IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1994/A-083

BETWEEN	HARRY ABRIKIAN	1st PLAINTIFF
AND	KOLLEEN RUSSELL	2nd PLAINTIFF
AND	ATHOL SMITH	3rd PLAINTIFF
AND	ARTHUR WRIGHT	1st DEFENDANT
AND	VERA WRIGHT	2nd DEFENDANT

Messrs. Charles Piper and Emile Leiba instructed by Piper and Samuda for the 1st Defendant.

Mrs. J. Samuels-Brown and Miss. Tahlia Maragh for the Plaintiffs.

Heard: 29th May, 26th June and 29th July, 2003

Mangatal, J. (Ag.).

1. This application by the 1st Defendant is an application to set aside an interlocutory judgment entered herein on the 12th June 2001 on the ground that it was irregularly entered. Alternatively, the application is to set aside the judgment if regularly entered, and if it is thought that the Judicature (Civil Procedure Code) Act (C.P.C) applies, on the ground that the First Defendant has an arguable Defence.

Alternatively, if it is found that it is the Civil Procedure Rules 2002 (C.P.R.) that apply, I am urged to set aside the judgment on the basis that the matters set out in C.P.R. 13.2, the most crucial of which is that the Defendant has a real prospect of successfully defending the action, have been satisfied.

2. Mr. Piper for the 1st Defendant has argued firstly that the Judgment was irregularly entered. His submission in essence is that the application for judgment could only have been made pursuant to S. 247 of the C.P.C. That section provides:-

> "If the plaintiff's claim is, as against any defendant, for unliquidated damages only, (Mr. Piper's emphasis) and that defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, and proceed with the action against the other defendants if any."

3. Mr. Piper went on to submit that the Statement of Claim in its amended form "Further Amended Statement of Claim" filed 27th May 1997 claims specific performance or, as an alternative, damages for breach of contract and other relief. It is therefore not a case in which the Plaintiff's case is for damages only , as is provided by S. 247 of the C.P.C. He asks that I contrast S. 442 of the C.P.C which provides that judgment may be obtained by

motion for judgment where no other provision is made for the entry judgment. Reliance is placed on the case of Arthur Badalor v. Mr. And Mrs. Neville Bryan (1989) 26 JLR 372 as authority for the proposition that where the judgment is irregularly entered the Court ought properly to set aside the judgment without more, with costs of the Application being awarded to the Applicant.

4. Mr. Piper has also submitted that it is the C.P.C which applies to this application and not the C.P.R. 2002.

5. Mrs. Samuels Brown on behalf of the Plaintiffs argued firstly, that it is the C.P.R 2002 which applies to this application and not the C.P.C.

6. Mrs. Samuels Brown also argued that the judgment was regularly entered and she advanced several bases for this submission. What I understood to be the gravamen of Mrs. Samuels-Brown's submission is that the Plaintiff is not imprisoned by the pleadings as originally filed and, that although the Plaintiff may have originally sued for specific performance or damages, the Plaintiff has a right to elect to seek unliquidated damages only against the Defendant.

7. Heavy reliance was placed on the case of Morley London Development Limited v Rightside Properties Limited (1973) 117 S J 876. In that case the Plaintiff claimed, inter alia, specific

performance of a contract for the sale of certain property, damages and necessary accounts and inquiries. Appearance was entered for the Defendants, but no defence was filed. The Plaintiffs issued a Summons under R.S.C Ord 86, r.1, seeking judgment for damages to be assessed and for an inquiry as to damages and for an account of all sums received by the defendant. The accompanying draft minutes of order similarly asked for an account and inquiry, and a supporting affidavit sworn by a legal executive concluded:

> "As my clients cannot now get Title from the defendants they now elect to take their remedy against the defendants in damages."

Before the master, the Defendants sought an adjournment of the Summons to a judge. Since that would involve some delay, the Plaintiffs decided to withdraw the Summons and having indicated clearly to the Defendants that they were going to do so, entered judgment in default of defence the same day pursuant to Order 19, r. 3. The judgment read:

> "No defence having been served ... and the plaintiffs abandoning their claim to the other relief sought on the Statement of Claim, it is ... adjudged that the defendant do pay the plaintiff damages to be assessed."

