COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

1994/CLE/GEN/FP/00093

BETWEEN

NEILS LAUSTEN
Plaintiff

AND

ANTHONY EGBERT HANNA
1st Defendant

AND

ANNA CORINA HANNA
2nd Defendant

BEFORE	The Hon. Mrs. Justice Estelle Gray-Evans
For the plaintiff:	Mr Edward Marshall for plaintiff
For the defendants:	Mr Frederick Smith Q.C. along with Mr R. Dawson Malone and Mr Carey Leonard for defendants
Hearing date:	29 October 2013

RULING

Gray Evans, J.

1. This is an application to set aside a judgment in default of defence and for leave to file and serve a defence and counterclaim.

2. The plaintiff and his wife, Solveig Lausten ("the vendors"), agreed to sell and the defendants agreed to purchase Lot 12 Block 16 Cutwater Lane, Shannon Country Subdivision, Freeport, Grand Bahama ("the said property"), by an agreement in writing dated 30 June 1988. The agreed purchase price was $100,000.00 payable by a deposit of $1,200.00 and the balance with interest at 12% per annum by 179 monthly payments of $1,200.00 commencing 1 July 1988. The defendants were at liberty at any time without notice or penalty to prepay the whole or any part of the outstanding balance. Completion of the transaction was to take place on "payment in full of the said purchase price and interest" at which time the vendors were to deliver to the defendants a conveyance of the said property.

3. The agreement provided further that subject to certain conditions the defendants were permitted to occupy the said property as "tenants at will" of the vendors.

4. By clause 8 of the agreement it was provided that:

> "If the purchasers (defendants) shall fail in any way to complete the purchase as hereinbefore provided through any cause other than the default of the vendors or shall be in breach of any of the purchasers' obligations hereunder the said deposit and all other moneys paid by the purchasers hereunder shall be retained by the vendors as compensation for their expenses relating hereto and for keeping the property off the market and thereafter this Agreement shall have no further effect and the purchasers peaceably shall forthwith vacate the said property."

5. The defendants paid the deposit and were allowed into possession of the said property.

6. The plaintiff commenced this action on 17 August 1994 by a generally indorsed writ of summons in which he sought possession of the said property and damages for breach of contract. In his statement of claim filed on 27 February 1995, the plaintiff alleged, inter alia, that in breach of the said agreement the defendants had defaulted in numerous payments of the agreed monthly installments of $1,200.00 and that despite numerous demands made by or on behalf of the plaintiff to the defendants for payment thereof, the defendants had wrongfully failed and refused to pay the same. The plaintiff alleged further that the defendants were also in breach of other terms in the said agreement, including refusing to deliver up possession of the said property as demanded by the plaintiff. The plaintiff included in the statement of claim a claim for interest, mesne profits, accounting and costs, in addition to his claim for damages and possession in the generally indorsed writ of summons.

7. Although an appearance was entered on their behalf on 15 October 1994, by 5 January 1996 the defendants had not filed a defence and the plaintiff on that date filed a summons seeking an order in the following terms:

> "...that the plaintiff herein be at liberty to enter judgment against the first and second defendants herein for possession of [the said property], costs, including the costs of this application to be taxed..."

8. By an order of the Deputy Registrar made on 7 March 1996, leave was granted to the defendants to file and serve a defence within 21 days of the date of the order, failing which, the plaintiff

was given leave to enter judgment against the defendants in terms of the said summons filed 5 January 1996.

9. No defence having been filed by or on behalf of the defendants within the time limited there for, the plaintiff, on 12 April 1996, entered judgment in the following terms:

> "Mrs Estelle Gray Evans, Deputy Registrar of the Supreme Court...having, by order dated the 7th day of March, A.D. 1996, ordered, inter alia, that the first and second defendants be at liberty to file a defence within twenty-one (21) days of the date hereof, failing which judgment in favour of the plaintiff may be entered against the first and second defendants.
>
> AND no defence having been filed or served by the first and second defendants within the said 21 days.
>
> IT IS THIS DAY ADJUDGED THAT the plaintiff herein, NEILS LAUSTEN, do recover possession of the land...described therein as...Lot Number Twelve (12), Block Number Sixteen (16), Cutwater lane, in Shannon Country Subdivision... as against the first and second defendants that the first and second defendants pay to the plaintiff costs to be taxed if not agreed.
>
> AND IT IS FURTHER ADJUDGED THAT the said first and second defendants do pay the said plaintiff damages to be assessed.

