IN THE COURT OF APPEAL **CL-AP 9/23**
THE TURKS AND CAICOS ISLANDS
PROVIDENCIALES (CIVIL DIVISION)

BETWEEN:

DEVON HAYLES

dba MIDTOWN MALL

Appellant

v

OSIAS JOSEPH
dba PLATINUM FITNESS and as FIT X GYM

Respondent

Before: **The Honourable Mr Justice Adderley, President (Ag.)**
The Honourable Madam Justice Cornelius-Thorne, JA
The Honourable Mr Justice Hylton KC, JA

Appearances: **George Missick for the Appellant**
Chloe McMillan for the Respondent

Hearing date: **26th January 2024**

Delivery date: **29th February 2024**

Default Judgment –Failure to file a defence- Refusal to set aside default judgment – Test for setting aside default judgment –Whether the default judgment should have been set aside based on the judge's findings on sharp practice and abuse of process - Irregularity of default judgment – Whether the default judgment was irregular based on the statement of claim; damages; pre-judgment interest and costs awards; or the draft counterclaim and defence.

Cases considered:

B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2; Evans v Bartlam [1937] AC 473; Ramkissoon v Olds Discount Co (TCC) Ltd (1961) 4 WIR 73.

JUDGMENT

1. This is an appeal against a judge's refusal to set aside a default judgment. The background is as follows.

Background

2. By a lease dated 17th June 2021, the Respondent leased commercial premises to the Appellant for a term commencing on 3rd January 2021 and expiring on 31st December 2021, at a rent of US$4,000.00 per month. The lease provided that if the Appellant continued in possession after its expiry with the consent of the Respondent, the occupation would be under a monthly tenancy on the same terms.

3. The lease also included a covenant by the Appellant to maintain the leased premises in good repair.

4. The Appellant remained in possession of the leased premises after the lease expired, without the Respondent's consent, and eventually vacated the premises on or about 18th March 2022.

5. On 18th May 2022 the Respondent issued a specially endorsed writ claiming:

    a. Mesne profits in the amount of US$12,000.00 for the months of January, February and March 2022;
    b. Reimbursement of US$320.00 for bank charges the Respondent incurred as a result of rental cheques that were dishonoured when presented for payment;
    c. "*Special damages for repairs*" in the amount of US$16,525.00;
    d. Interest on the sums claimed; and
    e. "*Costs in the claim*".

6. The writ was served on the Appellant on 8th November 2022 and on 29th November 2022 he filed an acknowledgment of service indicating an intention to defend the claim. On 13th December 2022, no defence having been filed, the Respondent's attorney wrote a letter to the Appellant's attorney which stated in relevant part:

> "We are aware that under s.66 of the Legal Profession Ordinance code of conduct that (sic) it is our duty to notify you of any intention to seek judgment in default. Please treat this letter as our formal notification to you that it is our intention to seek default judgment against your client if we are not in receipt of the defence by 4:00 pm on the 15th December, 2022."

7. Not having received a response or a defence, on 19th December 2022 the Respondent's attorney filed a request for judgment in default to be entered.

8. The Appellant's attorney told the court that the letter did not come to his attention until 19th December 2022, and he replied by email on the following day in the following terms:

> "Thank you for your letter and indulgence as you would have seen from the history between the parties that our client does advance not only a defence but a counterclaim to your client's claim. We had been engaged in several matters that made it difficult for counsel to take instructions and complete the defence. We have now done that and intend to file the defence today and serve you with an electronic copy until such time as we have sealed copies."

9. The Respondent's attorney responded on the same day:

> "Pursuant to the letter of the 13th December 2022, we applied for judgment in default promptly following your failure to acknowledge or respond to our correspondence.
>
> Moreover we were not in receipt of your defence by the specified date nor of any request for an extension of time."

10. On the following day (20th December 2022), the Registrar entered a default judgment in the sum of US$28,845.00 (i.e., the total of the sums set out in paragraph 5 above), with interest at 3% from the issue of the writ to the date of judgment, and at the judgment rate thereafter, and costs to be taxed.

The Decision in the court below

11. On 3rd February 2023 the Appellant filed a summons seeking an order setting aside the default judgment and unconditional leave to defend. He contended that the judgment was irregular in various respects and so should be set aside *ex debito justitiae*. Alternatively, he argued that the draft defence and counterclaim he exhibited in support of his summons disclosed a good arguable defence, and that the court should set aside the default judgment in the exercise of its discretion.