The Defendants took out a Summons to set aside the judgment on the basis that it had been irregularly obtained, alternatively that it ought as a matter of discretion to be set aside. The Defendants contended that order 19,

r. 3, (the equivalent of S.247. of the C.P.C.) applied only if the plaintiff's Claim was solely for unliquidated damages, however, they argued, that on the date of entry of the judgment none of the Plaintiff's claims had been effectively withdrawn as required by Order 21, r. 2 (1) (the equivalent of S. 240 of the C.P.C.) and that accordingly the case fell within 0.19, r. 7. In the alternative they argued that if the claim for specific performance had been effectively withdrawn the claim for equitable relief for an account had still subsisted.

In the Court of Appeal Lord Edmund Davies is reported as saying "that, apart from the special provisions of Lord Cairns' Act [Chancery Amendment Act 1858], specific performance was always an alternative to a claim for damages, and an election to seek damages only must be understood to involve and constitute a withdrawal of the prayer for specific performance 'Claims' in order 21, r. 2 (1), was used to indicate a course of action, enabling a plaintiff who had asserted several causes of action to withdraw part of his claim without leave on notice. It had no reference to the type of relief sought and no bearing on the abandonment by the plaintiff of any form of relief which he originally sought. A plaintiff was free to elect what relief he wanted to pursue, the only requirement being that at the time when the

matter came to court he should make clear what remedy he was seeking. He was under no duty to give prior notice of his election.

The Plaintiffs having made clear to the Court and to the defendants their election to abandon their claim to specific performance and to seek unliquidated damages, no more had been required of them. The judge had been right in holding that the prayer for an account had been ancillary only to that for specific performance and had been abandoned with it. As to discretion, he had reached the right result."

8. In the case of Moncure v. Delisser Supreme Court Civil App. No. 31 of 1997, the Court was concerned with a default judgment entered in relation to an application for recovery of possession. In allowing the Appeal in that case, our Court of Appeal accepted Counsel for the Appellant's argument that the final judgment in default was irregular because there had been no determination as required by S.25 of the Rent Restriction Act that it was reasonable to give judgment for recovery of possession.

9. At p.5 of the judgment, President of the Court of Appeal Justice Rattray concluded that when the Registrar is entering a default judgment, this is not the carrying out of an adjudicatory function; it is a purely administrative act. At page 6, Justice Rattray stated:

> "The need for the adjudication before the making of the order for possession is manifest, and the legislative purpose is likewise transparent – the protection of the tenant in these circumstances."

10. It is trite law that specific performance is an equitable remedy of a discretionary nature and there are said to be a number of "bars" to the grant of relief of this nature. Hence, before a judgment for specific performance can be obtained, the Court has to exercise adjudicatory functions in determining whether and how to exercise its discretion. On the authority of Moncure v Delisser therefore, it seems clear that had the default judgment herein been for the remedy of specific performance it would undoubtedly have been irregularly entered.

11. However, in the instant case the default judgment is for solely damages. The exact wording of the judgment is as follows:-

> "The first Defendant having entered an Appearance but not filing a Defence herein, IT IS THIS DAY ADJUDGED that the Plaintiffs do recover from the first Defendant damages to be assessed with interest thereon and costs to be taxed if not agreed."

This is the Judgment that was entered by the Registrar, which, as stated in Moncure v. Delisser, was strictly an administrative act.

12. The question is therefore whether the Plaintiffs were entitled to proceed as they did under S. 247 of the C.P.C. In other words, did the

state of affairs that existed prior to the entry of this Judgment, constitute a situation where the claim against the 1st Defendant "was for unliquidated damages only ." (my emphasis.).

13. Upon a careful reading of the Further Amended Statement of Claim, I am not convinced that in fact the claim for specific performance is against the 1st Defendant, as opposed to the Second Defendant. The Second Defendant is the sole registered proprietor of the land the subject of the dispute and the 1st Defendant was, on the face of the Agreement for Sale, Ex "AW 1" of the Affidavit of Arthur Wright sworn to on the 1st of April 2003, a purchaser in common, or along with, the Claimants herein. Whilst there may on the facts arguably be collateral agreements between the Claimants and the 1st Defendant, it seems to me that when the further Amended Statement of Claim is closely analyzed, the claims against the 1st Defendant are for damages under several heads including misrepresentation and the tort of deceit.

14. It would be cumbersome to set out all the paragraphs of the Statement of Claim. However, I found paragraphs 1 – 9 and paragraph 18 particularly instructive.

