In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016 No: 109

BETWEEN:

MICHAEL PAULO
(Trading as "MJP Construction")

Plaintiff

And

DAMON SIMMONS

Defendant

RULING

Date of Hearing: 22 November 2016
Date of Ruling: 9 December 2016

Richard Horseman, Wakefield Quin Limited for the Plaintiff
Vaughn Caines, Marc Geoffrey Limited for the Defendant

Application to Set Aside Judgment in Default of Appearance (RSC O.13/9)
Application to Amend Statement of Claim (RSC O. 20/5)
Jurisdiction of Registrar (RSC O. 32/11)

RULING of Registrar S. Subair Williams

Introductory

1. This matter has come before the Court on:

   (i) The Defendant's Summons to set Aside Judgment in Default and
   (ii) The Plaintiff's Summons to Amend the Statement of Claim.

2. By a Generally Indorsed Writ of Summons filed on 23 March 2016 the Plaintiff, trading as MJP Construction, claimed for damages against the Defendant in the sum of $304,697.40 for breach of contract arising out of non-payment of the outstanding balance due under a contract for renovations to the Defendant's property.

3. The Defendant denies liability for the claimed sum on the basis that the only agreement for renovation works entered between the parties was for the settled sum of $647,600.00. The Defendant's case is that the original agreement for renovation works attached to a termination date of 4 October 2008. The Plaintiff accepts that the original agreement was for $647,600.00 but avers that additional works were carried out beyond the original agreement thereby incurring additional liability on the Defendant for the sum of $304,697.40. The Defendants disputes that any additional works were carried out.

Background

4. By Affidavit of Service filed on 8 April 2016, service of the Indorsed Writ was confirmed to have been made on the Defendant personally on 5 April 2016.

5. The Defendant did not enter an appearance within the 14 day period prescribed by Order 12/5 of the Rules of the Supreme Court 1985 (RSC).

6. On account of the Defendant's failure to enter a Memorandum of Appearance and upon the Registry's receipt and consideration of the requisite filing, Judgment in Default for the sum of $304,697.40, as claimed in the Indorsed writ, was entered on 10 June 2016 in favour of the Plaintiff together with interests and costs to be agreed or fixed by further order.

7. On an *ex parte* summons with supporting affidavit evidence filed by the Plaintiff on 13 July 2016, an Order was made on 19 July 2016 by Hellman J for the Defendant to attend as a Judgment Debtor before me to be orally examined on 16 August 2016 as to his means under RSC O.48.

8. By letter to the Court, dated 12 August 2016, Marc Daniels of Marc Geoffrey Barristers and Attorneys Ltd ('Marc Geoffrey Ltd') wrote to the Court advising that his firm had recently been retained by the Defendant, Mr. Simmons.

9. The 12 August letter advised that Marc Geoffrey Ltd had made an enquiry with Counsel for the Plaintiff to obtain copies of the case file but to no avail as Counsel (Mr. Horseman) was, at that time, overseas. A request under a Search Praecipe was also filed on 12 August 2016 for Marc Geoffrey Ltd's receipt of a copy of the 'Court Bundle'. The letter also provided notice that an adjournment of the pending 16 August examination hearing would be sought in order for their chambers to review and advise on the file documents once received.

10. On 16 August 2016 the parties appeared before me in Chambers. Mr. Caines appeared for the Defendant /Judgment Debtor notwithstanding that a Notice of Appointment of Attorney under O.67/3 had not been filed. (However, on 17 August 2016 a 'Notice of Change of Attorney' was filed by Mr. Caines of Marc Geoffrey Ltd confirming his appointment to act for the Defendant.) Ms. Deborah Correia of Wakefield Quin Limited ('Wakefield Quin Ltd') appeared for the Judgment Creditor, holding for Mr. Horseman.

11. At the 16 August hearing before me, Mr. Caines confirmed that earlier that same day he filed a summons to set aside Judgment and to adjourn the examination of means hearing.

12. Unsurprisingly, Ms Correia indicated through her submissions that the application to set aside Judgment and to adjourn would be opposed.

13. Ms Correia complained that an email from Marc Daniels was received by Mr. Horseman on Friday 12 August at 5:33pm requesting copies of the file confirming their recent instruction and likelihood to file an application to adjourn.

