IN THE GRAND COURT OF THE CAYMAN ISLANDS

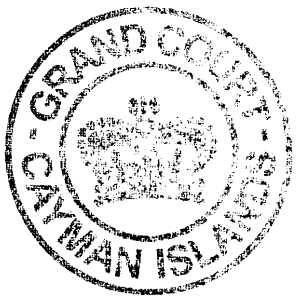
CAUSE NO. 86 OF 2014

BETWEEN:

DR. STEPHEN GAY — **Plaintiff**

AND

MARLON COLLINS — **Defendant**



Appearances: Mr. Colm Flanagan for the Plaintiff
Mr. Dennis Brady for the Defendant

Heard: 3 October 2014
Ex Tempore Ruling: 3 October 2014
Transcript of Ruling provided: 7 October 2014

EX TEMPORE RULING

The Application

1. This is an ex tempore ruling designed to give the parties my immediate decision and the reasons for it. The parties were informed that this transcript of the ruling would be made available to them. It is not intended to read as a written judgment.

2. I have before me the Defendant's Summons dated 22 July 2014 applying to set aside the default judgment which was entered on 11 July 2014.

3. The Plaintiff opposes this application.

Procedural Background

4. On 14 May 2014, a letter before action was sent to the Defendant. In the letter the Plaintiff gave notice that, unless he received payment of the entirety of the outstanding debt amounting to CI$130,983.69 by 3 PM on 30 May 2014, the proceedings to recover the sum (together with interest) would be issued without further notice. The letter also indicated that, if proceedings were commenced, he would seek to also recover any resulting legal costs.

5. Payment was not received and proceedings were initiated by the Plaintiff by means of a Writ of Summons and a Statement of Claim, both filed on 5 June 2014. These were served on the Defendant on 9 June 2014. The Plaintiff's claim therein relates to a number of payments of money totalling CI$130,983.69 lent to the Defendant from April 2005 to 12 May 2012. The Plaintiff contends that the Defendant signed a "Written Statement" on 12 May 2012 with an attached annex containing a breakdown of all the payments, thereby acknowledging the debt. The Statement also provides that the debt would be settled by sale of a portion of the Defendant's property and the balance cleared by regular monthly payments commencing on 1 August 2012.

6. On 10 June 2014 the Defendant filed his Acknowledgment of Service, indicating an intention to defend the whole of the claim.

7. The Defendant failed to file a Defence by the due date required by the Rules and an Application for Default Judgment was filed on 25 June 2014. On 11 July 2014, Default Judgment was entered as the Plaintiff had not been served with any copy of the Defence as required pursuant to GCR Order 19 rule 7(1). It is clear that this was a regular judgment, entered as of right by the Plaintiff. By that judgment, the Defendant is required to pay CI$130,983.69 with interest to the Plaintiff. A copy of the judgment was sent to the Defendant.

8. Before I move on, I would like to comment on what I perceive to be good practice in cases where the attorney for the plaintiff is aware that the defendant is legally represented, especially if an acknowledgement has been filed. It is a matter of professional courtesy and good practice that where an attorney knows that another attorney is concerned in a case that he should not seek to proceed by default without enquiry and warning.

9. On 22 July 2014 the Defendant filed a summons with affidavit in support to set aside the default judgment. Although not mentioned in the Summons, it can be taken that he is also seeking leave to file and serve a Defence out of time. His attorney indicated that the Defence could be drafted, filed and served within seven days. It is this Summons that I consider herein.

10. The Defendant filed a second affidavit, which was sworn on 1 October 2014. Regrettably, the Defendant failed to exhibit to either affidavit a draft of the

Defence to be relied upon. Although not a strict requirement, exhibiting a draft Defence would ordinarily assist the Court in establishing the possible grounds of the defence. The Plaintiff filed his affidavit on 12 September 2014.

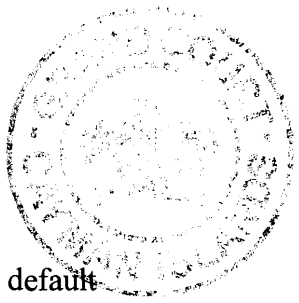
11. The Court has received the skeleton argument prepared by both attorneys. I have carefully considered the contents of both skeleton arguments and I thank Counsel for providing this helpful material.

Factual Background

12. The parties historically had a close friendship. As already stated the Plaintiff contends that, over a period of 7 years, he lent a large number of separate sums of money to the Defendant either in cash or by making payments on his behalf. The payment details are in a schedule exhibited to the Plaintiff's affidavit, which runs to six pages. The Plaintiff states that by signing the above-mentioned Statement the Defendant acknowledged his indebtedness. The Plaintiff further states that in July 2011 a cheque in the sum of $33,000 was made out to him by the Defendant, albeit coupled with the request not to cash it until the Defendant had informed him that he was in funds. The Plaintiff has not paid the cheque into his account. Mr. Flanagan indicates to the Court that he does not wish to raise any issues about the effect of promissory notes today, but he relies upon the cheque as an illustration that these were loans.

13. The Defendant, in his affidavits, reiterates that the parties were good friends, who gave each other mutual support and moved freely between each other's houses. He says that in 2004 he was unemployed and the Plaintiff kindly let him stay at his property and gave him physical support. He said at no time was there a landlord and tenant arrangement between them or one involving a series of loans. The Defendant denies that any payments made to him or made on his behalf were loans, but were made due to the kindness of the Plaintiff when recognising his difficulties at that time. He accepts at paragraph 6 of his second affidavit that he was lent a total of CI$3,620. He accepts that if the Court sets aside the judgment in default that he should pay that sum into Court. The Defendant also accepts that, if the order is set aside, he should pay the Plaintiff's cost of this application. He indicated that if the Court were to assess costs and the CI$3,620 to amount to a total of CI$7,500 he would be able to pay that into Court within 14 days. The Defendant accepts that he signed the Statement dated 12 May 2012, but he indicates that he did not read it properly and only signed it out of frustration and anger because he was upset that his friend was contending it was a debt. He said that his wife was about to have a baby and he was under pressure. The Defendant states that the vast majority of the items on the long list of separate payments exhibited by the Plaintiff were not ones from which he benefited and they have nothing to do with him. He said that the purpose of the $33,000 cheque was not to discharge a loan, but was a gesture for him to show his gratitude to the Plaintiff for his kindness and assistance. This claim clearly involves a number of disputed facts between the parties and it is contended by the Defendant that these are

appropriate for resolution only at trial. It is contended that the Court should not attempt to try issues of fact on affidavit evidence.



The Law

14. GCR Order 19, rule 9 gives the Court a discretionary power to set aside a default judgment. Order 19 rule 9 provides as follows:

> *"The Court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order."*

15. In ***Evans v Bartlam*** [1937] AC 473 Lord Atkins sets out how this discretion should be exercised. At Page 480, his Lordship states:

> *"I agree that both rules.... give a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The Court, 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."*

16. Lord Atkins also describes the reasoning behind this discretion at page 480 where he states:

> *"The principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that only has been obtained by a failure to follow any rules of procedure."*

17. Paragraph 13/9/18 of the Supreme Court Practice 1999 sets out the principles which the Courts have oft applied in setting aside Default Judgments. They are as follows:

> *"DISCRETIONARY POWERS OF THE COURT - The discretionary power to set aside a default judgment which has been entered regularly is unconditional, and the Court should not lay down rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which may be caused if the judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the Court should pay heed, 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 because, if the Defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also, as a matter of common sense the court will take into account the explanation of the Defendant as to how the default occurred. The foregoing general indications of the way in which the court exercises discretions are derived from the judgment of the Court of Appeal in the Saudi Eagle [1986] 2 Lloyd's Rep. 221 at page 223. From that case the following propositions may be derived:*
>
> *(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the Court must form a probable outcome of the action. However, when their Lordships applied that test to the facts they said, "The real question is whether it is a 'prima facie' defence.....a*

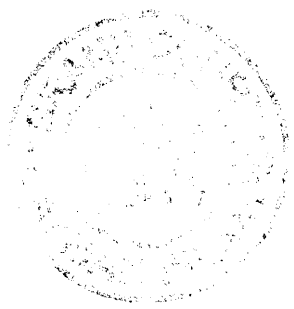
'serious defence'.... or has merits to which 'the court should pay heed.' "

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppels at law, must be considered "in justice" before exercising the Court's discretion to set aside."

It is contended in the matter before me that the Defendant, although he may not have deliberately ignored the proceedings, has acted in a rather dilatory manner towards them. Despite this, the Plaintiff rightly primarily concentrated on the real issue, which concerns the merits of the Defence. Mr. Flanagan submits that the Court must be satisfied that there is a Defence with a real prospect of success. I accept that the Court "*must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed.*"[1]

18. I have regard to the abovementioned sentiments of Lord Atkins already mentioned by me and also the test to be applied in deciding to set aside judgment obtained in default of defence which was considered by the Court of Appeal in the case of ***Day v Royal Automobile Club Motoring Services Ltd*** [1999] WLR 2150. In ***Day v RAC***, Ward J considered the note in Supreme Court Practice 1999, vol.1, p.160, para. 13/9/18 which he stated caused him concern. I endorse his view that each case should be looked at using one's common sense, having regard to the specific facts that arise. I also accept his view that the Court should be "*very wary of trying issues of fact on evidence where the facts are apparently credible and*

[1] Sir Roger Ormrod in Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc [1986] 2 Lloyds' Rep. 221.



are set against the facts being advanced by the other side." Having regard to local circumstances, I share Ward J's hesitancy in elevating the test, as is apparently set out in the White Book, to be solely a "*real likelihood that a defendant will succeed,*" but rather it should be whether there is an arguable case which carries a degree of conviction. Care should be taken not to usurp the function of the trial judge at such an interlocutory hearing by judging facts contained only in affidavits and reaching a provisional view of the probable outcome.

19. Ward J. following his review of ***Evans v Bartlam***, ***Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc (the Saudi Eagle)*** and ***Grimshaw v Dunbar*** [1953] 1 Q.B. 409 stated:

> *"At the heart of the discretionary exercise, therefore, is the need to do justice. Justice has to be done both to the Plaintiff and to the Defendant and, especially in this day and age, to the whole process of the administration of justice in the Courts. But it may not be out of place to cite one other passage in the speeches in the well known case of Evans v Bartlam [1937] A.C. 473 and to remind everybody of the words of Lord Atkin, at p. 480"*[2]

20. Ward J. indicated that he felt the test used in ***Grimshaw v Dunbar*** for setting aside a judgment given in a party's absence was also applicable to a situation as is before this Court. Ward J. set out the following sentiments of Jenkins L.J., in that case, dealing with how the Court was to view the merits of such an application:

> *"No doubt the judge is entitled to satisfy himself that the party applying has a bona fide intention of defending the action, and that*

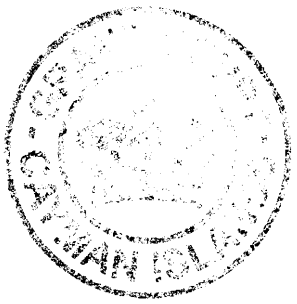
[2] The passage referred to by Ward J taken form Evans v Bartlam is set out at paragraph 52 above.

there is some possibility of his doing so with success.... I think that a new trial should seldom, if ever, be refused merely on the ground that the applicant's case appears to be a weak one...a party to an action is prima facie entitled to have it heard in his presence: he is entitled to dispute his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the Court. Prima facie that is his right, and if by some mistake or accident a party is shut out from that right and an order is made in his absence, then common justice demands, as far as it can be given effect to without injustice to other parties, and that litigant who is accidentally absent should be allowed to come to the court and present his case – no doubt on suitable terms as to costs..."

In the matter before me, there has not been a mistake or an accident. Although the Defendant may have been, to a degree, dilatory in his approach to this matter, it is not a case in which he has totally ignored the proceedings. He did file his Acknowledgement on time. His explanation for failing to file the Defence on time is that he was seeking additional evidence which he said he required to enable him to do so. This is not a good reason for non-compliance with the Rules, but it seems that his approach may have arisen from the legal advice that he was been given. I accept that he issued the application to set aside promptly.

21. The Court of Appeal in the Cayman Islands has endorsed the approach mentioned in a number of the above English cases when the President stated:

".... an order setting aside a regular judgment deprives a claimant of substantive rights which she has obtained in accordance with the process of the Court. That should not be done unless the Court



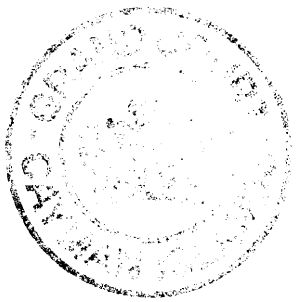
is satisfied that justice requires it. It is necessary, in order "to arrive at a reasoned assessment of the justice of the case" (ibid), for the Court to form a provisional view as to the outcome if the case were to be fought at trial, the proposed offence must carry some degree of conviction. Secondly, if the application of the primary consideration – "whether the defendant has merits to which the Court should pay heed" (ibid.) - leads to a conclusion that the proposed offence does not carry the required degree of conviction, the Court should not set aside the default judgment as there would be no purpose to be served by doing so."

Conclusion

22. I have carefully considered the full submissions made by Mr. Flanagan concerning the requirements to be satisfied before I use the discretion with which I am empowered, namely to set aside the default judgment of 11 July 2014, but as Lord Wright said in ***Evans v Bartlam*** *"in matters of discretion no one case can be authority for the other" and "that discretion....must be exercised according to commonsense and according to justice" (Gardner v Jay (1885) Ch. D 50, at 58).*

23. In ***Evans v Bartlam***, Lord Atkins pointed out that the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default.

24. I bear in mind these principles and, in particular, that at the heart of this discretionary exercise, I must do justice to both the Plaintiff and the Defendant. I have considered herein the number of clearly disputed facts including but not



limited to the nature of the payments and the large number of them, of which the majority are not accepted, some arguably being without sufficient details from the Plaintiff in his written schedule/annex. The disputed facts, even having regard to the existence of the May 2012 signed Statement[3], require a reasoned assessment to do justice to the case.

25. After due consideration, I find that the Defendant has shown there to be a strong arguable defence on the merits which carries some degree of conviction. There are issues that are more properly ventilated and conclusively ruled upon at trial rather than at this interlocutory hearing. Since the Default Judgment was obtained as a consequence of a failure of the Defendant to follow precisely the Rules of procedure, in the circumstances of this case, I am of the opinion that a further opportunity should be given to him to have it heard on the merits if, as agreed by him, the Defendant pays into Court the sum of $7,500[4] by or on 17th October 2014 and files his Defence in compliance with my order.

26. I will extend the time for the Defendant to file his Defence. However, he must now comply with the time limit set in this order and a failure to do so will result in him being precluded from defending this case. After taking instructions from the Defendant, Mr. Brady indicated that his client could file and serve his Defence within 7 days. Having regard to the nature of the order I make today to ensure that the Defendant recognises that the Defence must now be served promptly, and the

[3] See paragraph 4 above.
[4] See paragraph 12.

adverse consequence that will flow from any failure on his behalf to do so, I extend the time to 14 days.

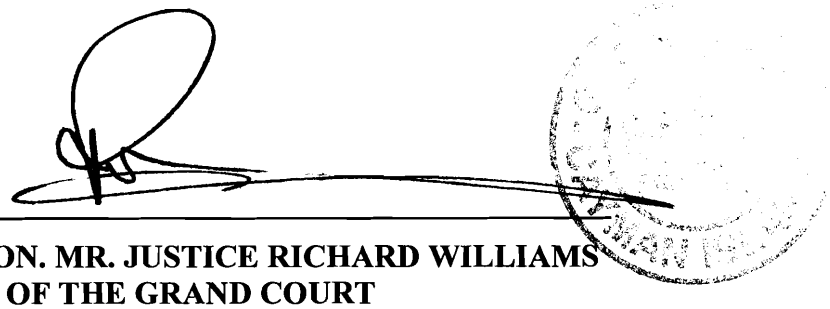
27. The order is as follows that:

(i) The Defendant is to pay the sum of CI$7,500 into Court by or on 17 October 2014.

(ii) Upon the payment by the Defendants of the CI$7,500 by the ordered date, the Default Judgment entered on 11 July 2044 will be set aside.

(iii) The Defendant is granted leave to file and serve his Defence within 14 days, namely by or on 17 October 2014. Unless this is done by the due date the Defendant will be precluded from defending this action and judgment shall be entered.

(iv) The costs of this application and the costs thrown away be borne by the Defendant.



THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT