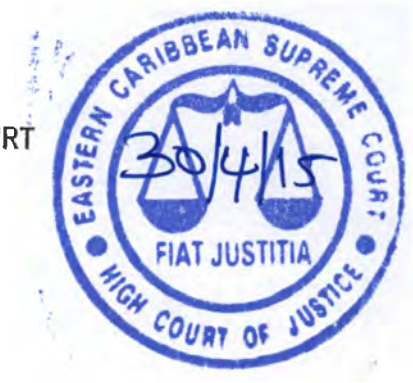
SAINT VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)



CLAIM NO 101 OF 2014

BETWEEN:

FAY-ANN DURHAM

Claimant/Respondent

and

BRIAN DAVIS

]Defendant/Applicant

Appearances

Mrs. Ronnia Durham-Balcombe for the Claimant/Respondent
Ms. Maia Eustace for the Defendant/Applicant

.....

2014: October 30
2015: April15; April 30

.....

DECISION

Introduction and background

[1] LANNS, J.[Ag]: This is an application by the claimant, Fay-Ann Durham to set aside a judgment in default of defence entered up against the defendant, Brian Davis on the 29th August 2014.

[2] On the 30th May 2014, the claimant instituted a claim against the defendant seeking damages in the amount of $25,372.94, for deceit arising from the claimant's fraudulent misrepresentation. The claimant also claimed costs, interest, and further or other relief as the court deems fit.

[3] Briefly, the pleaded case of the claimant was that on 6th December 2010, the claimant contracted with the defendant for the sale of a passenger van. On the same day, the defendant caused a valuation to be done by Joyette's Auto Collision Works (Joyette's). The defendant presented the valuation report to the claimant. According to the report, the van was valued at $53,500.00 inclusive of all accessories. The claimant offered to purchase the van for the $53,500.00 inclusive

of all accessories. The defendant thereupon told the claimant that the skirt kit on the van was the only accessory included in the valuation, and that the valuation did not include the rims, sound system and alarm system which at the time of the evaluation, were accessories on the van. The defendant also told the claimant that he would not sell the van without the accessories, because he would have no use for them, since he would be leaving the State soon. He then told the claimant that he wanted an additional sixteen thousand dollars for the accessories. The claimant, in reliance on the representations made in respect of the accessories, paid the defendant the sum of $69,500.00, being the $53,500.00 plus $16,000.00 for the rims, sound system and alarm system.

[4] In June 2012, eighteen months after, the claimant allegedly 'found out' that the accessories for which she had paid an additional $16,000.00 were included in the valuation done by Joyette's on 6th December 2010. The claimant says that she sought clarification from Joyette's and realised that the defendant had made a false representation as to the value of the passenger van, as a result of which, she had paid $16,000.00 in excess of the appraised value of the van.

[5] The claimant pleads that she had taken out a loan with the St Vincent Cooperative Bank Limited in order to purchase the van, and thus, she had to pay a greater sum in interest on the loan of $69,500.00 than she would have had to repay if she had bought the van for its $53,500.00 value. She said she had to pay $9,372.94.interest on the entire loan of $69,500.00; hence her claim for $25,372.94 (being $16,000.00+$9,372.94 = $25,372.94). Annexed to the claim form were the following exhibits which the claimant considered to be necessary to her case.

1. Exhibit 'FD 1' - Valuation of the passenger van from Joyette's, signed by Dennis B. Joyette. That valuation report shows the date of valuation to be the 6th December 2010; and in the column worded "Present Day Value", Mr Joyette states "$53, 500.00 with all accessories. " Below the valuation form is the following notation:

   "17th July 2012

   Please Note: As at the date shown above (6th December, 2010), this vehicle was valued with all accessories with the exception of the music. I have not valued this vehicle since then, therefore, I cannot say if any items were changed or replaced.

   Denis B. Joyette"

2. Exhibit 'FD 2' - Check for $69,500.00 drawn on First Caribbean International Bank, on 7th December 2010, payable to Brian Davis, the Defendant, who tendered it for payment on 9th December 2010.