15. In my view, paragraphs 3, 4, 8 and 9 show that "the said Agreement" which the Claimants are seeking to enforce is the signed Agreement

for Sale. That Agreement is between the Second Defendant, on the one hand, and the 1st Defendant and the Claimants on the other. Whilst the 1st Defendant may have been the 2nd Defendant's agent for certain purposes, those purposes were collateral to the 2nd Defendant's performance of the Sale Agreement.

16. I am therefore, on this basis, though I appreciate that this was not how the case was argued (it was argued as a case where the election was made not to pursue the remedy of specific performance, but to pursue only the remedy of damages against the 1st Defendant), of the view that this is a case in which the claim by the Plaintiff against the 1st Defendant was for damages only and on this view I find that the judgment was regularly entered.

17. However, even if the view which I have expressed is faulty, I find that the case of Morley London Development Limited v. Rightside Properties Limited, supports the position that was argued for by Mrs. Samuels-Brown, and that is that by filing for default judgment for damages only, the Plaintiffs had elected to seek only unliquidated damages against the 1st Defendant. Whilst Mr. Piper in reply correctly pointed out that in the Morley case, the Plaintiff had come before the Court and indicated the election and the reason for the election, I think

that Lord Edmund Davies initial words ie. that an election to seek damages only must be understood to involve and constitute (my emphasis) a withdrawal of the prayer for specific performance, were unnecessarily watered down by an analysis of the occurrences which took place in Court before the Master in that case. The position would be different if damages were being claimed, (as they can be), in addition to the remedy of specific performance, as opposed to in the alternative. If two remedies are set out in the alternative, and at a particular point in time a choice is made to embark on one only, I cannot see how it can be open to the Claimant to subsequently pursue the alternative which was not initially pursued. It is at that point extinguished, unless restored.

18. I am of the view that a determination as to whether the judgment was regularly or irregularly entered must turn on the content of the old rules. However, to my mind, that is not an end of the matter. Although I must cast my mind back to the old rules (C.P.C) in order to determine this matter, it would be wrong for me to take a blinkered approach and ignore the contents of the new C.P.R 2002. This matter not having been determined last term, albeit it was fixed for hearing

last term, it is being adjudicated on at a time when the C.P.R. 2002 rules are being applied to matters in our Courts.

In that regard I am mindful of the overriding objective of dealing with a case justly. Rule 26. 9 (3) is in these terms:

> "Where there has been an error of procedure or failure to comply with a rule, practice direction, Court order or direction, the Court may make an order to put matters right."

19. In the English Court of Appeal decision Mcphilemy v Times Newspapers Limited [1999] 3 ALL E.R 775, it was explained that in an appeal to the Court of Appeal from an interlocutory decision made before the provisions of the English C.P.R came into effect, (1) if the decision would not have been regarded as wrong before that date the Court will not interfere, (2) if it would have been regarded as wrong the Court will take into account the provisions of the C.P.R (in particular, the provisions of part 1) when deciding what order should be made for the future. The requirement that the court must seek to give effect to the overriding objective (Rule 1.1) when it exercises any power given to it by the CPR or it interprets any rule applies to the exercise of powers under the transitional provisions – Hamilton v. Field, The Times, April 26, 2000.

20. What problem does the interlocutory judgment for assessment of damages pose for the 1st Defendant? Had the judgment been for specific performance, that clearly would have been wrong and I would have no hesitation in setting aside the matter. However, this is a judgment for damages to be assessed. Save for the fact that I still have to adjudicate on the application to set aside the judgment in the alternative on the basis that it is regular, a simple order by the Court, or declaration and undertaking by the Claimants confirming the election would suffice to ensure that the Claimants could not pursue the remedy of specific performance, against the 1st Defendant.

21. So for the reasons set out above, I am of the view that the judgment was regularly entered.

22. Mrs. Samuels-Brown had argued in her written submissions (paragraphs 29 – 38 inclusive) that the interlocutory judgment is only a procedural step before moving on to an adjudication of the matter, and that the judgment not being final, there is no offence to S. 442 of the C.P.C which speaks to judgment by way of motion.

23. It is clear that the judgment is not final. However, it is a judgment on liability and as to the remedy to which the Plaintiffs are entitled and the really crucial question would therefore have to be what the nature

of the Plaintiff's claim and the relief sought are. I was unable to accede to this aspect of the argument.

24. I now turn to a consideration of the argument with regard to a consideration of the application on the basis of an application to set aside a regularly obtained judgment. Mr. Piper has submitted that it is C.P.C. that applies. He referred to the Judicature (Rules of Court Act, The Civil Procedure (Amendment No. 1) Rules, 2003, Rule 4, which amended Rule 2.2 of the C.P.R. 2002 by adding as paragraph (4) the following:-

> "Notwithstanding anything in part 73 these Rules apply to all old proceedings save for applications which have already been filed and fixed for hearing during the Hilary Term 2003."

This rule came into effect on February 17. 2003.

25. My reading of Part 73 of the C.P.R. 2002, Rule 2.2, and the February 17, 2003 amendment, which latter, it is to be noted, came into effect during the Hilary Term and not after, is that even if an application was listed for hearing in the Hilary Term, once it was adjourned, or not heard during that term (there was some dispute between the parties as to whether or not there was or was not an application for an adjournment which I need not go into), the new rules should apply when one is adjudicating. It is obvious that what

the rules were trying to achieve was a transition period whereby litigants and their Attorneys could have their matters adjudicated under the system they already knew, rather than under the rules which everyone was still coming to terms with. To take the words "fixed for hearing during the Hilary Term" to exempt from the new rules matters which were fixed for hearing but not heard during that term seems out of keeping with the spirit of the new Rules. Fixture and actual hearing on the date fixed seen taken for granted under the new Rules. I see no logical basis for a distinction in the treatment of matters filed before the new rules came into being which were fixed for dates after the Hilary Term, and matters filed before the new rules came into being which were fixed for hearing in the Hilary Term but which were not heard in that term and were adjourned, or now fixed, for hearing in the present term.

26. The obvious exception is where an application is being made now in respect of an irregularity which occurred when the old rules were operating. However, even there, as I have said, it seems to me that in the bundle of powers which the Court has to deal with a matter, the powers under the new rules must be included. Some of the new rules lay down procedures, and some of the new rules give the Court

powers. Therefore, even after an adjudication as to the procedural correctness of something (under the old rules C.P.C), the Court still has certain powers as to how to manage the litigation (under the new rules C.P.R. 2002). The Court has power to "put matters right." There is nothing in Rule 26.9 which limits the procedural error to those made in respect of the new Rules. It would also in my view be a very grave and unwarranted curtailment of the Court's contemplated management powers under the C.P.R. 2002, to have a judge not only adjudicate on matters where the procedure of the old rules applied, but to also limit himself or herself to the powers then existing under the old rules.

27. I am of the view that Rule 13.3 of the C.P.R 2002 applies. Though the application as set out in the Summons filed states the alternative to be on the ground that the 1st Defendant has an arguable Defence, Mr. Piper has argued the case on both the old and the new bases.

28. Rule 13.3(1) of the C.P.R is as follows:-

(1) Where Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant -

(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

29. In the course of his submissions as to the nature of the 1st Defendant's Defence, Mr. Piper submitted that paragraphs 7 – 13 of the Affidavit of Thalia Maragh sworn to on the 7th April 2003 are inadmissible. He submitted firstly, that these paragraph essentially deal with attempts to resolve the matter, which are treated as without prejudice, and are treated as inadmissible in evidence for any reason whatsoever. He relied on a case the name of which I am relieved to be able to reduce to writing, rather than attempting to pronounce it orally, the case of Chocoladefabriken Lindt and Sprungli/ag and another v. The Nestle Company Limited [1978] R.P.C. 287.

30. The head note states:-

> "In proceedings for interlocutory relief in respect of alleged passing off and infringement of a registered trade mark, a preliminary question arose as to the admissibility of certain evidence. This evidence comprised a telephone conversation and two telexes between the parties which took place in Switzerland prior to the issue of the writ. The disputed telephone conversation and the telexes related to a complaint by the plaintiffs relating to the matters in issue and to a proposed settlement of

> the dispute between the parties, though in none of them were the words "without prejudice" or their equivalent used."
> ....
> Held, that (i) both the telephone conversation and the telexes were covered by the protection of being "without prejudice".
> (ii) that it was doubtful whether the court had any general discretion to admit evidence which would otherwise be excluded as being "without prejudice."

31. Mr. Piper went on to submit that even if I were to disagree with him on the question of inadmissibility, any alleged negotiations which could have any effect on the 1st Defendant would have to be properly pleaded and made an issue between the parties, particularly if the discussions culminated in binding agreement.

