IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 22 of 2014

BETWEEN : **CHANDAR BHAN** and **FLORENCE ANITA PRASAD** both of Pacific Harbour, Navua in Fiji, Retired Businessman and Businesswoman respectively.

PLAINTIFFS

AND : **PREM CHAND** of Lokia, Nausori in Fiji trading as PREM BUILDERS

DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. Nagin H** for the Plaintiffs
Mr. Chandra S. for the Defendant

Date of Hearing : **18th September, 2014**
Date of Ruling : **21st November, 2014**

RULING

A. INTRODUCTION

1. The Defendant filed this Notice of Motion together with an affidavit in support seeking an order that the default judgment entered against the Defendant on 28th of April 2014 be set aside.

2. Upon being served with this Motion, the Plaintiffs appeared in court on 7th of July 2014, where both parties were given directions to file their respective affidavits which they filed accordingly. Subsequent to the filing of affidavits, this motion was set down for hearing on the 18th of September 2014. Both counsel agreed to conduct the hearing by way of written submissions on the date of the hearing. I accordingly directed them to file their respective written submissions which they filed as directed. Having

carefully considered the respective affidavits and written submissions of the parties, I now proceed to pronounce my ruling as follows.

B. BACKGROUND.

The Defendant's case,

3. The Defendant deposed in his affidavit in support that his solicitors requested the Plaintiffs' solicitors in writing to provide them a copy of the building contract on which the Plaintiffs' claim is founded. However, the solicitors of the Plaintiffs refused to provide a copy of the contract. The Defendant then tried to serve the Plaintiffs a formal request for further and better particulars, which was refused to accept by the office of the Plaintiff's solicitors. The Defendant claims that the Plaintiffs' lawyers executed this building contract between the Plaintiffs and the Defendant. He alleges that he was never given a copy of the contract after it was executed. Accordingly, the Defendant claims that he is not in a position to form his defence and file the statement of defence without properly perusing the said contract. He alleges that the Plaintiffs, knowing his difficulties, went ahead to obtain this default judgment. Having deposed his explanation for his failure to file and serve the statement of defence within the stipulated time, he pleaded for an order that the default judgment entered against him be set aside.

The Plaintiffs' Case,

4. The first Plaintiff filed an affidavit in opposition for this Motion, where he deposed that the Defendant was given a copy of the contract wherefore; the explanation given by the Defendant should not be accepted. In order to substantiate his contention, the first Plaintiff stated that the Defendant used to refer the contract which he had during the time of the construction of the building.

C. THE LAW

5. The Defendant made this application pursuant to Order 19 r 9 of the High Court Rules, which states that;

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

6. The founding principle of the jurisdiction to set side a default judgment has precisely expounded by Lord Atkin in his widely acclaimed passage in **Evans v Bartlam (1937) A.C.437)** where his lordship outlined that *"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".*

7. The Default judgments have been divided into two categories as regular and irregular judgments. Fry L.J in **Anlaby and others v Peatorius (1888) Q.B.D. 765**, held that *"There is a strong distinction between setting aside a judgment for irregularity in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular, has been obtained through some slip or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief.*

8. In view of the observations made by Fry L.J, in Anlaby and others v Peatorius (supra) it appears that the court has no discretionary power to refuse the application for set aside a default judgment which had obtained irregularly. In respect of the judgment entered regularly, the court has a discretionary power to either set aside the default judgment or not.

9. Lord Atkin in Evans v Bartlam (supra) has discussed the scope of this discretionary power in respect of the default judgments entered regularly in an inclusive manner, where his lordship held that;

"I agree that both RSC Ord 13, r 10, and RSC Ord 27, r 15, give a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to

guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

But, in any case, in my opinion, the court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not, in my opinion, exist".

10. Lord Wright in his speech in Evans v Bartlam (supra) has expressed similar observations as of Lord Atkin on this issue , where his lordship found that;

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 pass a judgment on which there has been no proper adjudication. This point was emphasised in Watt v Barnett. Here the appellant shows merits, in that the debt was primarily a gaming debt; he denies that he made any new contract within Hyams v Stuart King, an authority which has not yet been considered by this House. He clearly shows an issue which the court should try. He has been guilty of no laches in making the application to set aside the default judgment, though,

as Atwood v Chichester and other cases show, the court, while considering delay, has been lenient in excluding applicants on that ground. 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".

11. Having considered the two passages of Lord Atkin and Lord Wright in Evans v Bartlam (supra) it appears that the main issue that needs to be considered in an application for set aside a default judgment entered regularly is the existence of a meritorious defence. However, it is not a rigid rule, that limit the discretionary power of the court. It is allowed to depart from the issue of meritorious defence if the appropriate circumstances of the case are justifiably required to do so. Lord Russell of Killowen in his speech in Evans v Bartlam (supra) expounded the general scope of this discretionary power and elaborated that this discretionary power should not be limited or reduced to the issue of meritorious defence only. While elaborating the issue of meritorious defence, Lord Russel held that;

"It was argued by counsel for the respondent that, before the court or a judge could exercise the power conferred by this rule; the applicant was bound to prove (a) that he had some serious defence to the action, and (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that, until those two matters had been proved, the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence, or (what amounts to the same thing) to the exercise, of the judicial discretion. For myself, I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose. 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".

12. In view of the above mentioned passages in Evans v Bartlam (Supra),it is my opinion that the judicial approach in exercising the discretionary power to set aside a default judgment is not only restricted to the issue of meritorious defence, though it considers as a vital component. The court is allowed to divert its attention to other appropriate considerations if the circumstances of the relevant action are required to do so.

13. The Court of Appeal of New Zealand in **Russell v Cox (1983) NZLR 655**, having extensively discussed the principles enunciated in Evans v Bartlam and other leading authorities on this issue, expounded that the court is actually required to consider whether it is just in all the circumstances to set aside the default judgment, in which certainly the existence of a meritorious defence constitutes an important component, but does not limit it as a rule.

14. The Fiji Court of Appeal in **Wearsmart Textiles Limited v General Machinery Hire limited and Shareen Kumar Sharma (1998) FJCA26; Abu 0030u.97s (29 May 1998)** has elaborated the applicable principles for setting aside a default judgment entered regularly, where it was held that;

"The general principles upon which a Court should act on an application to set aside a judgment that has been regularly entered, are set out in the White Book, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143. They are as follows:-

"Regular judgment -If the judgment is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., ibid. p.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183, p.363).

15. It appears that the Fiji Court of Appeal in Wearsmart Textiles Limited V General Machinery Hire Limited and Shareen Kumar Sharma (supra) has recognised, that upon sufficient reason, the court could deviate from the issue of meritorious defence to other appropriate issues in an application for setting side of a default judgment.

16. I now draw my attention to this instance case, where the Defendant's application to set aside this default judgment is mainly founded on his explanation for his failure to file and serve the statement of defence within the stipulated time. He stated that he requested a copy of the building contract from the counsel of the Plaintiffs in order to form his defence and file the statement defence, which was later refused by the Plaintiffs. It appears that the defendant has further requested the Plaintiffs in his letter dated 12th of February 2014, not to proceed in the action any further until 14 days after the Plaintiffs supplied the said copy of the contract. In view of the letter dated 12th of February 2014, I find that the Defendant has given a sufficient notice to the Plaintiffs about his difficulties of forming his defence without perusing the said copy of the building contract.

17. Before writing the letter on 12th of February 2014, the Defendant filed and served his notice of acknowledgment of service on 10th of February 2014. The Plaintiffs' solicitors replied on 14th of February 2014 and refused to provide a copy of the said contract.Consequent upon such refusal, the Defendant then tried to serve the Plaintiffs a formal requested for further and better particularson 31st of March 2014, which was refused to accept by the solicitors of the Plaintiffs. Subsequently, on 28th of April 2014, the Plaintiffs entered this default judgment against the Defendant pursuant to Order 19 r 2 and 3.

18. Having considered the explanation given by the Defendant, it appears that upon being served with the writ of summons, the Defendant had been trying to obtain a copy of the building contract in order to form his defence and file the statement of defence without much delay. The Plaintiffs urged the court to disregard this explanation, however, I find no reason to disbelief the Defendant's explanation at this point of the proceedings as he has promptly filed his notice of acknowledgement and taken steps

to request the said copy of building contract from the Plaintiffs. It is reflective enough that the Defendant did not deliberately avoid or ignore the filing of his statement of defence. I accordingly accept the explanation given by the Defendant for his failure to file his statement of defence within the stipulated time. I do concur with the Plaintiffs' counsel's submissions that there was a reasonable delay between his first letter to the Plaintiff dated 12th of February 2014 and his formal notice of further and better particulars. However, it is my view that delay can be sufficiently compensated with an appropriate cost.

19. In conclusion, I make following orders that;

i. The Default judgment entered against the Defendant on 28th of April 2014 is hereby set aside,

ii. The Plaintiffs are hereby ordered to provide the Defendant a copy of the building contract dated 16th of January 2013 as stated in the statement of claim within 7 days of this order,

iii. The Defendant is hereby ordered to file and serve his statement of defence within 14 days after the service of a copy of the contract as ordered above,

iv. The Plaintiffs are awarded sum of $500 as cost of this application assessed summarily.

Dated at **Suva** this **21st day** of **November, 2014.**

HIGH COURT OF FIJI

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R.D.R Thushara Rajasinghe
Master of High Court, Suva