3. Exhibit 'FD3' - Valuation No.2 which is the same valuation and the same wording in the column worded "Present day value" indicating that the present day value is $53,500.00 with all accessories, with the exception of the music Curiously, the note at the end of the valuation form is the same, except Mr Joyette purports to have signed it on the 16th July 2012.

4. Exhibit 'FD 4' - Letter to Fay Ann Durham dated 19th June 2012, from Montgomery Howard, Senior Loans Officer of the St Vincent Cooperative Bank Ltd detailing, among other things, the difference in the interest payable on a loan of $53,500.00, and the interest payable on a loan of $69,500.00. Mathematically, the difference computes to $9,372.74 ($40,713.71 - $31,340.77 = $9,372.74).

[6] On the 17th July 2014, the defendant filed an acknowledgement of service indicating, among other things that service of the claim form and statement of claim was effected on him on the 17th June 2004; that he intends to defend the claim; and that he did not admit any part of the claim.

[7] Notwithstanding his expressed intention to defend the claim, the defendant failed to do so within the time stipulated by the rules of court. By the operation of CPR 10.3 (1), the defendant would have had until the close of business on Wednesday the 16th July 2014, to file a defence. He purported to file it on the 1st September 2014, after the claimant had filed a request for judgment for failure to file a defence, and after the judgment had been signed by the Registrar. The request was filed on the 30th July 2014. The Registrar adjusted the amount claimed, and the amount for which judgment was to enter. The amended request was not refiled, but the judgment was subsequently filed reflecting the amendments to the request, and the Registrar signed it on the 29th August 2014.

[8] Viewing the judgment, it is apparent that it was still entered for the wrong amount in that it does not reflect 'court fees on claim', 'legal practitioner's fixed cost on issue', 'court fees on entering judgment', nor 'legal practitioner's fixed costs on entering judgment'. I note too that no interest was claimed or allowed. In any event the claimant failed to expressly plead interest in accordance with rule 8.6 (4) and (5) which states that a claimant who is seeking interest must say so expressly in the claim form , and include in the claim form or statement of claim, details of the basis of entitlement, rate, and period for which it is claimed. If the claim is for a specified sum of money, the claimant is required to state the total amount of interest claimed to the date of the claim, and

(where applicable), the daily rate at which interest will accrue after the date of the claim must be expressly stated in the claim form. Obviously, the claimant has run afoul of rule 8. 6 (4) and (5).

[9] Interestingly, the file reveals that by letter dated 30th July 2014, the defendant's counsel wrote to the claimant's counsel seeking an extension of time within which to file the defence. By that time, as earlier stated, the request for judgment had already been filed, and so long as the conditions under CPR 12.5 were satisfied, the court office was obliged to enter the judgment. It would not have mattered if the defence was filed before the judgment was signed, so long as the request was filed before the defence was filed, which is the case here. As noted by Baptiste, J.A. in **Glenford Rolle v Stephen Lander**, DOMHCVAP2013/0025A, the filing of a defence subsequent to the filing of a claimant's request for judgment can never avail a defendant. Upon receipt of the claimant's request, the court must enter judgment for failure to defend if the conditions set out in CPR 12.5 are satisfied. "If the Defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour." (per Lord Dyson in **The Attorney General of Trinidad and Tobago v Keron Matthews,** [2011] UKPC 38. Additionally, in **The Caribbean Civil Court Practice 2011**, at Note 10.2, page 133, the learned authors explain that if a defence is filed late, but before the claimant has requested a default judgment, then default judgment will not enter. The default is having failed to file before the Request, not in having filed late, the authors explain. I commend those three authorities to learned counsel. Coming to the defendant's application.

[10] On the 8th September 2014, the defendant filed an application to have the default judgment set aside under CPR 13.3 on the grounds that a) the defendant applied to the court as soon as reasonably practicable after service of the judgment in default; b) that the applicant has a good reason for his failure to file the defence within the time prescribed by the rules; and c) that the defendant has more than a fanciful prospect of successfully defending the claim against him.