32. Mrs. Samuels-Brown in response argued that the without prejudice discussions may be disclosed for specific purposes, eg. showing that a settlement was arrived at and she says that that was the case here. She referred to paragraph 12 of Miss. Maragh's Affidavit.

33. Alternatively, she argued that the Defendant's conduct is under scrutiny. He has raised the issue of his conduct; she says, and further, the 1st Defendant has made allegations against his former Attorneys-at-Law's and their conduct of the matter so that it would not be

consistent or just to allow him to refer to their handling of his matter for one purpose, or to certain aspects, but not for others.

Mrs. Samuels-Brown referred to the case of Muller and Another v. Linsley and Mortimer (a Firm) December 8, 1994. In that case, in a Judgment lead by Lord Justice Hoffman in the English Court of Appeal (as he then was), it was held that "without prejudice" correspondence before settlement of an action for damages brought by the plaintiffs against a former employer of one of them was not privileged in the plaintiff's subsequent action for negligence against solicitors who had advised one of the plaintiffs before his employer had dismissed him. The Times Law Report records Lord Hoffman as saying the following:-

> "The correspondence in the present case fell outside the scope of the rule (without prejudice rule). The statement of claim raised the issue whether the plaintiffs conduct in settling the claim against the company was reasonable mitigation of damages..
>
> The conduct consisted in the prosecution and settlement of the earlier action. The without prejudice correspondence formed part of that conduct and its relevance lay in the light it might throw on whether the plaintiffs acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it might contain."

34. I am of the view that the contents of paragraphs 12, and 13 are inadmissible. I do not think, that the contents of paragraphs 7 – 11 inclusive are inadmissible, since essentially they simply deal with the fact that settlement discussions and negotiations were taking place. However, it is my view that the contents and nature of those discussions are inadmissible. I am of the view that these paragraphs do not support a case that there was a concluded agreement, and in any event, I agree with Mr. Piper that these matters would have to be pleaded. Indeed, if a settlement had reached its conclusion the proper course would perhaps be to sue on the Agreement reached, since the original cause (s) of action would now be submerged in the Agreement. The case of Muller is distinguishable because in that case the without prejudice correspondence was admissible to throw light on whether the plaintiffs acted reasonably in concluding the ultimate settlement, as opposed to establishing the truth of any express or implied admission it might contain. Here the reliance is on the discussions themselves for the truth of their contents. Also, I do not accept that the Defence has put his conduct in issue in the manner discussed in the Muller case by making certain allegations with regard to his former Attorneys only as a basis for explaining his failure to file

a Defence to the Claimant's claim as opposed to making such allegations in a Suit against his Attorneys.

35. In dealing with this application I shall therefore, exclude the contents of paragraphs 12 and 13 of the Affidavit of Thalia Maragh.

36. I return therefore, to the requirements of Rule 13.2.

37. I first turn to a consideration of the question whether the 1st Defendant has demonstrated a real prospect of successfully defending the claim. Mr. Piper referred to and relied on the English decisions Swain v Hillman [2001] 1 ALL . R 91, and E. D. and F. Man Liquid Products Limited v. Patel and Anor, Times Law Reports 18 April 2003.

38. Swain v. Hillman is authority for the proposition that the word "real" in the phrase "real prospect of successfully defending the claim," connotes a realistic, as opposed to a fanciful prospect of success. In that case it was also emphasized that the Court's powers are not meant to be utilized to dispense with the need for a trial where there are issues which should be investigated at trial and that the proper disposal of the issue of the prospect of success, should not involve the judge in conducting a mini-trial.

39. In E.D and F. Man Liquid Products v. Patel, Lord Justice Potter, referred to the case of Swain v. Hillman, and indicated that he regarded the distinction referred to in the latter, between a realistic and a fanciful prospect of success as appropriately reflecting the observation in the well-known Saudi Eagle case [1986] 2 Lloyds Report 221, that the defences sought to be argued had to carry some degree of conviction. The Defendant was required to have a case that was better than merely arguable, as obtained formerly under O.14 of the U.K. Rules of the Supreme Court.

His Lordship went on to indicate that although the Court was not to engage in a mini trial, that did not mean that the Court has to accept without analysis everything said by a party in his Statements before the Court. In some cases it might be clear that there was no real substance in factual assertions made, particularly if contradicted by contemporary documents.

40. Mr. Piper, on behalf of the 1st Defendant, argued that there were a number of issues raised by the 1st Defendant which show that in his Affidavit in Support of the application he has a real prospect of succeeding at trial. These issues Mr. Piper itemized in paragraph 7 of his written submissions.

41. On the other hand, Mrs. Samuels-Brown has argued that none of the issues raised, amount to a Defence with any real prospect of succeeding.

42. I am of the view that the 1st Defendant has raised a number of issues which demonstrate that he has a real prospect of successfully defending the claim. Chief amongst these, I see the following:-

(a) Was there an agreement wider in its terms than the Agreement for sale which was sought to be enforced? (Paragraphs 2 – 5, 9,10 of the 1st Defendant's Affidavit)

(b) Was that wider Agreement and or the Agreement for Sale referred to in the Statement of Claim, subject to an expressed or implied term that the approval of the KSAC was required in order for the enforcement of either, or both of them? (Paragraph 2 –5, 9,10 of the 1st Defendant Affidavit).

(c) What was the effect of letter dated May 11, 1993 from the KSAC refusing permission for the proposed development in relation to the property, the subject of the proceedings? (Paragraphs 2 – 5, 9, 10 of the 1st Defendant Affidavit).

(d) Assuming that the claim against the 1st Defendant is for specific performance which as I have said, I am not sure it is, what is

the effect of the failure of the Plaintiffs to make payments strictly in accordance with the Agreement for sale? (Paragraphs 6 – 8 inclusive of 1st Defendant Affidavit)

(e) Again assuming the claim against the 1st Defendant is for specific performance, what is the effect, in law of the fact that as originally framed, the claim was for a refund of deposit paid and other monies paid on account of the purchase price and the fact that the Defendants' then Attorneys-at-Law tendered a sum in full satisfaction of the claim made by the Plaintiffs? (Paragraph 12 and 13 of the 1st Defendant's Affidavit).

43. As to paragraphs (a) – (c) one concern I had was whether in relation to transactions involving land, the Court would find a sufficient memorandum in writing to satisfy the statue of Frauds in respect of essential terms. See Cheshire's Modern Law of Real Property, 11th Edition, P.374 – 381, and Hawkins v. Price [1947] 1 ALL E.R. 689. However, I am satisfied that these are issues, amongst others to be ventilated at trial and that there may in any event, also arise questions of part-performance.

44. In my view the Plaintiffs original claim ie. to recover the deposit and further amounts paid on account of the purchase price was really a claim in quasi contract as opposed to being a claim as to damages. See paragraph 871 – McGregor on Damages 15th Edition. In E.D and F.man Liquid Products Lord Justice Potter is recorded as stating that where there was a claim or judgment for moneys due and issues of fact were raised by a defendant for the first time which standing alone would demonstrate a triable issue, if it was apparent that, with full knowledge of the facts raised, the defendant had previously admitted the debt and or made payments on account of it, a judge would be justified in taking such acknowledgement into account as an indication of the likely substance of the issues raised and the ultimate success of the defence belatedly advanced.

45. The dicta of Justice Potter in relation to the acknowledgements made is in my view not dealing with without prejudice, incomplete negotiations. Further, the 1st Defendant's willingness to tender the deposit and payments on account as the Suit was originally framed, in my view has no effect on the amended claims against the 1st Defendant, whether for different types of damages for breach of contract or tort, or for specific performance, since the claims are

completely different in nature. In other words, the tender referred to in paragraphs 12 and 13 of the 1st Defendant's Affidavit have no effect on the question of the 1st Defendant's prospects of successfully defending the claim as presently formulated.

46. I am further satisfied that sub-paragraphs (a) and (b) of Rule 13.3 (1) have been satisfied. See paragraphs 14 – 19 of the 1st Defendant's Affidavit.

47. My order therefore, is that the default judgment entered in Judgment Binder No. 272 Folio No. 147 is set aside. This order is conditional on the 1st Defendant filing and serving his Defence by August 8th 2003. Costs of this application and costs thrown away are awarded to the Plaintiffs to be paid within 30 days of agreement, taxation, or other mode of ascertainment.

48. It is to be noted that Rule 13.7 states "where the Claimant abandoned any remedy sought in the claim form in order to enter a default judgment, the abandoned claim is restored if judgment is set aside." If therefore I am wrong, and the claim against the 1st Defendant was for specific performance, then that relief now stands restored since I have set aside the default judgment.

49. In accordance with Rule 13.6 (1), I must now treat this hearing as a case management conference unless it is not possible to deal with the matter justly at this time.