10. Pursuant to that judgment, and upon the ex parte application of the plaintiff, on 21 June 1996 leave was granted to the plaintiff to issue a writ of possession against the defendants. On 30 July 1996 a summons returnable before a judge on 6 August 1996 was filed on behalf of the first defendant for a stay of the order for possession. It appears from the judge's note on the face of that summons that on the return date counsel for the defendants appeared and vacated the date. He was given liberty to restore, but it appears that nothing further was done on that summons.

11. The file lay dormant for more than a year, then, on 21 October 1997, a notice of change of attorney was filed by the defendants' new counsel. Nothing further appears to have been done in the action by that counsel.

12. Thereafter, the file lay dormant for almost seven more years, when, on 5 July 2004, the defendants' present counsel filed a notice of change of attorney and a summons asking, inter alia, that the judgment and order for possession be set aside and that the defendants be given leave to defend.

13. That summons was supported by the affidavit of the first defendant also filed on 5 July 2004 to which was exhibited a draft defence and counterclaim in which the defendants counterclaimed for the following:

> (1) Specific performance of the agreement
>
> (2) A declaration that clause 8 of the agreement is a penalty, unconscionable, harsh, does not represent a true measure of the plaintiff's damages and is therefore unlawful as against public policy and is therefore void and unenforceable;
>
> (3) Relief from forfeiture;
>
> (4) Possession of the property
>
> (5) Damages, interest and costs.

14. Thereafter, the file lay dormant for another six years, until 7 October 2010, when counsel for the defendants filed a notice of intention to proceed. Nothing further was done by or on behalf of the defendants until 25 June 2012 when another such notice was filed.

15. On 28 December 2012, the defendants filed a notice that the hearing of the 5 July 2004 summons would take place on 25 February 2013 at 10:00 a.m. However, counsel for the plaintiff having brought to the attention of counsel for the defendants that the defendants' 5 July 2004 summons had been dismissed for want of prosecution by Maynard J (Actg), during a "call over" in April 2007, and of his intention to object to the defendants proceeding on that summons, the defendants on 25 February 2013, filed a "re-issued summons".

16. The defendants did not proceed with that re-issued summons, but counsel for the defendants applied for and was given leave to file a new summons. By that summons, filed on 27 February 2013, the defendants seek, inter alia, the following reliefs:

> 1. An order that the judgment dated and filed herein on 12th April 1996 in default of a defence ("the judgment in default") and the execution issued thereon by a writ of possession dated and filed here on 21st June 1996 ("the writ of possession") in respect of Lot 12, Block 16, Cutwater Lane, Shannon Country Club Subdivision, Freeport, Grand Bahama, Bahamas ("the property") be set aside on the ground that the judgment in default is irregular...
>
> 2. Further and/or alternatively, an order that the judgment in default and the writ of possession be set aside on the ground that the defendants have a good defence to this action.
>
> 3. An order that the defendants be at liberty to file and serve a defence and counterclaim;

17. The defendants rely on the first defendant's affidavits filed 5 July 2004 and2 May 2011 respectively.

18. The defendants contend that the judgment is irregular for the following reasons:

> (1) The plaintiff's summons filed herein on 5th January 1996 for leave to enter judgment in default of a defence was made pursuant to Order 13 RSC which provides for judgments in default of an appearance to a writ instead of Order 19 which provides for judgments in default of a pleading;
>
> (2) The plaintiff's summons for judgment in default contained a misrepresentation of fact to the Court at paragraph 1 thereof which states that:
>
> > "The plaintiff is the fee simple and beneficial owner of the said property by virtue of an indenture of conveyance dated the 31st day of July, A.D. 1979..."
>
> (3) The judgment in default contained relief for damages to be assessed contrary to the order of the Court made herein on 7th March 1996 by which the Court granted the defendants leave to file a defence within 21 days failing which the plaintiff would be at liberty to enter judgment in the terms of the plaintiff's summons for judgment in default. The plaintiff's summons for judgment in default did not seek any relief for damages.