14. Ms Correia argued that the Defendant's Counsel had the sufficient time on Friday, all of the following weekend and all day Monday to consider the case file documents, having collected the copy file from Wakefield Quin Ltd on Friday 12 August 2016. She criticized Counsel for not having sooner filed their application to set aside Judgment. Ms. Correia also queried the reasons for the Defendant's delay in securing Counsel given that the writ was filed in March 2016.

15. I took the view that the summons filed, albeit on even day, would have to be heard and determined in any event. If the said summons were to succeed, then the Examination of Means hearing would amount to wasted costs one way or the other. For those reasons, I adjourned the Examination of Means hearing and later issued the Defendant's summons to be heard before me on 11 October 2016 at 11:00am.

16. By Mr. Caines' letter to the Court of 5 October 2016, the parties mutually requested for the 11 October hearing to be delisted to accommodate a long-standing Magistrates' Court matter which Mr. Caines was keen to prioritize. Agreed dates were suggested and the summons to set aside Judgment was relisted to be heard on 22 November 2016 before me.

17. On 30 September 2016 Wakefield Quin Ltd filed a summons to be heard by a Judge sitting in Chambers for the Plaintiff's Statement of Claim to be amended in the form exhibited to the Plaintiff's supporting affidavit. The summons also sought an order to strike out the Defendant's summons to set aside Judgment and for costs of the application.

Jurisdiction of Registrar

18. On 22 November 2016 the parties appeared before me on both summonses. This came after a query as to whether I would hear the matter or if it would be necessarily listed before a Judge sitting in Chambers.

19. Without contention from either party on the jurisdiction of the Registrar and having fully considered the below provisions, both summonses proceeded before me.

20. Under RSC Order 32/11, the Registrar is given jurisdiction to hear any application which may be heard by a Judge sitting in Chambers:

    RSC Order 32/11:

    11 (1) The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a judge in chambers except in respect of the following matters and proceedings, that is to say-

    (a) matters relating to criminal proceedings;
    (b) matters relating to the liberty of the subject;
    (c) any other matter or proceedings which by any of these rules is required to be heard only by a judge
    (2) The Registrar shall have power to grant an injunction in the terms agreed by the parties to the proceedings in which the injunction is sought.

    RSC Order 32/13 grants a Judge the power to direct any summons, application or appeal to be heard in Court if the Judge considers that by reason of its importance or for any other reason it should be so heard. RSC Order 32/19 empowers a Judge to direct matters to be disposed of in Chambers.

    The applications which may be made under RSC Order 13/09 (Setting Aside Judgment) and RSC Order 20/5 (Leave to Amend Pleadings) are both applications for the consideration and determination of "the Court".

    The meaning of "the Court" is set out in RSC Order 1/4(2):
    In these Rules, unless the context otherwise requires, "the Court" means the Supreme Court or any one or more judges thereof, whether sitting in court or in chambers, or the Registrar; but the foregoing provision shall not be taken as affecting any provision of these Rules and, in particular, Order 32, rule 11, by virtue of which the authority and jurisdiction of the Registrar are defined and regulated.

The Plaintiff's Case

1. This action was originated by a Generally Indorsed Writ filed 24 March 2016.

Plaintiff's statement of Claim and Prospective Amended Statement of Claim

2. A Statement of Claim was filed on the same day together with the writ. A draft Amended Statement of Claim was filed as an exhibit to the Plaintiff's affidavit filed in support of his 11 October 2016 summons for leave to amend his Statement of Claim.

3. In the Statement of Claim it was pleaded that the contract for renovations to the Defendant's home was made on or about 20 November 2008. However, the Plaintiff also asserted that he completed the contractual works on 4 October 2008 (a date preceding the making of the agreement). The obvious date error was corrected in the draft Amended Statement of Claim to 25 February 2008 when the works started. Perhaps in error, it was maintained in the Statement of Claim, however, that the renovation works were completed on 4 October 2008.

4. In the briefly pleaded facts in the Statement of Claim, the Plaintiff claimed that the Defendant failed to pay the balance due under the contract and that the Plaintiff has, therefore, suffered loss and damage in the sum of $304, 697.40. In the draft Amended Statement of Claim the originally claimed sum of $304,697.40 is reduced to $302,197.40 on the basis of payment received by the Defendant against the $304,697.40 sum.

