ST. GEORGE WEST COUNTY

PORT OF SPAIN PETTY CIVIL COURT

RULING: SETTING ASIDE JUDGMENT ENTERED IN DEFAULT OF DEFENCE

CITATION: Susan Bascombe v. Ashmael Moore

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 31 of 2012

DELIVERED ON: 13th May 2013

CORAM: Her Worship Magistrate Nalini Singh
St. George West County
Port of Spain Petty Civil Court Judge

REPRESENTATION:

Mr. St. Clair Michael O'Neil appeared for the Applicant/Defendant

Mr. Mansergh K. Griffith appeared for the Respondent/Plaintiff

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1. THE APPLICATION

1. By Notice of Application dated and filed on the 1st February 2013, the applicant/defendant sought an order that the judgment obtained against him on the 2nd March 2012 be set aside.

1.2 This Notice was brought under **Section 11 of the Petty Civil Courts Rules** made under **Section 53 of the Petty Civil Courts Act Chap. 4:21** which provides as follows:

> "Where a defendant upon a Default Summons fails to file the affidavit or notice to obtain leave to defend within the time limited for so doing and judgment for the plaintiff upon his claim has been entered accordingly, the Judge may upon application made by the defendant set aside the judgment upon such terms as to costs or otherwise as he may think just, and allow the defendant thereafter to defend the whole or such part of the claim as he may think proper. Any application made in this behalf must be supported by affidavit disclosing a defence upon the merits and explaining the neglect, and notice of the application together with a copy of the affidavit shall be served upon the plaintiff or his Attorney-at-law at least three clear days before the date fixed for the hearing of the same".

1.3 Having regard to the above, the Court's view is that an application to set aside judgment upon a Default Summons, must be supported by an affidavit which does two things. It must:

(a) disclose a defence upon the merits and

(b) explain why an affidavit or notice to obtain leave to defend was not filed within the prescribed time.

2. THE ISSUES

2.1 The issues which therefore arise for consideration in this matter are:

(a) Whether the affidavit discloses a defence upon the merits.

(b) Whether the affidavit explains the reason for the neglect in filing an affidavit or notice to obtain leave to defend within the prescribed time.

3. THE LAW

(a) Whether the affidavit discloses a defence upon the merits.

3.1 A determination of whether the affidavit discloses a defence upon the merits involves the consideration of two matters. One is the meaning of the term "disclosing a defence" and the second is the meaning of the term "a defence upon the merits". I turn now to an examination of the meaning of each of these terms.

Meaning of Disclosing a Defence

3.2 For an affidavit to be considered as "disclosing a defence", the case of **Whiley v. Whiley 140 ER 1248** suggests that the defendant must actually set out the facts which he intends to rely upon, in the affidavit. As Cockburn CJ said in this judgment, at page 1251:

> "I think it is impossible to say that disclosing a defence means no more than stating the fact of the existence of a defence. It clearly means something more: the defendant must shew upon his affidavit what the nature of the defence is. He

> need not set out the whole defence in minute particularity: but he must do something more than nakedly state that he has a defence to the action upon the merits".

So an affidavit which discloses a defence cannot be one that simply states that the defendant has a good defence to the action on the merits. It must actually show the nature of the defence and set out facts which will enable the court to decide whether or not there is a matter which would afford a defence to the action: **Stewart v. McMahon (1908) 1 Sask. L.R. 209, 7 W.L.R. 643 per Wetmore CJ at pg. 646.** As Hamel-Smith JA noted in **Roger Soogrim v. David Brown (trading as David Brown Transport Service) CVA No. 168 of 2000 at pg. 3:**

> "At paragraph 9 of the affidavit, attorney stated that the defendant had a good defence on the merits. Simply saying that takes the issue no further. It really is a conclusion for a Judge or Master to draw and not the defendant or his attorney… This case is a reflection of the lackadaisical approach of some attorneys in dealing with applications to set aside regular judgments. For too long the practice has been simply to be as brief as possible with the concluding declaration that 'the defendant has merit'. Attorneys must understand that in actions of this nature it is imperative… to swear to the facts".

