In the end, I will set aside the default judgment to the extent that the Defendant pays the sum of $150,012.00 forthwith with interest at the statutory rate of 5% per annum. The balance of the default judgment will go to Case Management after all pleadings have been closed.

[60] Leave is granted to the Defendant to file and serve defence within 14 days. The Defendant will pay prescribed costs of $31,500.00 to the Claimant.

Indra Hariprashad-Charles

High Court Judge