Plaintiff's Affidavit filed in Support of Summons to Strike out Application to Set Aside

5. In the Plaintiff's affidavit evidence sworn on 30 September 2016 and filed in support of the 11 October 2016 summons, Mr. Paulo agreed that the initial contract was for $647,600.00. He went on to state in his affidavit that the contract price was increased as a result of changes made to the original scope of work. Mr. Paulo specified that the changes were agreed by Mr. Simmons and they '*included digging out and constructing a basement which included installing a bathroom, electrical and plumbing as well as other works.*'

6. On the Plaintiff's Statement of Claim, it appears as if the claimed sum of $304,697.40 (now $302,197.40) is an outstanding portion of the contract under which works ended on 4 October 2008. It is likely, having reviewed the Plaintiff's supporting affidavit evidence, that the stated completion date of '4 October 2008' in the Statement of Claim was unintended.

7. On the Plaintiff's affidavit evidence the $304,697.40 is said to be owed as payment for extensive renovations completed within an additional one year period running up to 25 November 2009.

8. The Plaintiff was previously represented by Conyers Dill & Pearman Limited who wrote a letter to the Defendant on 16 July 2010 ('the CD&P letter'). The CD&P letter was exhibited to Mr. Paulo's affidavit. It suggests that the original quote was an estimated total of $647,600.00 and that extensive renovations valued at $304,697.40 ended in November 2009 (not 4 October 2008):

Plaintiff's Exhibit: Exert from CD&P Letter of 16 July 2010:

"*We are instructed on behalf of MJP Construction (MJP) who, pursuant to a written agreement carried out extensive renovations...between February 25th and November 2009.*

The contract originally quoted an estimated total price of $647,000 which was based on constructing the shell, extra and certain finishes for the work done.

In addition to the original scope of work, additional work was carried out at your request by MJP. That work included the following work which was not included in the original estimate. Bottom apartment renovation, electrical, excavation, tiling through out, (sic) landscaping and new upper floor slab. The work is detailed in the invoices which were produced every two weeks by MJP and which accompany this letter. At no time have you disputed the fact that you requested the work or quality of the workmanship. Indeed since December you have assured Mr. Paulo that you were in discussions with your bankers in order to arrange financing so that MJP could be paid in full.

However, in breach of your contract you have failed to pay the sum of $304, 697.40..."

Plaintiff's Exhibit: Mr. Paulo's 16 March 2011 to Defendant

9. Evidence of the additional sum owed was exhibited by the Plaintiff in his 16 March 2011 letter to MJP Construction wherein he stated the outstanding sum of $304,697.40. On the Plaintiff's case, Mr. Simmons' signature is affixed to the letter as an agreement to pay $1000.00 per month in order to reduce the total owed sum of $304,697.40.

Plaintiff's Exhibit: Mr. Paulo's email exchanges with the Defendant

10. The Plaintiff also exhibited an email exchange between the parties made on 23 January 2014. In the said email message Mr. Paulo advised Mr. Simmons on a reduced total owed. The email discloses that Mr. Paulo confirmed receipt of payment of $2,500 which was to be applied against the $304,697.40 sum. This led to the reduction in the outstanding total to $302,197.40.

The Defence Case

The Prospective Defence

11. A single-paged draft Defence was filed prospectively on 7 November 2016.

12. The draft Defence states a complete denial of liability for the sums claimed in the Statement of Claim and in the proposed Amended Statement of Claim. It seems on the Defence pleadings that it is asserted that there was no agreement for additional works beyond the $647,600.00. In the draft Defence filed, it is also denied that the Plaintiff fulfilled his contractual obligations to complete the renovations as per the original agreement.