3.3 What then are the facts the applicant/defendant is expected to swear to in his affidavit? The answer is facts which disclose a defence upon the merits; the meaning of which I turn to now.

Meaning of a Defence Upon Its Merits

3.4 The cases have suggested that an affidavit which discloses a defence upon the merits is an affidavit which discloses facts from which a court can determine that:

- The applicant has an arguable or triable case: **Nazir Mohammed v. Ramdassie Changoor HCA No. 3126 of 1974 per Deyalsingh J at pg. 2, Isha Mohammed (dependent of the deceased Hadeed Mohammed) v. Siew Beeka and Bissoon Beeka HCA No 751 of 1977 per Blackman J at pg. 2, Hollis Juteram v. Trinidad and Tobago Electricity Commission HCA No. 3030 of 1982 per Douglin Master at pg. 4, Bank of Commerce of Trinidad and Tobago Limited v. Oswald Gittens HCA No. 4068 of 1983 per Seapaul Master at pg. 3** and **Intercommercial Bank Limited v. Oliver Magnus & Joan Webley HCA S977 of 2002 per Sobion Master at pg. 2.**

- The defence is real and not imaginary and that it is worthy of being entertained and considered: **Watt v. Barrett 3 Q.B.D. 183 per Cockburn CJ at pg. 185,** and **Miller v. Ross (1909) 2 Sask. L.R. 449, 12 W.L.R. 315 per Wetmore CJ at pg. 317 para. 4.**

- There is a *bona-fide* question to try: **Anderson v. Anderson and Boyd Bros. [1934] 2 W.W.R. 128 per Martin JA at para. 10.**

- There is evidence that the applicant has a *prima facie* defence: **Evans v. Bartlam [1937] A.C. 473 per Lord Atkin at pg. 480, Trinidad Transport Enterprise Ltd. & Boysie Nanan v. Desmond Norbert de Souza CA Civ. No. 12 of 1969 per Sir Arthur**

McShine CJ at pgs. 1-2, and **Elegant Sportswear Ltd. v. Futterman Maya Co. Inc. CA Civ. No. 14 of 1969 per CEG Phillips CJ (Ag.) at pgs 1-2.**

- The applicant has a defence that is at least worthy of investigation: **Sales v. Sereda [1952] 5 W.W.R. (N.S.) 470 per Thomson J at para. 4.**

3.5 There is also case law to the effect that a defence upon the merits cannot be likened to a good defence: **Burns v. Kondel (1971) Vol. 1 Ll LR per Lord Denning MR at pg. 555** and **Environmental Specialist Services Limited v. St. George West County Council HCA No. 974 of 1990 per Dolye Master at pg. 7.** From this it is immediately apparent that the test the Petty Civil Court Judge is concerned with, is lower than the "realistic prospect of success" test employed by their lordships under **Part 13.3 of the Civil Proceedings Rules** (hereinafter referred to as the CPR).

3.6 With this in mind, I turn now to a consideration of whether, on the affidavit evidence before me, a defence upon the merits is shown. In so doing, I have found it necessary to examine firstly the affidavit of respondent/plaintiff Susan Bascombe, dated and filed on the 18th day of January 2012 in support of the Default Summons in the substantive matter.

The Affidavit of the Respondent/Plaintiff

3.7 On an examination of this document, the respondent/plaintiff claimed $15 000.00 TTD plus costs. This is how the respondent/plaintiff said the money became due to her:

> "On the 14th day of March, 2011 I contracted with Ashmeal Moore of No 95 Don Donald Hill, Long Circular Road. St. James, in an agreement whereby he would

have physical possession and control of my motor vehicle registration number PBJ 9462, he using the vehicle plying for hire and in return pay to me the sum of $200.00 TTD per day.

It was a term of the contract that the Defendant would be required to meet 50 per cent of the cost of repairs to the vehicle, if during the course of normal hire it was proven that he was at fault in an accident involving the said vehicle. If however the accident occurred during such time when the Defendant was not plying for hire he (the Defendant) would be liable to meet the full cost of such repairs.

On the 7th day of May, 2011 the Defendant while driving the vehicle was involved in an accident at Point Fortin. He later admitted to me that the vehicle was not being used in the course of normal hire, and as a result accepted liability in meeting the entire cost of repairs to the vehicle.

The cost of repairs effected on the vehicle amounted to $18 639.00, so certified by Steadley Auto Garage of Pioneer Drive, Petit Valley.

By letter, dated 2nd September, 2011, from my Attorney-at-Law Mr. Cecil H.A. Pope, the Defendant was accordingly notified of the sum he was required to meet in respect of repairs to the said vehicle. However, he has since paid me the sum of $2,500.00 only.

> The sum of $16, 139.00 which as a result is now due and payable by the Defendant, but in order to meet the limitation of the statutory sum payable I have forgone the payment of the sum of $1,139.00".

3.8 In short, the respondent/plaintiff's case is that she entered into an agreement with the applicant/defendant whereby he would be allowed to use her private car as a taxi if he could pay to her the sum of $200.00 per day and after two and a half years, title in the said vehicle would be transferred by her to him. Further, if during the course of that user, the vehicle was damaged she would pay 50% of the cost of repairing the vehicle unless the damage occurred whilst in the private use of the applicant/defendant in which case he would be expected to pay the entire cost of repairing the vehicle. The vehicle sustained damage whilst the car was being used privately and the applicant/defendant now refuses to pay for the full cost of the repairs.

Illegality

3.9 From this it is immediately apparent that the agreement contravenes **section 21(5) of the Motor Vehicles and Road Traffic Act Chap. 48:01** which provides that:

> "No motor vehicle shall be used as a taxi which is not duly registered as such under this Act; and if this subsection is contravened, the owner and the driver of the motor vehicle shall be guilty of an offence against this Act; but it shall be a defence on the part of the owner to prove that the contravention was without his knowledge and that he had taken all reasonable steps to avoid such contravention".

So, before going on to examine whether the applicant/defendant has a defence upon the merits to this claim, the immediate question which confronts this Court is whether the Court has jurisdiction to entertain this claim in light of the fact that it is tainted by illegality.

3.10 It is generally the case that contracts which are tainted by illegality are unenforceable in law. This principle can be traced back to the case of **Holman v. Johnson (1775) 98 ER 1120** where Lord Mansfield stated at page 1121 that:

> "The principle of public policy is this; *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act".

This means that neither contracting party can claim monies owed, or recover monies paid, under an illegal contract if to do so, requires a contracting party to base his claim on illegality or, disclose illegality in proving the claim. Indeed losses lie where they fall. As Lord Eldon put it in **Muckleston v. Brown (1801) 31 ER 934 at page 942**:

> "[T]he plaintiff stating, he has been guilty of a fraud upon the law, … to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty, the court will not act; but would say 'let the estate lie where it falls'".

3.11 A qualification to this concept applies if the illegal aspect of the contract could be severed. If this could be done then the contract may be enforced in a court of law. Quoting from **Chitty on Contracts Volume I (30th edition) at paragraph 16-194:**

> "Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable".

This principle was set out in some detail by Mr. P.J. Crawford Q.C. whilst sitting as Deputy High Court Judge in the matter of **Sadler v. Imperial Life Assurance Co of Canada [1988] I.R.L.R. 388 at pages 391-392** when he said that "a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision" once certain conditions are satisfied. These conditions were identified by him as:

> "1. The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains.
> 2. The remaining terms continue to be supported by adequate consideration,
> 3. The removal of the unenforceable provision does not so change the character of the contract that it 'becomes not the sort of contract that the parties entered into at all'".

I come now to an examination of each of these conditions with the view to determining whether the Court has jurisdiction to entertain the claim in the first place.

Is the unenforceable provision capable of being removed without the necessity of adding to or modifying the wording of what remains?

3.12 I understand this to refer to the "blue pencil rest" which was enunciated by Lord Sterndale M.R., in **Attwood v. Lamont [1920] 3 K.B. 571 at pages 577-578** as:

> "I think... that it is still the law that a contract can be severed if the severed parts are independent of one another, and can be severed without the severance affecting the meaning of the part remaining. This has sometimes been expressed, as... that the severance can be effected when the part severed can be removed by running a blue pencil through it. This is a figurative way of expressing the principle, and like most figurative expressions may quite possibly lead to misunderstanding... I think it clear that if the severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, the different parts of it cannot be said to be independent".

3.13 A court cannot rewrite contracts, so the first question is if after severance, what remains makes literal sense *and* it is still in keeping with the essence or scope of what the parties envisaged when they entered into legal relations without the need for rewording, then severance is possible.

3.14 Applying this understanding to the matter at hand, I am satisfied that if the "blue pencil test" were to be applied, the offending part can be deleted and the essence of the contract will still be maintained without having to add to or, modify the wording of what remains. This is because if the matter of plying the private car for hire is severed, the meaning of the remaining part of the contract still remains what was originally envisaged by the contracting parties -which is that the applicant/defendant is to pay to the respondent/plaintiff the sum of $200.00 TTD per week for two and a half years after which title in the car would pass to the applicant/defendant

and there is no need to add or modify anything to maintain this meaning. That said, the blue pencil test can apply.

Do the remaining terms continue to be supported by adequate consideration?

3.15 The next question is whether the illegal aspect of the contract is substantially the whole or main consideration for the promise which is to be enforced. If it is then the court cannot sever the illegal aspect of the agreement. In the matter of **Alec Lobb v. Total Oil GB [1985] 1 W.L.R. 173 at page 188** Lord Justice Dunn made the point that:

> "...if the valid promises are supported by sufficient consideration, then the invalid promise can be severed from the valid even though the consideration also supports the invalid promise. On the other hand if the invalid promise is substantially the whole or main consideration for the agreement then there will be no severance".

3.16 After severance of the offending part of the contract between the parties, I have found that what remains is still supported by consideration on the part of both contracting parties since the applicant/defendant would still be bound to pay to the respondent/plaintiff the sum of $200.00 TTD for the possession of the vehicle whereas the respondent/plaintiff would be receiving $200.00 TTD per week for parting with possession of her vehicle.

Does the removal of the unenforceable provision change the character of the contract so that it 'becomes not the sort of contract that the parties entered into at all'?

3.17 The final matter to be addressed is whether the deletion would so alter the character of the agreement so that the Court would, in effect be enforcing a different contract. Indeed the court will never strike out words in a contract if to do so would alter entirely the scope and intention of the agreement. This is because as Lord Justice Younger stated in **British Reinforced Concrete Engineering Co v. Schelff [1921] 2 Ch. 563 at page 573,** the doctrine of severance "does not authorise the making of a new contract for the parties". I have found that the deletion in this case would not alter the character of the agreement between the parties.

3.18 Having addressed my mind to each of these considerations outlined above, I find that the term relating to the illegal use of the car can be severed from the rest of the contract. As such, the Court has jurisdiction to entertain this matter.

3.19 Further, on the facts set out by the respondent/plaintiff the damage to PBJ 9462 was not sustained whilst the car was plied for hire. Proceeding on the basis that the illegal aspect of the contract has been severed, I turn now to the affidavit of the applicant/defendant dated and filed on the 1st February 2013 (in support of the Notice of Application to set aside the Respondent/Plaintiff's judgment) under the hand of Mr. Ashmael Moore, to see whether it discloses a defence upon the merits to the claim of the respondent/plaintiff.

The Affidavit Filed on Behalf of the Applicant/Defendant

3.20 According to Mr. Ashmeal Moore he entered into an agreement with the respondent/plaintiff to purchase her car if he paid to her the sum of $200.00 TTD per week. Upon payment of same for two and a half years, the respondent/plaintiff would transfer title in the car to the applicant/defendant. Further, one of the terms of this agreement was that in the event of any accident the applicant/defendant would be required to pay for 50% of the damages. Specifically the applicant/defendant stated that:

> "a contract existed between the Plaintiff and the Defendant, which clearly states at paragraph 3 that in the event of any accident that I am in error, I would be required to pay 50% of all the damages...
>
> It is denied that there was ever any condition in the agreement that the accident had to occur while the vehicle was being used during "the course of normal hire".
>
> While it is admitted that I was involved in an accident on the 7th May 2011, it is denied that I admitted liability for the full cost of the repairs. When approached by the Plaintiff, I continuously referred to the agreement between the parties but the Plaintiff continued to insist that I was liable for the full amount.
>
> I deny that the repairs to be effected amounted to $18, 639.00 as it is inconsistent with the damage to the vehicle. At no time did the Plaintiff provide me with any invoice or receipt showing that this sum was actually paid.

> I deny that I received any letter in September 2011 from anyone representing the Plaintiff. Furthermore, it is denied that I paid the Plaintiff $2,500.00. After the accident occurred, the parties agreed that I would carry the vehicle to my painter and straightner to have the vehicle repaired. I purchased the front nose for the vehicle, which comprises of the headlights, indicator lights, front bumper and radiator at a cost of $2,500.00. ...
>
> I then proceeded to carry the said vehicle and the front nose for repair. I was informed by my straightner/painter, who I know as Lance Boyce and he informed me and I verily believe it to be true that the cost to repair the said vehicle would be $3,500.00. I communicated this to the Plaintiff and she agreed to have the said Lance Boyce repair the said vehicle".

3.21 In summary, the applicant/defendant alleges that the respondent/plaintiff agreed to pay half the cost of repairing the vehicle and now, the respondent/plaintiff is reneging on this aspect of the agreement by stating that the applicant/defendant told her he would pay for the full cost of repairing the vehicle. Further the respondent/plaintiff has not specifically proved the cost of repairing the car so the applicant/defendant contests not just liability but quantum as well.

3.22 The issues to be determined are therefore:

i. Whether there was an agreement that the applicant/defendant would pay the full cost of repairs or whether the agreement really was that the respondent/plaintiff would pay 50% of the cost of repairing the vehicle.

ii. Whether the applicant/defendant told the respondent/plaintiff he would pay the entire cost of repairing the vehicle and acting upon this representation the respondent/plaintiff sought to repair the vehicle expecting to be fully reimbursed by the applicant/defendant.

iii Whether the true cost of repairing the car is as advanced by the respondent/plaintiff or as is contended by the applicant/defendant.

3.23 Put simply, the issue really is whether the applicant/defendant is liable to the respondent/plaintiff for the full cost of repairing her vehicle or just 50% of the costs incurred therein. Additionally whether quantum is specifically proved. These are questions of fact which ought properly to be determined at trial.

3.24 In light of the foregoing, I am of the view that the affidavit of Mr. Ashmael Moore discloses a defence upon the merits.

(b) Whether the affidavit explains the reason for the neglect in filing an affidavit or notice to obtain leave to defend within the prescribed time.

4.1 The Default Summons was filed on the 18th January 2012. This document was served on the applicant/defendant on the 29th January 2012. The applicant/defendant had 10 clear days from the date of service to obtain leave to defend the matter. This meant that the applicant/defendant had until the 8th February 2012 (inclusive) to obtain leave to defend the matter. This was not done and on the 2nd March 2012, an application was made to obtain judgment in the circumstances. This was granted on the 2nd March 2012.

4.2 According to the affidavit dated and filed by Mr. Ashmael Moore on the 1st February 2013, which was filed in support of the application to set aside judgment entered in default on the 2nd March 2012, the applicant/defendant explained the neglect in filing an affidavit or notice to obtain leave to defend the matter within the prescribed time in this way:

> "Sometime on or around the 29th day of January 2012, I received a document from the Plaintiff claiming the sum of $15, 182.00 against me.
>
> However I mistakenly believed that the said document, which did not give a date for the hearing of the matter, was to be followed by another document which would give the date and time for me to attend court and give me the ability to defend the claim against me. Due to the fact that I was unemployed I was unable to attend the office of an attorney to obtain the advice to assist me with the matter.
>
> Sometime in March 2012, I received more documents, which indicated that I needed to attend court on the 15th day of May 2012 at 9:00. I thought that this was the date on which the matter as to start and at no time believed or was of the opinion that judgment had already been obtained.
>
> When I attended court on the 15th day of May 2012, the Learned Magistrate informed me that I had the right to retain an attorney to which I responded I was not in a financial position to do so. The Learned Magistrate then informed me that I could attend the offices of Legal Aid where an Attorney at Law can be assigned to me for the purpose of this matter.

After the said hearing, I immediately went to the Legal Aid and Advisory and made an application for a legal aid counsel.

I continued to attend the hearings on my own and the matter was adjourned... to facilitate the assignment of an Attorney at Law for my matter...

...I attended on the 30th day of November 2012. It was on this date I met my current Attorney at Law. and gave him instructions that the matter was for trial...

At the hearing my Attorney at Law indicated that we were not in a position to proceed with the matter on that date and requested that the matter be adjourned. the Plaintiff was unrepresented at this hearing. During this entire process, I was of the view that the matter before the court was the substantive claim of the Plaintiff and not the judgment summons.

When the matter came up for hearing on the 28th January 2013, my Attorney at Law, while speaking to the Plaintiff's Attorney at Law in my presence, was informed that the matter was in fact for a judgment summons and not for trial of the substantive claim. It was on this date, my Attorney at Law explained the misunderstanding and requested an opportunity to make this application".

4.3 **Section 11 of the Petty Civil Courts Rules** made under **Section 53 of the Petty Civil Courts Act Chap. 4:21** provides that the Petty Civil Court Judge may set aside judgment and an

application made in this behalf must be supported by an affidavit which explains the neglect. Additionally, **Section 32 of the Petty Civil Courts Act Chap. 4:21** provides that:

> "The Judge shall have power, on application made on notice, in his discretion to set aside any judgment pronounced by him and grant a new trial of any action tried by him on any of the grounds on which the High Court may grant a new trial of any action tried in such Court...".

One of the grounds upon which a High Court may grant a new trial of any action tried in such court is, according to **Part 40.3 of the CPR,** once there is a "good reason" for non appearance when default judgment was previously granted. If **section 11 and section 32 of the Petty Civil Courts Act Chap. 4:21** are read in this light, it would seem that the Petty Civil Court Judge should be satisfied that the explanation for the neglect in filing the affidavit or notice to obtain leave to defend within the time limited for so doing is a "good reason". It follows -and logically so, that not just any explanation would suffice to move the Court to set aside judgment as per **section 11 of the Petty Civil Courts Act Chap. 4:21.**

4.4 From the contents of the affidavit of the applicant/defendant, it is evident that the application to set aside judgment is predicated upon the mistake made by the applicant/defendant as to the date of hearing of this matter and the issue which arises for determination is simply, whether this is a "good reason" to move the Court to set aside judgment.

4.5 The case of **Brazil v. Brazil [2003] E.W.C.A. Civ. 1135** is instructive in this regard. This was a case in which the defendant failed to attend the trial of proceedings in which he was the only effective defendant. The case was decided against him in his absence, and resulted in

the loss by him of his home. The defendant was illiterate and unaware that the trial was taking place. The court set aside this judgment on the basis that there was "good reason" for the defendant's absence at the hearing. These reasons were that the defendant was acting in person, he was illiterate and did not receive any order notifying him of the trial date. In arriving at this conclusion Lord Justice Mummery, in a judgment with which Lord Justice Hale agreed, set out at paragraph 12, what should be the court's approach to deciding whether the existence of a good reason for not attending the trial had been made out:

> "I agree with Hart J that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a 'good reason'. The court has to examine all the evidence relevant to the defendant's non-attendance, ascertain from the evidence what, as a matter of fact, was the true 'reason' for non-attendance, and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly". (emphasis mine).

4.6 The importance of looking at all the circumstances of the case was emphasized in the matter of **Ayela & Kalley v. The Mayor and Burgesses of the London Borough of Newham [2010] E.W.H.C. 309 (QB)** at paragraph 34 where Mr. Justice Sweeney made the point that:

> "when considering whether a party had a good reason for not attending a trial, the court has to consider the case in the light of all the relevant factors for non-

attendance and then, looking at the matter in the round, to determine whether the reason is sufficient for the court to exercise its discretion in favour of the defaulting party".

4.7 What then are the relevant factors in the case at hand? The applicant/defendant stated that he received a document which did not have the date of hearing on it so he assumed that the document would be followed by one with a date of hearing on it. When the Court has regard to the contents of the default summons however, there can be no dispute that the wording of the document is in plain, unambiguous English. It is set out below:

FORM 2

(Default Summons).

In the Petty Civil Court of..... No. .....

Between

Plaintiff,

And

Defendant.

Take notice that unless within ten clear days after personal service of this summons on you, you obtain leave to defend in accordance with rule 10, you will not afterwards be allowed to make any defence to the claim which the plaintiff makes on you, as per margin, the particulars of which are hereunto annexed; but the plaintiff may, without giving further proof in support of such claim than the affidavit filed in ..... Court

$ ¢.

Claim … … … … …

Court Fees … … … …

Instructing Attorney's-at-law Fees …

Total … … $

herein, proceed to judgment and execution.

Dated this ..... day of ..... , 20.....

.....

Clerk of the Court.

Plaintiff or Plaintiff 's Instructing Attorney-at-law

To the Defendant,

(N.B.—This Summons must be personally served on the defendant within a period of six months from the date of issue).

If you pay the debt and costs, as per margin on the other side, into the Chief Clerk's Office, you will avoid further costs.

If you do not obtain leave to defend, but allow judgment against you by default, the order upon such judgment will be to pay the debt and costs forthwith.

Summonses to witnesses and for the production of documents by them will be issued upon application at the Clerk's Office, upon payment of the proper fee.

Bring this Summons with you when you come to the Court or to the Clerk's Office for any purpose connected with this action.

ENDORSEMENT AFTER SERVICE

This summons was served by ..... personally on .....at ..... on the ..... day of ..... , 20..... , at ..... o'clock of the .....noon.

.....

Bailiff/Plaintiff/ Plaintiff's Agent.

4.8 Quite simply, it states in unambiguous and clear wording that unless within ten clear days after personal service of the summons on the defendant leave is not obtained to defend the matter, afterwards the defendant may not be allowed to make a defence to the claim. There was no evidence in the affidavit of the applicant/defendant that he was illiterate as was the case with the defendant in *Brazil v. Brazil (supra)* and in the Court's humble view this puts the matter at hand on an entirely different footing from the facts of *Brazil v. Brazil (supra).* Incidentally a similar approach of scrutinizing the wording of the originating document to imply good and proper notification was adopted by His Lordship Mr. Justice Des Vignes in the matter of **Edwin Marcelle, Edwin Marcelle and Neva Guy-Marcelle v. Yvonne Marcelle CV 2011-02975** where the clear wording of the originating document justified the finding that the defendant was duly notified of the date of hearing.

4.9 Additionally, the disturbing aspect of this case is that the applicant/defendant received the default summons and it clearly states that if a defendant does not obtain leave to defend but allows judgment to be entered against him by default, the order upon such judgment would be to

pay the debt and costs forthwith. In this case, the debt claimed is no paltry sum which could easily be ignored -more so by an unemployed person. Instead it is $15,000.00 TTD and this was a defendant who was not gainfully employed. That said, the Court would have to accept that the unemployed applicant/defendant would have received this document on the 29th January 2012, mistakenly believed (without saying why he would make this assumption in the first place) that it would be followed by another document with a date to attend court, and be content to fail to consult an attorney on the matter for an entire month. To compound what can only be classified as a self induced and misguided position, the Court would also have to accept as perfectly reasonable behavior that when nothing happened in the matter for an entire month, the applicant/defendant never ventured to the Court or to the Clerk's Office to ascertain the position with the matter; or even get the date of hearing he was waiting on -and this is notwithstanding the fact that the default summons specifically states on its face that one can come to the Court or to the Clerk's Office for *any purpose* connected with the action. Further no mention is made in the affidavit of the applicant/defendant that he even made attempts to call the Petty Civil Court Registry of the Port of Spain Magistrates' Court for guidance. For my part I find that this is not impressive.

4.10 According to Mr. Justice Pumfrey in **Zouzou v. Family Welfare Association [2004] E.W.H.C. 557 at paragraph 26,**

> "Where a claimant is seeking to set aside a judgment obtained by the defendant, in my view the court is entitled to require a full and frank explanation for the reasons for non-attendance. There are many circumstances which arise at the interlocutory stages of an action, where a default is attributable to matters which

> lie mainly or wholly in the knowledge of the party in default. Where the court is confronted with such circumstances, it seems to me as a matter of common justice that the court must be satisfied so that the other party can be satisfied, that the judgment which has been regularly obtained, should be set aside on cogent grounds".

On the evidence before me I am of the view that it fails to satisfy the Court that the applicant/defendant had a good reason for the neglect in filing the affidavit or notice to obtain leave to defend within the time limited for so doing.

4.11 In arriving at this conclusion I have given due consideration to the fact that the interests of justice in general dictate that litigation between parties should be decided on the merits of the case and not upon technicalities. Indeed this is the approach that is commended by the cases of **Ramnarine Seenath v. Seenath & Another CA Civ. No. 22 of 1965** and **The American Foreign Insurance Co. (a firm) and the Quaker Oats Co. v. Allan Lumsden and Lumsden & Co. Ltd**. **CA Civil No. 11 of 1967.** Certainly, from a policy standpoint it is crucial to any system of justice that litigants are afforded a fair opportunity to present their cases to the court. At the same time, surely it must be the case that judges should as a matter of case management, act robustly to bring cases to closure within of course, the necessary parameters of fairness. Looked at from this perspective, I am inclined to agree with the findings in the case of **R v. London Quarter Sessions Appeals Committee Ex. p. Rossi [1956] 1 QB 682 CA.** where it was held that no person can be made liable under court order unless he has been given fair notice of the proceedings to enable him to appear and defend them. On the facts of this case I find as a fact that the applicant/defendant was duly served with process and was therefore given fair notice

of the proceedings to enable him to appear and defend them. This is not the type of case where - as was the case in **White v. Weston [1968] 2 Q.B. 647,** a county court summons was served on the defendant's previous address and he did not receive it so when judgment was given against him without his having actual and real knowledge of the proceedings, he was entitled to have the judgment set aside as of right, *ex debito justitiae.*

4.12 I have also given to the applicant/defendant the most generous accommodation that could be extended to litigants in person -which is what the applicant/defendant was at the time he was served with the default summons in this matter. This notwithstanding, I feel constrained to share the sentiments of Lord Justice Gross in the matter of **Williams & Anr v. Hinton & Anr [2011] E.W.C.A. Civ. 1123** where at paragraph 24 his Lordship made the point that "It is one thing to make even generous allowances, as the Court invariably does, for LIPs (Litigants in Person); but there should not be one rule for LIPs and a different rule for those legally represented".

5. THE CONCLUSION

5.1 Having duly considered the all of the material and submissions advanced to this Court in this application, I am, with respect, wholly unable to find that there is anything disclosed which allows me to conclude that Mr. Ashmael Moore had a good reason for his neglect in filing an affidavit or notice to obtain leave to defend within the prescribed time. Since the conditions set out in **section 11 of the Petty Civil Courts Act Chap. 4:21** are conjunctive and not disjunctive in that it is a duo of hurdles the applicant/defendant is required to overcome, his failure to demonstrate "good reason" for his neglect to file an affidavit or notice to obtain leave to defend

within the prescribed time -notwithstanding the fact that I have previously found that a defence is disclosed upon the merits, leaves the Court with little choice but to conclude with hesitation that the applicant/defendant is not entitled to invoke the discretion of the Court to set aside the judgment which was entered against him.

5.2 For these reasons I refuse the application to set aside default judgment.

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Her Worship Magistrate Nalini Singh

Petty Civil Court Judge