19. The Deputy Registrar's order granting the plaintiff leave to enter judgment was not drawn up. However, the file notes reflect the following:

> (1) The application was made pursuant to RSC Order 19 rules 5, 6 and 7;

(2) The defendants were represented by counsel at both hearings before the Deputy Registrar on 14 February 1996 and 7 March 1996;

(3) The defendant was granted leave to file a defence within 21 days failing which, the plaintiff was at liberty to enter judgment "in terms of the summons for order for possession filed 5 January 1996."

20. In light of those notes, it seems to me that the defendants' complaint of irregularity on the ground that the plaintiff's application was made pursuant to RSC Order 13 is without merit as it is clear from the notes that the Deputy Registrar heard the application and granted the order pursuant to RSC Order 19 and not RSC Order 13 as stated in the summons. As for the complaint of misrepresentation, both parties having been represented by counsel who participated in the hearings before the Deputy Registrar, and no objection having been taken at the time on such ground, it is not now, in my view, open to the defendant, some 17 years later, to complain of irregularity in the proceedings in that regard.

21. Consequently, I do not concern myself with the process leading up to the entry of judgment, but only with whether or not the judgment in default of defence, having been entered with leave of the Court, should be set aside.

22. In that regard, I accept the submission of counsel for the defendants that, having given leave to enter judgment "in terms of the summons filed 5 January 1996", the plaintiff was only at liberty to enter judgment for possession of the said property. So, notwithstanding counsel for the plaintiff's assertion that no attempt has been made by the plaintiff to have damages assessed pursuant to the said judgment, in my view, the plaintiff having included in the said judgment a relief not sought in the said summons, the same is irregular.

23. It is accepted that the Court has a discretion to set aside or vary a default judgment on any terms that it thinks fit (RSC Order 13 rule 9 and RSC Order 19 rule 9), the principle being 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" (Lord Atkin in *Evans v Bartlam* [1937] 2 All ER 646 at 650, [1937] AC 473 at 480).

24. As a general rule, where a judgment is irregular, the defendant is entitled, ex *debito justitae,* to have it set aside: Analby v Praetorious (1888) 20 Q.B.D. 764.

25. However, an application to set aside a judgment for irregularity must be made "within a reasonable time" (RSC Order 2 rule 2(1)) and where a defendant waits too late, he may lose his "right" to do so and may then have to rely on the discretion of the Court. See Singh v Atombrook Ltd. [1989] 1 W.L.R. 810, where a defendant who applied to set aside a judgment for irregularity three months after becoming aware of its terms, was held to be too late to have the judgment set aside as of right, and was compelled to rely on the discretion of the court. (English Supreme Court Practice 1999, note 13/ 9/8).

26. By no stretch of the imagination can an application to set aside a judgment in default of defence made seventeen years after the judgment was entered be considered as having been made "within a reasonable time". In my judgment, therefore, the defendants have lost their "right" to have the aforesaid judgment set aside ex *debito justitae* and must rely on the court's discretion. In that regard, and in light of the time which has passed since the default judgment was entered and the defendants became aware of it, I refuse to exercise my discretion in favour of the defendants by setting aside the said judgment in default on the ground of irregularity.

27. The defendants seek, in the alternative, an order that the said judgment and writ of possession be set aside on the ground that the defendants have a good defence to the plaintiff's claim.

28. As I said, the court has a discretion whether or not to set aside a default judgment. Lord Atkin, in the well-known case of Evans v Bartlam *supra,* said that the discretion "is in terms unconditional although the courts have laid down for themselves rules to guide them in the normal exercise of their discretion". Those rules were extracted by Sir Roger Ormrod from the speeches in Evans v Bartlam supra in the English Court of Appeal case of Alpine Bulk Transcript v Saudi Eagle ("the Saudi Eagle") [1986] 2 Lloyd's Rep 221 where he states:

> "... bearing in mind that "in matters of discretion no one case can be authority for another" (ibid. p. 488):
>
> (i)....
>
> (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 p. 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 p. 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. p. 489 and per Lord Russell of Killowen at p. 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...to which he could have set up some serious defence."

16 His Lordship continued:

> "In applying these "general indications" it is important in our judgment to be clear what the "primary consideration" really means....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 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."

29. Whether or not injustice would be caused to the defendants if the judgment were not set aside or prejudice to the plaintiff if the judgment were set aside are also considerations for the Court in the exercise of its discretion. See Vann v Awford (1986) The Times, April 23, CA, and Allen v Taylor[1992] 1 PIQR P255.

30. Disclosure of a meritorious defence is, therefore, said to transcend any reasons given by the delinquent defendant for delay in making the application, even if his explanation turns out to be a lie (Vann v Awford). In that case, judge at first instance declined to set aside a judgment given against the defendant in default of appearance. He had lied when explaining, on oath, why judgment was allowed to be entered against him. On appeal, the Court of Appeal held that notwithstanding the lie, and

notwithstanding the prejudice to the plaintiffs, because the defendant had a meritorious defence, the judgment in default would be set aside on terms.

31. It seems to be from the authorities cited that although the primary question for this court in considering whether or not to set aside a default judgment is whether there is a defence on the merits, where, as in this case, there has been delay in making the application to set aside, that question must be weighed against the likely prejudice to the plaintiff if the judgment is set aside; the reasons proffered by the defendants for why they allowed judgment to be entered against them; and the defendants' reasons for the delay in making the application to have such judgment set aside.

32. The defendants say that they have a meritorious defence the gist of which is that clause 8 aforesaid is a penalty and is, therefore, void and unenforceable and that they are entitled to relief from forfeiture by way of counterclaim upon payment of the balance due under the agreement as, they contend, the right to forfeit was merely to secure the payment of money due under the agreement and not to compensate the plaintiff. (See paragraphs 15 and 16 of the draft defence and paragraphs 35-42 of the first defendant's second affidavit).

33. In support of their contention, the defendants rely on the cases of re Dagenham (Thames) Dock Company ex parte Hulse (1873) L.R. 8 Ch. App. 1022 and Shiloh Spinners Ltd v Hardin [1973] AC 691.

34. Mr Smith, Q.C. submits that the provision for forfeiture in the said agreement is clearly to secure the installment payments, and it is "extremely likely" that, in answer to a claim based on clause 8 of the said agreement, the court would decline to enforce it and instead would permit the defendants to make good their default as they have always been prepared to do.

35. Although counsel for the defendants acknowledges that the said agreement provided that the moneys paid "shall be retained by the vendor as compensation for their expenses relating hereto and for keeping the property off the market", he submits, as I understand him, that that provision was an attempt by the draftsman to get around the penal nature of the provision. However, in his submission that statement is false in substance because, he argues, there was no genuine correlation between the vendor's "expenses" and the amount received at the time of forfeiture, and "no effort to make a genuine pre-estimate of the loss suffered".

36. Furthermore, the defendants say that they now have the means to fulfill their side of the bargain (see paragraphs 38 to 40 of Mr Hanna's second affidavit). Counsel for the defendants argues that hand in hand with relief from forfeiture, on the facts of this case, it was also "extremely likely" that the court would grant specific performance of the contract to the defendants as specific performance eis ordinarily available on a contract for an interest in land: AMEC Properties Ltd v Planning Research Systems plc [1992] BCLC 1149 per Mann LJ.

37. Counsel for the defendants submits further that where there has been delay in seeking to set aside a default judgment the court must consider whether the plaintiff will suffer "irreparable mischief" if the court were to accede to the application to set aside. Atwood v Chichester (1878) 3 QBD. In that regard, Mr Smith Q.C. submits, the plaintiff has not adduced evidence of any irreparable mischief he would suffer should the court accede to the defendant's application to set aside the default judgment, in addition to which, he argues, the plaintiff makes no objection to the reasons proffered by the defendants for their delay in making this application.

38. Accordingly, counsel for the defendants submits, this court now has an opportunity to remedy an injustice that has festered for years and put into effect the bargain that the parties always intended, without causing any irreparable prejudice to the plaintiff.

39. Counsel for the plaintiff submits that the defendants' summons should be dismissed on the grounds of inordinate delay of more than sixteen years as well as the likely prejudice to the plaintiff. In support of his submissions, Mr Marshall relies on Abadeen Engineering Ltd v Albury [2011] 1 BHS J.

No. 4 in which the facts are similar to those in the case at the bar and in which Bain, J refused to set aside a judgment after ten years; and Mullock v Price t/a Elms Hotel Restaurant [2009] EWCA Civ. 12222, where the UK Court of Appeal refused to set aside a judgment that had been entered two years before the application to set aside was made. The plaintiff also relies on Singh v Atombrook Ltd [1989] 1 WIR 810 aforesaid.

40. Furthermore, counsel for the plaintiff submits, the defendants do not have a meritorious defence as contrary to the position advanced by counsel for the defendants, clause 8 aforesaid was not a penalty but a true measure of the plaintiff's damages and was, therefore, an enforceable contractual term. Counsel for the plaintiff argues further that:

(1) The agreement was a lease to own agreement which allowed the defendants into occupation prior to the completion of the sales transaction.

(2) Clause 8 of the agreement was expressly included to compensate the plaintiff for keeping the property off the market during the defendants' occupation and for any expenses arising out of or relating to the agreement, in the event the defendants failed to complete the sales transaction.

(3) Under the terms of the agreement, the defendants were obligated to pay the plaintiff the sum of $1,200.00 per month for 179 months [approximately 15 years]. After remaining in occupation for 97 months [approximately 8 years], the defendants failed to complete the sales transaction and the sum of $88,091.90 was purportedly retained under clause 8. This is equivalent to a sum of $908.17 per month.

(4) No injustice has been perpetrated by the plaintiff on the defendants in this case. The defendants were in occupation of the plaintiff's three-bedroom house for 97 months. It was eminently reasonable and fair for the plaintiff to be compensated in respect of the defendant's occupation of the property over a period of 97 months in the amount equivalent to $908.17 per month, which is a patently fair and reasonable estimate of the plaintiff's loss by reason of allowing the defendants to occupy the property for 97 months.

41. According to Mr Marshall, the real injustice in this case has been perpetrated by the defendants against the plaintiff. In that regard, he points out that under the agreement the defendants were also obligated to maintain the property in good repair and condition during their occupation, but failed to do so, resulting, he says, in the plaintiff having to expend a sum in excess of $77,000.00 to repair the property and the structure built thereon. Further, that the amount of loss suffered by the plaintiff as a result of the defendants' occupation and failure to fulfill their obligations under the agreement was some $105,308.10.

42. In counsel for the plaintiff's submission, given the actual loss suffered by the plaintiff versus the sum retained under clause 8 aforesaid it cannot be reasonably asserted by the defendants that clause 8 was a penalty clause, which was designed to secure the payment of money and not designed to compensate the plaintiff for the defendant's breach.

43. Consequently, Mr Marshall submits, as a result of time and money expended during the defendant's delay, if the judgment is set aside, the plaintiff would suffer a serious prejudice which, he says, is unquantifiable particularly given the fact that the property has once again become the plaintiff's home.

44. Having heard the parties and considered the submissions and authorities, and while I am not unsympathetic to the defendants' plight, and notwithstanding the draft defence and counterclaim which the defendants say show that they have a meritorious defence, I am not persuaded that this is a case in

which I should exercise my discretion and set aside the judgment in default. I note counsel for the defendants' argument that the plaintiff has not put forward any evidence of irreparable mischief. However, notwithstanding counsel for the defendants' admonition that the court's judgment not be clouded by the passage of time, to my mind, the lengthy delay in dealing with this matter cannot be ignored and is in, in my view, itself prima facie evidence of prejudice.

45. In saying that I make the following observations:

(1) The plaintiff filed his statement of claim on 27 February 1995. Thereafter the defendants ought to have filed their defence within fourteen days, that is, on or before 13 March 1995.

(2) No defence having been filed, the plaintiff filed its summons for leave to enter judgment on 5 January 1996. Notice thereof was served on the defendants. That summons was heard over two days (14 February 1996 and 7 March 1996). On both occasions, the defendants were represented by counsel and given leave to file a defence within 21 days of 7 March 1996.

(3) Still no defence was filed and judgment was entered on 12 April 1996 and a writ of possession issued shortly thereafter on 21 June 1996.

(4) The judgment, having been filed with leave, is not simply a default judgment entered because the defendants failed to meet a procedural requirement. Instead, it is a default judgment which was entered after the defendants failed to meet a procedural requirement as well as failed to file and serve a defence after being given leave to do so, which means, in effect, that this is a second application by the defendants for leave to defend.

(5) Although a summons was filed on 30 July 1996 on behalf of the first defendant for a stay of execution of the writ of possession, on the date scheduled for the hearing of that summons, 6 August 1996, counsel for the defendants appeared and vacated the fixture.

(6) Notwithstanding the defendants' delinquency during the period 1996 to 2004 when the defendants say they were having difficulties with their legal representatives, in 2004 the defendants engaged their current counsel, yet the matter continued to lay dormant. In his second affidavit, the first defendant accounts for this by saying that he was not able to pay his current attorney's legal fees. That was 2011. No reasons have been proffered for the delay since then, although in that same affidavit the first defendant avers that he was then in a position to pay his legal fees and instruct his attorneys to proceed with his application.

(7) If the judgment is set aside the defendants say they want the agreement to be specifically performed and that they have the means to fulfill their side of the bargain. In that regard, the first defendant says they have calculated the sum due to the plaintiff under the agreement as $12,000.00 which they have paid into their attorney's client account for payment to the plaintiff.

(8) The defendants admit that there were some late payments over the years, although they say that they were "very minor". In their draft defence exhibited to the first defendant's 5 July 2004 affidavit, the defendants allege that by 15 March

1996 they had paid $88,091.80 on account of the $100,000.00 leaving a balance of $11,908.20 at that date and that they paid a further sum of $500.00 on 14 May 1996, leaving a balance then due on the purchase price of $11,408.20.

(9) As evidence of such payments the defendants rely, in part, on what appears to be a list of payments for the period 1 July 1988 to 29 January 1996 exhibited to a letter dated 15 March 1996 from Company Management (Freeport) Ltd to Wallace R. Allen, Esq., the defendants' former attorneys.

(10) Using the defendants' figures, it seems to me that:

i. 179 payments of $1,200.00 each (principal and interest) would yield $214,800.00(principal and interest) under the agreement.

ii. By March 1996, the defendants ought to have made approximately 95 payments of $1,200.00 each or approximately $114,000.00, on account of which the defendants admit to having paid $88,591.80, so that the arrears of payments due at that time would, by my calculation, have been approximately $25,408.20.

iii. With approximately 84 more payments of principal and interest in the sum of $1,200.00 per month still due under the contract, it seems to me that the balance necessary to complete the contract would be more than $12,000.00, even making allowance for interest adjustments for payments less than the $1,200.00 provided for in the agreement, of which there appears to have been several.

(11) Finally, not only did the defendants fail to comply with the Rules of the Supreme Court and the Order for the filing a defence, but they were also inordinately delinquent in pursuing their application to have the judgment set aside.

(12) I note that in none of the cases relied on by the defendants was the delay between the entry of judgment in default and the application to set aside more than a few months.

(13) In Atwood v Chichester *supra*, judgment in default of appearance had been entered on 19 October 1876. It is unclear when the summons to have the judgment set aside was taken out, but that summons was dismissed on 30 July 1977, less than a year after the judgment had been entered; and in Vann v Awford *supra*, judgment was entered on 3 July 1985 and it was not until after the assessment of damages had been completed in November 1985 that the defendant sought to have the judgment set aside, less than six months after the judgment had been entered.

46. In the circumstances, it would not, in my judgment, be a proper exercise of my discretion to set aside the judgment in default of defence which has been allowed to stand for upwards of seventeen years.

47. The defendants' summons to set aside the judgment in default of defence filed herein on12 April 1996 is, therefore, dismissed with costs to the plaintiff, to be taxed if not agreed.

Delivered this18th day of December A.D. 2013

Estelle Gray-Evans
Justice