13. Paragraph 4 of the Defence reads, "*...it is denied that the Plaintiff entered into contract with the Defendant to carry out the additional renovations as alleged by the Plaintiff on or about the 25th February 2008...*"

14. Paragraph 5 reads, "*It is denied...that the Plaintiff had fulfilled his contractual obligations and completed the renovations as per the original agreement. Otherwise it is agreed the renovation work was completed on 4 October 2008.*"

15. Paragraph 6 reads, "*The Defendant did not agree to the additional $304,697.40 in costs in the original contract. The original contract was for $647,600 in total.*"

16. The Defence categorically denied the Plaintiff's assertions in paragraphs 5- 8 of the draft Amended Statement of Claim which may be summarized as follows:

    (i) loss to the Plaintiff in the sum of $302,197.40;
    (ii) a written agreement wherein monthly repayments in the sum of $1000.00 would be made by the Defendant who acknowledged the debt of $304,697.40;
    (iii) partial payment by the Defendant against the claimed sum; and
    (iv) emails between the parties between 2012-2014 wherein the Defendant acknowledged the claimed debt

17. Curiously, however, the draft Defence does not address the supporting affidavit evidence sworn and filed by Mr. Caines wherein it is averred that the Defendant '*ended up paying $700,000.00 to MJP via draw down*'.

18. In fact, the Draft Defence does not go beyond the acceptance of the original agreement having been valued at $647,600.00

The Affidavit Evidence filed in support of Application to Set Aside Default Judgment

19. In support of the Defendant's application, two affidavits were filed in the name of Mr. Caines (not Mr. Simmons). The first affidavit was filed on 16 August 2016 in support of the summons filed on the same date for Counsel to be heard on an application to set aside Judgment in default. The second affidavit was filed on 7 November 2016 in support of the same 16 August 2016 summons.

The First Affidavit

20. The first affidavit deposed was grounded on an assertion that Judgment should be set aside '*as it was outside of the 6-year timespan allotted for action of this type to be filed with the Supreme Court Registry.*' Mr. Caines referred to section 7 of the Limitation Act 1984 as it related to contractual claims.

21. Mr. Caines stated in the affidavit that the originating writ filed was out of time as the start time for the cause of action began on 4 October 2008. However, this line of submissions was withdrawn by Mr. Caines at the 22 November 2016 hearing.

22. It must be said, however, that a gross bulk of the documents exhibited to the first affidavit were documents already filed with the Court in this action and already placed on the Court file (eg. a copy of the originating writ; statement of claim back-page; previous Court orders; affidavits of service; correspondence to the Court and a copy of the Judgment entered). Counsel need not (and ought not) exhibit Court documents to affidavits when the affidavit filed is in relation to the same action as the Court documents exhibited. The effect of such exhibits amounts to an unnecessarily voluminous duplication of documents on the Court file.

The Second Affidavit

23. The second affidavit from Mr. Caines in support of the Defendant's application to set aside Judgment was filed on 7 November 2016, some 14 days prior to the 22 November hearing of the summonses before me.

24. On the second affidavit, the Mr. Caines advanced an entirely different basis for his application to set aside the Judgment made in default of appearance. The second affidavit asserted that '*the contract is void due to mistake and or misrepresentation. In the alternative it is at the very least voidable.*' (See paragraph 5 of the second affidavit under the first sub-title 'INTRODUCTION')

25. At paragraph 6 under the subtitle 'APPLICATION' the second affidavit reads, "*I have in my possession documents received from Mr. Ronald Simmons of 24 Northcourt Avenue,*

Pembroke Parish, detailing the original Estimate Submission received from MJP Construction."

26. Following the said paragraph 6 in the second affidavit, paragraphs 1-3 under the subtitle 'BACKGROUND' reads;

    1. "*By way of background the original quoted price for the renovations via an agreement entitled, "MJP Construction General Construction Division Estimate submission" was BM$647,600.00 as indicated in Exhibit "VVC1".* (VVC1 is an exhibit to the first affidavit).

    2. *The renovations entailed extending the house, by creating a two bedroom one and a half bedroom (sic) apartment for my (sic) son Damon Simmons Junior. The renovations required the removal of the roof and the designing of a master bathroom.*

    3. *Mr. Simmons ended up paying BM$700,000.00 to MJP via draw down. Subsequent to the additional payment of the BM$700,000.00 MJP then claimed Mr. Simmons owed an additional $304,697.40 plus interest. This is the gravamen of the claim for $304,697.40.*

27. Under the subtitle 'CAUSES OF ACTION' in the second affidavit it reads;

    4. *"The Principles of Mistake and alternatively Misrepresentation apply as a cause of action in this matter. Mr. Simmons mistakenly believed he owed MJP construction that amount of money due to Mr. Paulo informing him that he owed this amount of money, thereby taking advantage of him.*

    5. *Alternatively, Mr. Paulo misrepresented to Mr. Simmons that he owed his $304,697.40 thereby causing his (sic) to sign the contract found in Exhibit MJP1. Further to this point though Mr. Simmons signed that contract, he did not agree to a payment of $1000.00/month.*

    6. *In accordance with the Plaintiff's Amended Statement of Claim, the contract for $304,697.40 is void or voidable due to mistake or alternatively misrepresentation. Additionally there was no consensus ad idem as to the specific terms of the contract.*

    7. *I humbly invite the Court to consider the matters detailed above in deciding the default Judgment should be set aside. It would be a fundamental injustice to have granted the Plaintiff to file an Amended Statement of Claim while conversely preventing the Defendant from presenting a defence that would have a real prospect of success and carry some degree of conviction, utilizing the above-mentioned principles."*

Defence Exhibit: VVC1 MJP Construction- Estimate Submission ('Estimate Submission')

28. The Estimate Submission for $647, 600 (also referred to as the original quote) is signed by both parties and date marked, '*February 25th, 2008, updated October 4th 2008*'.

29. It is an agreed fact between the parties that the terms of the original agreement is set out in the Estimate Submission.

30. Notably, in the opening paragraph of the Estimate Submission it reads in part, "*We reserve the right to adjust our quote if further changes are made after the 21st January 2008. Quote is good for 3 months from January 21st 2008*".

Governing Legal Principles in Setting Aside Default Judgment

31. On the governing legal principles to be applied in determining whether Judgment should be set aside, the parties were agreed. Indeed, the law on this area has been outlined in considerable detail and clarity by Kawaley CJ in *Burgess v Burgess-Salina and Williams [2016] Bda LR 8* (to which I was referred by Mr. Horseman) and *Smith v Stoneham and Stoneham [2015] Bda LR 64*.

32. In both of these cases, the principles enunciated in the Judgment of Sir Roger Ormrod at page 223 in *Alpine Bulk Transport Inc v Saudi Eagle Shipping Co. Inc ('The Saudi Eagle') [1986] 2 Lloyd's LR 221* were set out:

"The following 'general indications to help the Court in exercising the discretion" (per Lord Wright at page 488) can be extracted from the speeches in Evans v Bartlam [1937] AC 473, bearing in mind that "in matters of discretion no one case can be authority for another' (ibid, page 488):

(i) a Judgment signed in default is a regular Judgment from which, subject to below, the plaintiff derives rights of property;

(ii) the Rules of Court give to the judge a discretionary power to set aside the default Judgment which is in terms "unconditional" and the court should not "lay down rigid rules which deprive it of jurisdiction" (per Lord Atkin at page 486);

(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if Judgment followed automatically on default;

(iv) *the primary consideration is whether the defendant "has merits to which the Court should pay heed" (per Lord Wright at page 489), 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 if he has shown "merits" the "Court will not, prima facie, desire to let a Judgment pass on which there has "been no proper adjudication" (ibid. page 489 and per Lord Russell of Killowen at page 482).*

(v) *Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant "found himself bound by a Judgment regularly obtained to which he could have set up some serious defence" (per Lord Russell of Killowen at page 482).*

In applying these 'general indications' it is important in our Judgment to be clear what the 'primary consideration' really means. In. the course of his argument Mr Clarke Q.C. used the phrase 'an arguable case' and it, or an equivalent, occurs in some of the reported cases (e.g. Burns v Kendel [1977] 1 LlLR 554 and Vann v Awford). This phrase is commonly used in relation to Order 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default Judgment, it does not accord, in our Judgment, with the standard indicated by each of their lordships in Evans v Bartlam[1]. All of them clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. (In Evans v Bartlam there was an obvious defence under the Gaming Act and in Vann v Awford a reasonable prospect of reducing the quantum of the claim). Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular Judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the Judgment were to be set aside and the defence developed. The 'arguable' defence must carry some degree of conviction."

Merits of Application to Set Aside Default Judgment

Reasons for Delay in entering a Memorandum of Appearance

33. No real explanation was offered by the Defendant as to how it came about that he found himself bound by a default Judgment which he could have avoided had he entered a Memorandum of Appearance and Defence.