[11] Madonna Barbour, legal secretary in the law chambers of Cato & Cato swore to an affidavit in support of the application to set aside, with five documents exhibited thereto. And the claimant Fay-Ann Durham swore to an affidavit in response, opposing the application, with four documents exhibited thereto. Curiously, the defendant had not seen it fit to swear to his own affidavit of merit in support of his application to set aside the default judgment; and I glean from the learning in the cases that the legal secretary is a stranger to the proceedings and is not in a position to swear to the facts which constitute the proposed defence. Nowhere is it stated why he cannot swear to his own affidavit in support in an application of this kind. That said, in her affidavit, the legal secretary deposed that the facts set out in her affidavit are true and correct, and are within her personal knowledge, except where indicated to the contrary. To the contrary, most of the matters deposed to in the affidavit were preceded by the statement 'I am informed by ... ' or 'I am advised by... '. None of the 'information' or 'advise' came from the applicant/defendant, himself, who has direct knowledge of the facts in his proposed defence. It would have been preferable to

have a firsthand affidavit evidence from the defendant. I am not of the view that the affiant Ms Barbour had direct knowledge to attest to the facts in the proposed defence. However, as the affidavit was not challenged, and further, as the sources and grounds of the information and belief that the defendant had a good reason for his failure to file a defence, and that he had a reasonable prospect of successfully defending the claim are set out, I do not dwell on it or delve any further.

[12] It is noteworthy that the matter had progressed to the stage where the parties had filed submissions and authorities in support of, and in opposition to the application brought under CPR 13.3. However, the defendant, subsequently filed an amended application to set aside the default judgment pursuant to CPR 13.2; and CPR 13.3. Again, Madonna Barbour, swore to the affidavit in support of the amended application. As in her first affidavit, she says that to the best of her knowledge, information and belief, the facts deposed therein are true and correct, and that she has the authority of her principal to swear to the affidavit.

[13] In relation to rule 13.2, the ground of the amended application is that the judgment in default is irregular in that a) the claim is not a claim for a specified sum of money within the meaning of CPR 2.4; b) the Form 7 request for entry of judgment in default seeks judgment for a specified sum of money when it ought to seek judgment for a sum to be determined by the court; c) even if the claim was for a specified sum of money within CPR 2.4, no receipted bills are attached to the claim as required by CPR 2.4; d) the Registrar ought not to have entered judgment for a sum in the absence of receipted bills; e) the Registrar ought to have entered judgment for a sum to be determined by the court and fix a date for the assessment of damages; f) alternatively, the Registrar ought to have complied with P.D. 3 of 2012 by fixing a date for status hearing, when, upon the elapse of the last day for filing the defence, no defence was filed.

[14] Counsel for the parties filed submissions, and these were augmented by brief oral arguments.

Issues

[15] The questions which come to the fore are, (i) whether the judgment was wrongly entered in default of defence for a specified sum of $25,887.94 as damages for deceit and or fraudulent misrepresentation; (ii) whether the judgment should have been entered for damages in terms to be decided by the court; or (iii) whether the claimant ought to have applied to the court in accordance with rule 12.10 (4) and (5); (iv) If any of these questions are answered in the affirmative, whether the judgment should be set aside under 13.2 for irregularity; or whether it should be varied under the inherent jurisdiction of the court so that it becomes damages in an amount to be decided by the court.

The submissions

[16] Learned counsel for the applicant (Ms Eustace) grounded her submissions on the following points as summarised.

1. The claim is not for a specified sum of money, for although the claimant has specified the damages sought, for the purposes of a default judgment, the claim must relate to the loss of damages suffered as a result of an accident caused by the defendant's negligence. The claim for fraudulent misrepresentation is not such a claim.

2. The claimant has not exhibited receipted bills to her claim. In any event the claimant is required to prove her loss. She has not done so. In order to substantiate her claim regarding the interest payable on the $16,000.00 she borrowed above the appraised value of the passenger van, the claimant merely exhibited a letter from the Bank dated June 2012, purporting to show details of the proposed loan amounts.

