

SETHUEL KELLY -V- OCEAN CATERING LIMITED

High Court of Solomon Islands
(Palmer C.J.)

Civil Case Number 138 of 2001

Hearing: 6th May 2004
Judgment: 13th August 2004

A.N. Tongarutu (Mrs) for the Plaintiff
A. Radclyffe for the Defendant

Palmer C.J.: This is the application of the Defendant by Summons filed 5th March 2004 for orders inter alia for the Judgment entered against the Defendant on 24th April 2003 be set aside and for the writ of possession dated 30th January 2004 to be revoked or suspended until further orders.

The Defendant relies on a number of grounds for this application. First she says there are serious issues to be argued. In her draft defence she argues that from January 2001, the Plaintiff agreed to waive payment of rent due to the ethnic troubles. She also says that from about October 2001, the Plaintiff collected rent from one of the rooms in the building, room number 2. Further, from about 2003 to the present, the Plaintiff had wrongfully collected rent from the tenants of the building. The amount claimed therefore would have been further reduced. She estimates the value of the money outstanding to be around \$170,000.00. The Defendant does not dispute that a landlord/tenant relationship exists between them. She however disputes the amount of the rent arrears outstanding.

She also points out that any claims prior to 31st May 1995 are statute barred and should not have been included.

On the issue of delay she says that she had to leave the country at the height of the tension. She says that when the Plaintiff applied for judgment on 22nd April 2003, she was not told about it until 30th July 2003. She said the last communication before judgment was on 26th March 2003 when she was informed by her lawyer of a proposed consent order. She responded on 3rd April 2003 opposing the terms of the order. After she became aware of the judgment in July 2003 she contacted Andrew Nori of Bridge Lawyers to see if the judgment could be set aside. Nothing further was done until she engaged current Counsel and a Notice of Change filed on 1st March 2004. An application to set aside was filed shortly thereafter on 3rd March 2004.

The Plaintiff obtained Judgment in Default on or about 24th April 2003 for the failure of the Defendant to file defence within the prescribed time limit. Order 29 rule 12 of the High Court (Civil Procedure) Rules, 1964 ("the Rules") gives jurisdiction to this court to set aside any judgment by default upon such terms as to costs or otherwise which the court may think fit. I have considered the affidavit of merits of Shirley Williams filed 5th March 2004 in support of this application. I have considered the draft defence filed and satisfied that a prima facie defence on the merits had been established. The issue turns on the question as to how much arrears in rent is owed. The Defendant has adduced material which if accepted on the evidence will undoubtedly affect the amount of the rent claimed. Also the application of the Limitation Act on the claim in excess of six years will also reduce the amount of the arrears claimed.

The delay complained of in this case had been caused primarily by the difficulties in communications between counsel for the Defendant and the Defendant, exacerbated by the fact that the Defendant resided overseas. The Defendant however has been consistent in her instructions to her lawyer from the beginning as to her denial of the Plaintiff's claims. She does not admit that the whole amount is outstanding.

I accept some delay has been caused in the process. If delay is to be successful however, as a ground for dismissal of this application to set aside, it is pertinent to show that it involves a serious risk that there will not be a fair trial of issues if judgment is to be set aside - see **Barratt Manchester Ltd v. Bolton Metropolitan Borough Council and Another**¹. Delay will also be a relevant factor where it can be stigmatised as an abuse of process and prejudicial to the Plaintiff - **Grovit v. Doctor and Others**².

In her instructions of 3rd April 2003 to her lawyer (A & A Legal Service) the Defendant had advised basically that the matter be defended. This was not done. On 24th April 2003 judgment in default was obtained. She says she was not aware of this until July 2003 when she informed Andrew Nori to see if he could act for her. Only then was she informed of the judgment in default. As early as 14th August 2003 she had maintained intention to have the judgment set aside. This was contained in her instructions to Mr. Nori. However nothing came out of that until she was able to instruct Mr. Radclyffe who then eventually applied to have the judgment set aside by summons filed 3rd March 2004. The blame for the delay cannot be placed solely on her shoulders. From the outset she had made known to her lawyers, first to A & A Legal Service, then to Mr. Nori and eventually with Mr. Radclyffe that she disputed the claims of the Plaintiff. It has taken her time to get instructions off but the delay cannot be said to be inordinate or inexcusable. Had her instructions been complied with, little delay would have occurred. Part of the delay lay with her lawyers who did not get off the ground her instructions. Also part of the delay can be attributed to the fact that there were attempts to try and get a settlement between the parties.

I am not satisfied in the circumstances that delay is inordinate or inexcusable. I am also not satisfied it will cause any prejudice to the Plaintiff if any new trial is convened, neither can it be stigmatised as an abuse of process. Bearing in mind the principle, 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 procedure³, I am satisfied in the circumstances the appeal should be allowed and the judgment in default be set aside.

The costs of the Plaintiff in any event must be borne by the Defendant.

Orders of the Court:

1. Set aside judgment in default dated 24th April 2003.
2. Enlarge time for filing of defence within 7 days.
3. The Plaintiff to have his costs to date in any event.

The Court.

¹ [1998] 1 W.L.R. 1003 at p. 1011

² [1997] 1 W.L.R. 640.

³ *Evans v. Bartlam* [1937] A.C. 473 at p. 480.