[1] *"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"* (per Lord Atkin in *Evans v Bartlam [1937] AC 473 at 480)*

34. It warrants mention that Mr. Simmons was unrepresented by Counsel prior to Mr. Caines' appointment in August 2016. However, I am also reminded of the 16 August 2016 hearing before me when Ms Correia (holding for Mr. Horseman) criticized the Defendant for his delay in first securing Counsel in August 2016, given that the writ was filed six months earlier in March 2016.

35. In *Burgess v Burgess-Salina and Williams ante*, Kawaley CJ was critical of months of delay in serving a Defence and Couterclaim:

> "*Mr. Durham argued that the Court should treat the delay in filing the Defence and Counterclaim as being very short. The chronology set out above shows that the delay, overall ran into months rather than days and that, in hindsight, the Defendants' counsel was overly generous with his consensual extensions of time. Obtaining legal assistance from a disbarred lawyer to save costs cannot in any event constitute a reasonable excuse for failing to file through your attorney of record a pleading within time. There was no excuse which justified this Court treating the default as one which ought to be forgiven (despite the absence of a Defence with real prospects) a residual jurisdiction which this Court occasionally exercises in the wider interests of justice.*"

In this case, I find no reason to exercise such residual jurisdiction as the cause for delay is not in my view is not sufficiently just for me set aside judgment on this basis.

It ought not to go unnoticed that in *Burgess v Burgess-Salina and Williams* Kawaley CJ dismissed the summons to set aside Judgment in Default '*because the Plaintiff...failed to disclose a defence with real prospects of success*' not because of unjustifiable delay.

Analysis of Merits of Defence Case - 'Real Prospects of Success'

36. The Defence case is not stated in positive terms in the draft Defence filed. Apart from a series of short and unexplained denials, the Court would have to look to the affidavit evidence filed in support of the application to set aside Judgment.

37. On the second affidavit filed, the Defence case is said to be founded on '*the principles of mistake and alternatively misrepresentation...*' Mr. Caines in his submissions before me attempted to attach these defences to Mr. Simmons' mistaken belief that he owed MJP Construction *$304,697.40.* Mr. Caines submitted these defences as reasons explaining:

    (i) Mr. Simmons' omission to rebut any part of the CD&P letter of 16 July 2010 wherein Mr. Simmons was informed of the outstanding sum of $304,697.40 for payment in exchange for additional work carried out at his request. (The additional

works were specified in this letter to include, "*bottom apartment renovation, electrical, excavation, tiling through out, landscaping and new upper floor slab.*")

(ii) Mr. Simmons' signature on the Plaintiff's exhibited 16 March 2011 letter where Mr. Simmons appears to agree to the stated outstanding sum of $304,697.40 and monthly repayments in the sum of $1000.00 (having already received the CD&P letter seven months prior wherein he was advised that the additional sums owing was on the basis of additional work done);

(iii) Mr. Simmons' failure to challenge or contest the Plaintiff's restatement of the sums owed in the 2012-2014 email exchanges between the parties referring to the outstanding sum of $302,197.40 and partial payment made by the Defendant;

38. Mr. Caines in his second affidavit before the Court stated:

"In accordance with the Plaintiff's Amended Statement of Claim, the contract for $304,697.40 is void or voidable due to mistake or alternatively misrepresentation. Additionally there was no consensus ad idem as to the specific terms of the contract..."

39. Through the draft Defence filed, the Defendant denied the Plaintiff's fulfillment of the renovation obligations under terms of the original agreement. This proposition is hardly plausible in the face of the Defendant's uneventful acceptance the CD&P letter (which suggests not only completion of the original works but completion of additional works); his endorsement of the 16 March 2011 letter (which asserts the claimed sum to be owing) and the email exchanges which covered the 2012-2014 period (which again asserts the claimed sum to be owing and partial payment made in the sum of $2,500.00).

40. On the prospective Defence, the Defence case is suggestive that the only agreement entered was for the sum of $647,600.00 as stated in the Estimate Submission and for works which ended on 4 October 2008.

41. However, it has not gone unnoticed by this Court that on the second page of the Estimate Submission a list of various categories of renovation works appears under the heading, "*Total cost for our estimate is **not inclusive** of the following*". The list which follows includes subheadings, *inter alia* 'Excavation'; 'Landscaping'; 'Tiling and brickwork' and 'Finished Electrical'. The extra work described in the CD&P letter is consistent with at least some of these categories of renovation works for additional charge.