3. The claimant failed to exhibit direct evidence of the existence of a loan with the St Vincent Co-operative Bank. or any lending institution. Nor has the claimant, four years after the purchase of the vehicle, exhibited a verified loan statement or receipt for loan payments.

4. There is no basis upon which the Registrar could have entered judgment for a specified sum of money. The claim is for an unspecified sum of money.

[17] Counsel relied mainly on the rules of court, particularly on the provisions of CPR 2.4 as discussed, explained or interpreted by Bannister J. [Ag] in the case of **Curtis Zimmerman v British Virgin Islands Tourist Board**, at paragraphs [16] and [17], Claim No BVIHCV2009/388 delivered 30th July 2010.

[18] Learned counsel for the Claimant (Mrs. Durham-Balcolme) grounded her written and oral submissions on the following summarised points:

1. The claimant's claim was for a specified sum of money which represented the loss suffered by the claimant as a result of the defendant's fraudulent misrepresentation to the claimant.

2. The claimant itemised the sum claimed in the particulars of loss and damage, and exhibited the valuation certificate, the bank cheque made payable to the defendant for the

van, and a response letter from the bank showing the difference in interest payable by the claimant on the amount borrowed to purchase the van, and the amount she would have borrowed had she purchased the van at the assessed value.

3. The claim is for a specified sum of money within the meaning of CPR 2.4, as it is ascertained or capable of being ascertained as a matter of arithmetic, and is recoverable under a contract.

4 This is not a case like **Staphine Emanuel v Clyde Lecointe**, DOMHCV2009/0166, (delivered 10th February 2010), where the master observed that the Registrar had entered judgment for $69,249.29, even though neither the claim form nor the statement of claim were accompanied by receipted bills evidencing that sum of money. This is a case akin to **Anju Dhar et al v Glenford David** et al, BVIHCV2009/0384, wherein the claimant had particularised the expenses they incurred, and tendered contemporaneous documentary evidence in relation to the breach of contract and thus, the judge found that the claim for breach of contract was simply a sum that had been ascertained. In the instant claim, the claimant, having particularised her loss, and exhibited documentary evidence in support thereof, the sum claimed could have been ascertained by the Registrar.

[5] In **Zimmerman's** case, there were no receipted bills, but Bannister J. [Ag] was able to deduce what were the sums due under the contracts prior to repudiation. The claimant has provided particulars, and exhibited documentation from which the court can calculate the specified amount claimed as damages for losses directly caused by the fraudulent misrepresentation without the need for receipted bills.

[6] If the court were to decide that the default judgment was irregularly obtained, in that it should have been a sum to be decided by the court, then the court must set aside the judgment. However, the court has an inherent jurisdiction to enter such judgment as it considers the claimant to be entitled to, as was done by Bannister J. at paragraph [18] of the decision in **Zimmerman**; or the court can vary the judgment as was done by Hariprashad-Charles, J. in the case **of Anju Dhar,** she having been satisfied that the claim for a specified sum was made out.

Discussion

[19] There are two bases upon which a default judgment can be set aside. The first is where judgment is irregularly obtained, for example, where the defendant can establish that the correct procedures have not been followed in obtaining judgment in which case the defendant can have judgment set aside as of right without the requirement of establishing a defence to the claimant's claim. Here the court may set aside judgment on or without an application.

(**Royal Trust Corporation of Canada v Dunn** 60 OR 3rd 468) ;(**CPR 13.2 (2)**.

[20] On the other hand, if the judgment is regularly obtained and the defendant is asking the court to exercise its discretion under CPR 13.3 to set aside the default judgment and allow the Defendant to defend the claimant's claim, certain conditions must be satisfied.

[21] As was previously stated, the amended application to set aside was made pursuant to both CPR 13.2; and CPR 13.3. Obviously, if the judgment is found to have been irregularly obtained, in the context of CR 13.2, there will be no need to proceed under 13.3. Accordingly, I first consider whether the judgment was irregularly obtained. Here, the critical question will be whether the claim, as pleaded, was for a specified or unspecified sum of money.

The relevant rules

[22] The relevant procedural rules to be examined are The Civil Procedure Rules 2000, rules 2.4; 12.5; 13.2; and 16.2 (not necessarily in that order).

[23] Rule 13.2 sets out cases where the court must set aside default judgment.

[24] CPR 13.2 reads:

> "(1) The court must set aside a judgment entered under Part 12 if judgment was wrongfully entered because in the case of -
>
> (a) a failure to file an acknowledgement of service – any of the conditions in rule 12.4 was not satisfied; or
>
> (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.
>
> "2" The court may set aside judgment under this rule on or without an application.

[25] CPR 12.5 provides:

"12.5 ... The court office at the request of the claimant must enter judgment for failure to defend if --

(a) (i) the claimant proves service of the claim form and statement of claim; or

(ii) an acknowledgement of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(c) the defendant has not --

(i) filed a defence to the claim or any part of it ...

(ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) satisfied the claim on which the claimant seeks judgment; and

(d) ..."

[26] It is clear to me that the applicable sub-rules of rule 12.5 are (a) (b) and (c) (i) and (iii). It is also clear to me that the conditions set out there were met. When on the 30th July 2014, the claimant filed a request to enter judgment in default of defence, there was proof of service of the claim form and statement of claim; the time for filing a defence had expired, and there was a figure that was claimed, which the Registrar obviously regarded as a specified sum. Rule 12.5 states that the court office at the request of the claimant must enter judgment for failure to defend if the stated conditions are satisfied. (Emphasis mine).

[27] On the face of the request for judgment, then, there was nothing to prevent the Registrar from entering default judgment as requested by the claimant, except the apparent error in respect of the amount claimed, and the amount for which judgment was to enter.

[28] The critical question remains: whether the claim as pleaded was for a specified or unspecified sum of money. The claimant says it was for a specified sum; the defendant does not agree. As far as Ms Eustace is concerned, the claim was one for an unspecified sum, even though a figure was assigned for damages, and notwithstanding the documents annexed to the claim form/statement of claim.

[29] In CPR 2.4 a "claim for a specified sum of money" is defined to mean

> (a) ... a claim for a sum of money that is ascertainable or capable of being ascertained as a matter of arithmetic and is recoverable under a contract; and
>
> (b) for the purposes of Parts 12 (default judgment) and 14 (judgment on admissions) a claim for –
>
> (i) ...
>
> (ii) ... or
>
> (iii) any other actual financial loss, other than loss of wages or other income;
>
> Claimed as a result of damage which is alleged to have been caused a result of the defendant's negligence where the amount of each item in the claim is specified, and copies of receipted bills for the amounts claimed are attached to the claim form or statement of claim."

[30] It cannot be said, and it has not been shown that $25, 887.94 is a sum that is capable of being ascertainable as a matter of arithmetic in relation to the claim for damages for deceit for the fraudulent misrepresentations allegedly made by the defendant during the sale of the passenger van. The $25,887.94 was not claimed as a result of damage caused in an accident as a result of the defendant's negligence. Accordingly, the court is not of the view that the documents annexed to the claim form/statement of claim are documents for the 'purposes of Part 12 (default judgment)'. They may however be useful in an assessment of damages.

[31] I am of the view that the default judgment was irregularly obtained because the claim was a claim for damages for fraudulent misrepresentation, albeit linked to an agreement for sale and purchase of a motor passenger van, and could not be categorised as a claim for a specified sum of money within the meaning of CPR 2. 4.

[32] In the Canada case of **Saunders v Lewis et al** (1990), 1990 Canlii 7221 (NL SCTD) Cameron J discussed the principles to be applied in determining whether a claim was liquidated or unliquidated:

> "1. When the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by a scale of charges or other positive data, it is said to be "liquidated", but when the amount to be recovered depends upon the circumstances of the case, and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally "unliquidated".
>
> "2. If the claim is in its nature a claim for damages at large, it is generally not a "liquidated demand" even if the plaintiff puts a figure on the damages which he or she is claiming." (My emphasis).
>
> "3. A claim for liquidated damages, i.e. an amount of damages pre-determined or pre-determinable by the terms of a prior agreement, will be considered a liquidated demand."
>
> "4. Where damages, i.e. pecuniary compensation, are claimed, the ease with which the damages may be quantified does not change the characterization of the claim from a claim for unliquidated damages to a liquidated demand."
>
> "5. It is the claim as pleaded which must be examined to determine how the claim is to be characterized. Thus in the case of a claim based on contract, it must be alleged that one party has obligated himself or herself to pay the other a specific sum of money either absolutely or upon the happening of a specified contingency, in order for the claim to be treated as liquidated." (My emphasis).

[33] In our jurisdiction, the Nevis case of **Dr Miranda Fellows v Carino Hamilton Development Company Limited and John Eivik,** HVCAP2011/006 is instructive, and I adopt the reasoning

therein. In that case, the claimant brought an action for breach of a building contract relating to a condominium in Nevis. The claimant entered into an agreement with the defendants to purchase a condominium from them by way of a loan from a bank. The claimant paid the deposit to the defendant and entered into the mortgage. A dispute arose between the parties over the identity of the condominium in question. The claimant alleged that the 1st named defendant sold her condominium to someone else, and the 2nd defendant knowingly made false representations to her. In her prayer for relief, the claimant prayed thus:

> "AND THE CLAIMANT CLAIMS:
>
> As against the 1st Defendant, ...
>
> (a) Rescission of any and all contracts the Court may hold to be legally enforceable;
>
> (b) Payment of all outstanding amounts due under the mortgage together with any and all ancillary and corollary payments arising as a result of the mortgage;
>
> (c) Payment of interest due on the mortgage in the amount of EC$100,759.06 as of the 21st day of August 2009, and accruing at EC$181.82 per diem to the date of judgment.
>
> As against both Carino and the 2nd Defendant, John Eivik, the Managing Director of Carino:
>
> (d) Damages for fraudulent misrepresentation in the amount of EC$1,000,000.00, and interest thereon; and
>
> (e) Costs;
>
> (f) Any other remedy which this Honourable Court may grant."

[34] No defence having been filed or served, the claimant filed a Form 7 request for the court office to enter in her favour, judgment in default of defence in the amount of $1,000,000.00. The defendant brought an application pursuant to CPR 13.3 to set aside the judgment in default of defence and for

extension of time to file a defence, and seeking relief from sanctions. The master set aside the judgment pursuant to CPR 13.2, on the ground of irregularity, and gave leave for the defence to be filed and served. The defendant appealed, and the appeal was dismissed. The Court of Appeal, Mitchell J.A. examined and discussed at length the relevant provisions of the CPR 2000. Then, at paragraphs [13] and [14] Mitchell, J.A. stated;

> "[14] In my view, the Master was correct to find that CPR 12.10 (1) (b) was not an appropriate sub-rule on which she could have proceeded. Given the various reliefs prayed for in the claim ... this was a claim for "some other remedy" in addition to damages. It required to be proceeded with as an application under CPR 12.10 (5)."
>
> "[14] What the Master was faced with in this matter was a claim which was framed as a claim for a quantified amount of damages of $1,000,000.00. This sum having been claimed as "damages for fraudulent representation" was clearly without merit. As the master was aware, damages for fraud are always general damages, which are required to be assessed by the court. It is a basic rule of civil procedure that it is not open to a claimant to specify an amount of general damages in any claim arising out of tort.. The Master was faced with an impossibly bad default judgment and was constrained to do the best she could to remedy the situation. She was entitled by CPR 13,2 (2) to take the step she did on her own initiative and without any application by the defendants. She cannot be faulted in the exercise of a discretion she undoubtedly had."

[35] Applying the foregoing principles to the instant claim, it must be concluded that the claim is unspecified or unliquidated. The claimant claimed damages against the defendant for deceit as a result of fraudulent misrepresentation. This must be classified as a claim for 'some other remedy' pursuant to 12.10 (4) Although the amount claimed is stated as a fixed sum, of $25,887.94, it is clear from the way in which the matter is pleaded that the amount is not a matter pre-determined as a result of the alleged deceit or fraudulent misrepresentation. It depends upon evidence being led as to what was included in the valuation, what precisely Mr Joyette meant by the term in the valuation "With all accessories", on the completed valuation form; and also what he meant by the words "with all accessories with the exception of the music", in the note below the completed

valuation form. Additionally, it depends upon evidence led as to the content of the conversation between the claimant and the defendant at the time of sale. There are other matters which can only be proven on evidence before the court. This is not a claim for damages for breach of contract; although it purports to be linked to the agreement for sale of the van; rather it is a claim for damages for deceit which depends upon proof of the value of the claim. Accordingly, the claim is not one for a specified sum of money; so final judgment in default of filing a defence ought not to have been entered, and it was accordingly irregularly obtained. It is a sum for an unspecified sum of money. As noted by Mitchell J.A. in **Fellowes**, a Form 7 may not be used to request a default judgment in respect of an unspecified sum of money. It required to be proceeded with as an application under CPR 12.10(5).

[36] Appling **Fellowes,** and **Saunders**, the defendant is entitled to have the default judgment set aside.

Should the court nevertheless, under its inherent jurisdiction , vary the judgment so that it becomes judgment in default in an amount to be decided by the court on assessment?

[37] As stated before, Mrs. Durham-Balcome has submitted that even if the defendant were entitled to have the judgment set aside, the court has an inherent jurisdiction to make an appropriate order, as was done in **Zimmerman**; or the court can vary the judgment as was done by Hariprashad-Charles, J. in the case **of Anju Dhar,** having been satisfied that the claim for a specified sum was made out. The decision in those two cases must be taken to be correct on their peculiar facts, which are far removed from the facts of the case at bar. Moreover, it has been said that the inherent jurisdiction is not applicable where there are clear rules relating to a specific issue or matter. Obviously, I am not persuaded by the submission of counsel, that the court, having found that the judgment was irregularly obtained should nevertheless go on to consider whether to vary it. In the first place, I do not interpret CPR 13.2 as permitting variation of a judgment.. Accordingly, I am not inclined to consider counsel's alternative argument. that I vary the judgment so that it becomes judgment for damages to be assessed. I propose instead to set aside the default judgment in its entirety, and give the defendant seven days to file and serve his defence.

[38] Having decided as I have, it would not be necessary for me to consider the application under CPR13.3. However, if it were necessary for me to do so, I would have found, based on the plethora of cases in our jurisdiction, that the defendant had not given a good explanation for his failure to file a defence, inasmuch as our courts have stated that the lack of diligence of an attorney is not a good reason for delay. However, I would have been inclined to find that it is not possible to conclude that the defendant has no real prospect of successfully defending the claim without the benefit of disclosure and oral evidence of the parties. Also, I would have been inclined to find that there will be evidence which will ultimately have to be led by the parties which cannot be gleaned solely from the documents placed before the court. by the parties.

Conclusion

[39] It is hereby ordered that

1. The default judgment entered on the 29th August 2014 is hereby set aside in its entirety.

2. The defendant has seven days in which to file a defence in the form annexed to this application. Thereafter, the matter is to proceed in accordance with the rules of court, that is to say, it must be set down before the master (and not the judge) for first case management conference following the close of pleadings.

3. The defendant has succeeded in setting aside the default judgment, but it is his failure to file his defence in the time specified why the application came to be made. It is clear, from the submissions, that counsel for the claimant did a lot of research prior to and after the amended application brought by the defendant, and incurred additional costs in the process. In the circumstances, the defendant shall pay to the claimant costs of the application assessed summarily in the sum of $1000.00, to be paid in 14 days, or at some future date to be agreed by the parties.

[40] I've been aided by helpful written submissions provided by counsel on both sides. I am grateful for their assistance and commend them for their industry.

Pearletta E Lanns
High Court Judge [Ag]