12. Gruchot J dismissed the summons. He held that the default judgment was not irregular, and that nothing in the proposed defence had a real prospect of success. However, the learned judge also concluded that the conduct of the Respondent's attorney and the circumstances in which the default judgment was entered constituted sharp practice and an abuse of the court process.

The Appeal

13. The Appellant appeals to this court against the decision to dismiss his application. In addition to relying on the same grounds he had argued in the court below, the Appellant also submits that having concluded that the Respondent's attorney used sharp practice in entering the default judgment, the learned judge erred in allowing it to stand.

14. The Appellant's grounds of appeal can be summarised in the following way:

    a. The finding that there had been sharp practice and an abuse of the court's process should have resulted in the judgment being set aside;

    b. The statement of claim had included a claim in detinue which was not withdrawn or proven;

c. The claim for mesne profits was not a liquidated sum and therefore there should have been an order that damages be assessed and not a judgment for the sum claimed;

d. The claim for damages for repairs was not a liquidated sum and therefore there should have been an order that damages be assessed and not a judgment for the sum claimed;

e. The judgment should not have included pre-judgment interest as that had not been pleaded;

f. The judgment should have included a fixed sum for costs instead of costs to be taxed;

g. The judge erred in not taking the proposed counterclaim into account; and

h. The judge erred in failing to recognize that the proposed defence had a real prospect of success.

15. I will address each in the same order.

Sharp Practice and Abuse of Process

16. The judge explained his conclusion in this way:

> (12) Mr Missick took issue that the time period of 2 days afforded to the Defendant to file his defence, in the Plaintiff attorneys' letter of 13th December 2023 suggesting that it was not a good faith warning as required by Section 66(2) & (3) of the Code of Professional Conduct set out in the Legal Profession Ordinance (Cap. 2.01) ('the Code'). I would comment that I view the period to be short, too short. There was no urgency in the matter, the claim having not been served for some 5 months from issue. An acknowledgment of

service had been filed indicating an intention to defend the claim and I understand that there had been correspondence passing between the attorneys regarding the dispute.

(13) The requirement not to proceed without enquiry and warning is not simply a procedural step that has to be followed. The purpose is to give a Defendant who has failed to comply with the prescribed time limits a proper opportunity to remedy his error. I note that no notification was given to Mr. Missick that the request for default application had been sent to the Court. The Code is to be observed in the spirit and not just the letter. The inference I take from this is that the Plaintiff was seeking to gain a tactical advantage which it would not achieve had there been further communication and as such, it is sharp practice and an abuse of the Court process. Had there been any merit in the Defence then I may well have considered adverse costs against the Plaintiff on the set aside of the judgment. To quote Mr Justice Murphy in Bloomin Caribe, 'Tactics such as these only demean and embarrass the profession and offend the Court. I make it clear that the views I have expressed on the general principles are shared by my brother judges with whom I have discussed'."

17. The long title of the Legal Profession Ordinance Cap 2.10 ("the LPO") states that it is:

> "An ordinance to make provision with respect to the practice of law in the Turks and Caicos Islands; for the admission of attorneys; for the establishment of a bar council; for the conduct and discipline of persons admitted as attorneys; and for connected purposes."

18. The LPO's provisions are consistent with that purpose: they address the admission, conduct and discipline of Attorneys-at-Law, and do not purport to, for example, prescribe rules of court.

19. The Schedule to the LPO sets out a Code of Professional Conduct ("the Code"). The legislative scheme is that breaches of the Code should be reported to the Bar Council (section 59 of the Code), which can make a report to the Chief Justice after an inquiry (section 24 of the LPO), who can discipline an attorney after a hearing (section 25 of the LPO).

20. I agree with the judge's observation that "*The Code is to be observed in the spirit and not just the letter"*, but there is nothing in the LPO or the Code which suggests that a breach by an attorney would have an adverse effect on his or her client.

21. To address the specific alleged breach in this case, sections 66(2) and (3) of the Code provide that:

> (2) "Where an Attorney knows that another Attorney is concerned in a case, he should not proceed by default without enquiry and warning".
>
> (3) An Attorney shall not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of another Attorney not going to the merits or involving the sacrifice of the client's rights."

22. The applicable rules of court (the Civil Rules 2000) do not indicate that warning opposing counsel is a condition precedent to the entry of default judgment. O.19 r 2(1) of the Civil Rules 2000 entitles a plaintiff to enter default judgment upon the expiration of the prescribed time to serve a defence. The order specifically refers to the time fixed by or under the Civil Rules:

> "Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against the defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants if any." (My underlined emphasis)

23. There is no dispute that the Appellant failed to serve a defence before the expiry of the time fixed by the rules. In my view therefore, a breach by the Respondent's attorney of section 66 of the Code would not make the default judgment irregular, and this ground of appeal fails on that basis.

24. Further and in any event, I am unable to agree with the judge's conclusion that there had been sharp practice. It is a very strong thing to accuse counsel of sharp practice and

deliberately abusing the court's process. I have seen nothing in the conduct of the Respondent's attorney or in the circumstances of this matter that would justify that finding.

25. Neither the Code, nor as far as I am aware, any practice direction or even settled practice prescribes the length of the warning that should be given. The time for the service of the defence expired on or about the 6th December 2023, so when the Respondent's attorney wrote the warning letter on 13th December the defence was already about 7 days overdue. The Respondent's attorney then waited another 6 days before filing the request for default judgment.

26. In my view, the judge was wrong to conclude that the Respondent's attorney was guilty of sharp practice and abusing the court's process.

Detinue

27. In paragraph 9 of the statement of claim, the Respondent asserted that he is entitled to a claim in detinue. However, the prayer did not include such a claim and the default judgment did not include damages or any other relief for that cause of action. The judge was right to hold that no claim in detinue was made, and to hold that this was not a basis to set aside the default judgment.

Mesne Profits

28. The judge held that the claim for mesne profits was a liquidated amount because it was not a claim for possession of land, since the Appellant had already vacated the leased premises. The conclusion is correct but the reason is wrong. A claim for mesne profits against a former tenant who continues in possession is treated as a claim for liquidated damages when the claim is based on the rental that had been payable prior to the termination of the tenancy.

29. The learned authors of the Supreme Court Practice (the White Book) explain[1]:

[1] At 13/4/8.

> "A claim for possession of land is frequently accompanied by a claim for arrears of rent and mesne profits. In such a case the plaintiff may enter judgment under r.5 for possession of the land and for the arrears of rent and mesne profits and damages for breach of covenant but in such case, only one judgment is required, final for the land and arrears of rent as being a liquidated demand, and interlocutory for mesne profits or damages, to be assessed.
>
> On the other hand, if the indorsement on the writ claims mesne profits from the date of the writ until possession at a given rate and states or shows that such rate is the same as the agreed rent of the premises, the ascertainment of the amount is a mere matter of calculation, and it is the practice to enter judgment for such amount, as a liquidated claim. (My underlined emphasis)

30. In the course of his oral submissions the Appellant's counsel sought to distinguish the present case on the basis that the statement of claim did not expressly state that the claim for mesne profits was based on the agreed rent. However, the pleading stated that the agreed rent was US$4,000.00 per month then went on to claim $12,000.00 for 3 months mesne profits. That plainly "*shows that [the sum claimed for mesne profits] is the same as the agreed rent of the premises"*.

31. In my view, the inclusion of the amount claimed for mesne profits was not an irregularity, and this ground of appeal also fails.

Damages for Repairs

32. It appears that the submissions in the court below focused on whether the amounts claimed for repairs were special damages, and whether they were properly particularised. The judge held that they were not special damages – he said "*the claim was simply a claim for damages for disrepair*". This is not correct. Damages are either special or general, and these were plainly special damages.

33. However, that was not the real issue. The real issue was whether it was a liquidated demand or a claim for unliquidated damages. If the former, the amount claimed can properly be included in a default judgment. In paragraph 22 above I quoted O.19 r 2(1) of the Civil Rules 2000, which provides that where the claim is for a liquidated demand only, the plaintiff may

enter final judgment for the sum claimed. O.19 r. 3 goes on to provide that in a claim for unliquidated damages, the default judgment must be for damages to be assessed.

34. The White Book explains the difference in this way[2]:

> "A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then sum is not a "debt or liquidated demand", but constitutes "damages". (My underlined emphasis)

35. The sum claimed for repairs in this case had not even been paid by the Respondent. It was an estimate of the costs. When this extract from the White Book was brought to her attention during oral submissions, counsel for the Respondent quite properly accepted that the parties had not agreed the amount and it was not ascertainable as a mere matter of arithmetic.

36. In the circumstances, the default judgment should not have been for the sum claimed, but should have been for damages to be assessed. The judgment is therefore irregular in this respect and the judge should have set it aside.

37. This is enough to dispose of this appeal, but for completeness, I will address the other issues raised by the Appellant.

Pre-judgment interest

38. The default judgment included pre-judgment interest at the rate of 3% from the date the writ was filed. The Appellant argues that it should not have done so, because the claim for interest was not pleaded.

[2] At 6/2/5.

39. The Respondent (and the judge) point out that the prayer of the statement of claim included *"interest on the sums claimed",* and they relied on section 19 of the Civil Procedure Ordinance (Cap. 4.01) which provides that "*in proceedings before the Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the Court thinks fit or as rules of court may provide*".

40. The learned authors of the White Book state[3]:

> "The default judgment cannot include interest unless it is claimed in the writ or pleaded in the statement of claim as being due under s.35A of the S.C.A. 1981, and the rate at which the interest is claimed is not higher than that payable on judgment debts at the date of the writ. If therefore the claim for interest is not expressed to be under s.35A, or is for a rate higher than that payable on judgment debts or is claimed "at such rate as the court thinks fit" the default judgment will exclude any interest, but interlocutory judgment for interest to be assessed will be entered. …"

41. In this case, the statement of claim did not refer to the Ordinance, and it did not indicate the rate that was being claimed or the period for which it was claimed, or even that the Respondent was claiming pre-judgment interest. Although relatively minor in terms of the amount involved, the judgment is also irregular in this respect.

Costs

42. The judgment granted the Respondent costs to be taxed. The Appellant says costs on a default judgment are fixed pursuant to the relevant rules of court, so the judgment should have stated that sum instead of providing for a taxation. In my view, that would not be a basis to set aside the judgment. It is a point to be taken up with the Registrar or other taxing officer, who should tax the costs in the prescribed amount.

The Counterclaim and the Merits of the proposed Defence

[3] 13/1/5.

43. The judge was right to disregard the draft counterclaim. It is a separate claim which the Appellant can pursue despite the default judgment. The matters raised in the draft counterclaim do not purport to be part of the defence.

44. The judge also held that the draft defence does not disclose any defence that has a real prospect of success. The Appellant relied on the fact that in paragraph 10, the statement of claim asserted that he caused extensive damage to the leased property, and in paragraph 13 of the draft defence he denied that paragraph. However, it is well established that a draft defence is not enough. An application to set aside a default judgment must be supported by an affidavit of merits, which provides evidence of the proposed defence.

45. The decision of the House of Lords in **Evans v Bartlam**[4] is often cited. In that case, Lord Atkin said (at page 480) that one of the rules laid down by the courts for guidance in exercising the discretion to set aside a regularly obtained judgment in default is that "*there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence*". A judge must have evidence on which to exercise his or her discretion.

46. In this case, the only evidence filed by the Appellant in support of his application to set aside the default judgment was the affidavit of Sheniqua Taylor-Walkin, a paralegal employed to the Appellant's attorneys. The deponent did not purport to have any personal knowledge of the facts. She merely exhibited the draft defence. The facts of **Ramkissoon v Olds Discount Co (TCC) Ltd**[5] were somewhat similar.

47. In that case, the application to set aside the default judgment was supported by an affidavit of the defendant's solicitor, which attached a defence signed by counsel. The judge in chambers dismissed the application, and the Supreme Court of Trinidad & Tobago (Appellate Jurisdiction) dismissed the defendant's appeal, in part on the ground that no merit had been shown by the defendant.

[4] [1937] AC 473.
[5] (1961) 4 WIR 73.

48. McShine CJ (Ag) pointed out (at page 75) that the solicitor's affidavit "*does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence*". The learned judge continued: "*since the facts related in the statement of defence have not been sworn to by anyone, consequently there was not, in our view, any affidavit of merit before the judge nor before us*".

49. **B & J Equipment Rental Limited v Joseph Nanco**[6] is a decision of Jamaica's Court of Appeal. The defendant/appellant's position was stronger in that case because the supporting affidavits had been sworn by a director of the appellant company. However, the application to set aside the default judgment and the subsequent appeal both failed because there was no direct, admissible evidence as to the merits of the proposed defence. Morrison JA (as he then was) explained[7] that the director "*did not purport to speak either from her personal knowledge or from information or belief*" and her evidence was therefore hearsay and did not constitute a proper affidavit of merits.

50. In the circumstances, there was no proper affidavit of merits in the instant case, and the judge was right in [24] of his reasons to conclude that there was no evidence that the Appellant had an arguable defence, with a real prospect of success.

[6] [2013] JMCA Civ 2.
[7] At paragraph 51.

Disposition

51. I would allow the appeal, set aside the judge's order and the default judgment, and grant the Appellant unconditional leave to defend. The default judgment was irregular because it included the sum claimed for repairs which was not a liquidated claim and pre-judgment interest which had not been pleaded.

February, 29 2024

Hylton KC, JA

I agree

_____

Adderley, JA, President (Ag)

I also agree

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Cornelius-Thorne, JA