42. In the first and second affidavit of Mr. Caines, the Defence asserts that Mr. Simmons paid $700,000.00 to MJP Construction *'via draw down'*. Further, exhibited to Mr. Caines' first affidavit there is an HSBC Bank of Bermuda transaction confirmation slip dated 29 October 2008. On the face of the said bank slip, a debit amount in the sum of $125,000.00 was made

payable to MJP Construction. However, this exhibit is not further explained in the affidavit on which it sits.

43. Having regard to the evidence from the Defence confirming payment of sums beyond the originally quoted $647,600.00, the unavoidable conclusion is that an updated agreement for additional works done beyond 4 October 2008 was formed. The existence of an updated agreement is consistent with the case described in the exhibited CDP letter of 6 July 2010.

44. For these reasons, I find that the Defendant has shown no real prospects of success in the advancement of its unexplained denials and asserted defences of mistake and/or representation.

Application for Leave to Amend Statement of Claim

45. The prospective Amended Statement of Claim primarily seeks to reduce the quantum of loss from $304,697.40 to $302,197.40.

46. Mr. Horseman's application to amend his statement of Claim was essentially unopposed by Mr. Caines.

47. RSC Order 20/3 allows for a party to amend any pleading of his once at any time before the pleadings are deemed to be closed:

20/3(1): A party may without the leave of the Court, amend any pleading of his once at any time before the pleadings are deemed to be closed and, where he does so, he must serve the amended pleading on the opposite party.

48. RSC Order 18/20 outlines when pleadings are deemed to be closed:

18/20(1): The pleadings in an action are deemed to be closed
(a) at the expiration of fourteen days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim, or
(b) if neither a reply nor a defence to counterclaim is served, at the expiration of fourteen days after service of the defence.
The pleadings in an action are deemed to be closed at the time provided by paragraph (1) notwithstanding that any request or order for particulars has been made but has not been complied with at that time.

49. Without the benefit of a developed submission or guidance on this particular point, in my view it is practical that the pleadings in an action would be deemed to be closed once a regular Judgment in Default has been entered. In this matter, Judgment was entered on 10 June 2016.

50. For that reason, I do not hold the view that RSC Order 20/3 applies in this case. Indeed, it was most sensible of Mr. Horseman to apply for leave to amend his Statement of Claim.

51. RSC Order 20/5 (1) provides:

> "*... the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*"

52. The proposed amendments to the Statement of Claim are not material and do not introduce a new cause of action. Instead, they would have the mere effect of correcting the start date of the original contract for renovation works and updating the quantum claimed.

Conclusion

53. Leave is given for the Plaintiff to Amend the Statement of Claim only to insert the red-ink changes shown in the draft pleading exhibited to the supporting affidavit filed on 30 September 2016. Leave is also granted for the Plaintiff to amend, as necessary and correct, the stated timeframe of completion of the renovation works only on the basis that the Plaintiff's affidavit evidence describes the renovation period to have been completed in November of 2009. Leave to amend shall cease to have effect after 21 days of this ruling.

54. The Summons to set aside the Judgment in Default of the Memorandum of Appearance and Defence is allowed only to the extent that the Judgment in Default for $304,697.40 is varied to substitute the sum of $302,197.40. Otherwise the said Summons to set aside Judgment is dismissed and leave to enter an Amended Judgment for $302,197.40 plus interest is granted, contingent on the filing of an Amended Statement of Claim as allowed herein.

55. Subject to the above-stated variation, the application to set aside Judgment is accordingly refused because the Defendant has failed to disclose a defence with real prospects of success.

56. (I made no findings on the merits of the time-barred limitation point made in Mr. Caines' first affidavit as he withdrew those grounds at the 22 November 2016 hearing).

57. Leave to proceed with the Examination of the Defendant's Means under Order 48 is allowed upon letter to the Registry confirming a request for the fixture of a date for hearing.

58. I will hear Counsel, if necessary, on the terms of the Order to be drawn up to give effect to the present Ruling.

59. Unless either party applies within 14 days by letter filed in the Registry to be heard as to costs, the costs of the present application for the setting aside of Judgment shall be awarded to the Plaintiff to be taxed if not agreed. No order for costs is made in respect of the application to amend the Statement of Claim.

Dated this 9th day of December 2016

SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT