[2016] JMSC CIV. 99

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV02698

BETWEEN	**COMMUNICATIONS CONSULTANTS LIMITED**	**CLAIMANT/ RESPONDENT**
AND	**SOFTWARE DISTRIBUTORS LIMITED**	**1ST DEFENDANT**
AND	**LEICESTER LEVY**	**2ND DEFENDANT/ APPLICANT**

IN CHAMBERS

Miss Catherine Minto instructed by Nunes Scholefield & DeLeon& Co for Claimant/respondent.

Seyon Hanson instructed by Seyon Hanson & Co. for 2nd Defendant/Applicant.

14TH January, 2016

Application to Set Aside Default Judgment

BROWN Y, MASTER AG.

[1] On April 28, 2005, the claimant Communications Consultant Limited and the 1st defendant Software Distributors Limited entered into a lease agreement in relation to a part of Balmoral House at 2 Balmoral Avenue, Kingston 10. In his capacity as the managing director of Software Distributors Limited, Leicester Levy, the 2nd defendant, signed the lease agreement on behalf of that company. The lease agreement contained an arbitration clause, wherein the parties agreed that *"any dispute or difference"* between them should be referred to arbitration. A

maintenance clause was also an expressed term of the lease agreement and it is the contention that this provision was breached, which sparked an action by the claimant to recover the sum of $1,095,845.85 from the defendants.

[2] The action came to the attention of the defendants by way of a claim form served on them on 1st June 2009. An acknowledgement of service was filed by the defendants' attorney-at-law who, at that time, was Mr. Kent Gammon. He signalled an intention to defend the claim. The defendants, having failed to file a defence to the claim, prompted the claimant to seek and obtain a judgment in default of defence on August 3, 2011. That judgment in default remained unsatisfied, and so, the claimant obtained an order for seizure and sale of goods on 13th August 2015. However, it was the bailiff's visit to 2 Balmoral Avenue, Kingston 10, on September 9, 2015, to enforce the Judgment which caused the defendants to retain their present attorney-at-law Mr. Seyon Hanson, to seek the following orders:

i. That the Default Judgment obtained by the Claimant against the 1st and 2nd Defendants and entered in Binder No. 752 and Folio 226 be set aside.

ii. That any steps by the Claimant to enforce the Default Judgment entered in Binder nol. 752 and Folio 226 be stayed pending the determination of this application.

iii. That the matter be stayed pending the Arbitration based on Clause 6(c) of the lease agreement; or alternatively,

iv. That the claimant be ordered to file a particulars of claim and serve same on the Attorney-at-Law for the 1st and 2nd defendants within 14 days of the order.

v. That the time for filing the Defence by the 1st and 2nd defendants be 42 days after the receipt by the 1st and 2nd defendants' Attorney-at-law, of the claimant's Particular of Claim.

vi. That the service of this Notice of Application be abridged if necessary;

vii. Costs to be cost in the claim.

[3] In support of their application, the defendants have relied on the affidavit of the 2nd defendant Mr. Leicester Levy filed on September 23, 2015.

At this juncture, I will turn my attention to the 2nd defendant's case.

The Case for the 2nd Defendant

[4] The crux of the 2nd defendant's case is that he had never had any personal contractual arrangement with the claimant and he merely acted in his capacity as a director of the 1st defendant company. As such, he maintained that he was "*wrongfully and without basis sued in my personal capacity*." Nonetheless, the claimant's attorney Miss Minto contended that this defendant could have raised that issue by a prompt filing of defence and that the joining of the 2nd defendant in the claim would have been "*a matter for trial.*"

[5] The positions of both 2nd defendant and claimant call for an examination of the lease agreement and the doctrine of corporate personality. The lease agreement states inter alia:

> **"This instrument of Lease is made the 25th day of April 2005 between Communications Consultants Limited, the party described at item 1 of the First Schedule hereto (hereinafter called "the Lessor") of the one part and Software Distributors Limited the party described at Item 2 of the First Schedule (herein after called 'The Lessee') of the other part."**

[6] Now, this lease agreement clearly states who the contracting parties are. There is no mention of Leicester Levy as a party to this contract rather, he is featured as a signatory on behalf of the 1st defendant company. It is my opinion that he acted as a mere employee of the company and this status could not have elevated him to the position of contracting party.

[7] The doctrine of corporate personality also offers assistance to Mr. Levy in his bid to be divorced from these proceedings. For instance, in ***Salomon v Salomon & Co. Ltd. (1987) HL*** it was held that "*the company exists at law and is a being separate from those who own its shares or run its business.*"

[8] In light of the foregoing, any action brought against Mr. Leicester Levy in relation to the lease agreement made on 25th day of April, 2005 cannot be sustained. Therefore the judgment in default entered on August 3, 2011, against Mr Leicester Levy named therein as the 2nd defendant, and the subsequent order for seizure and sale of goods obtained by the claimant on 13th day of August 2015, are hereby set aside.

The 1st Defendant's Case

[9] In its quest to obtain the court orders sought, which included setting aside the default judgment, the 1st defendant advanced several arguments, with the main thrust being:

i. That it has never been served with a particulars of claim notwithstanding that in its acknowledgement of service, it erroneously indicated that it had. Furthermore, it had placed great reliance on its attorney's posture that a claim form served without particulars of claim is irregular.

ii. That neither the default judgment nor the judgment summons was ever brought to its attention by its then

attorney-at-law Mr. Kent Gammon. As such, it was unaware of any judgment against it until the arrival of the bailiff at 2 Balmoral Avenue, Kingston 10, on September 9, 2015, to enforce the Judgment of Seizure and Sale of Goods.

iii. That in relation to the maintenance payment, in contention, the 1st defendant had advised attorney Mr. Kent Gammon to invoke the arbitration clause which was contained in the lease agreement at 6(c). Having given that instruction, nothing from the said attorney-at-law was forthcoming.

And finally, that it had a good defence and a real prospect of successfully defending the claim.

[10] However, in signalling its strong objection to the grant of the 1st defendant's application, the claimant posited inter alia that the 1st defendant's application to file a defence was long overdue, *"coming 6 years, three months and six days after being served with the claim."*

[11] The claimant further noted that that the defendant did not indicate that it had any issue with the process served. Regarding the issue of setting aside the default judgment, the claimant's resistance was based on the fact that the 1st defendant's application was emerging "*two years, one month and a day"* after being served via its attorney Mr. Kent Gammon.

[12] It was also the claimant's view that the claim form served on the defendant satisfied all the requirements of CPR 8.2 (1) and 8.7 and provided this defendant with all the relevant particulars to defend the claim. The opposing positions of the parties engender a discussion as to whether the claim form can stand without the particulars of claim to render the default judgment entered, one regularly

obtained. Thus an examination of the claim form vis-a-vis Rule 8.2(1) of the CPR is inevitable.

Rule 8.2(1) of the CPR states

"A claim form may be issued and served without the particulars of claim (or affidavit or other document required by rule 8.1 (1) (b)(ii) only if –

a) The claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8, 8.9 and 8.10; or

b) The court gives permission.

Having perused the rules aforementioned, it would seem that the ones applicable to this case are 8.7 which deals with the contents of the claim form, and 8.9 which speaks to the claimant's duty to set out its case.

[13] A scrutiny of the claim form shows that Rule 8.7(1) has been complied with. Rules 8.7(2), 8.7(4), 8.7(5) and 8.7(6) are not applicable to the case under review. However, Rule 8.7(3) has not been observed.

[14] Rule 8.7 (3) states inter alia:

"A claimant who is seeking interest must –

(a) Say so in the claim form, and

(b) Include in the claim form ... details of –

i. The basis of entitlement;

ii. The rate;

iii. The date which it is claimed;

iv. The date to which it is claimed; and

v. where the claim is for a specified sum of money,

- The total amount of interest claimed to the date of the claim; and
- The daily rate at which interest will accrue after the date of the claim."

[15] The claim form in question, does not clearly state the basis of entitlement. The general reference to the claim as having arisen from a lease agreement, is, in my opinion, not sufficient; and the table provided cannot be a substitute for a further and better particulars. For example, the claim form states; "*the defendants are indebted to the plaintiff in the sum of $897,789.69 which is the amount which has not been paid to the plaintiff as required by the terms and conditions affecting maintenance for the premises arising out of a lease agreement between the parties in respect of that part of Balmoral House ..."* This statement does not indicate what period this debt covers and the table provided does not cure this, as the latter is also bereft of relevant details. For instance, while this table shows the interest rate attached from May 2005 to April 2007 as 18% per annum, it does not provide that information for the period May 2007 to November 2008, thus opening the door for speculation.

[16] The claim form as already noted, stated the figure owing as $897,789.69, yet further in the said document, it speaks to *"an order compelling the defendants to pay the sum of $1,093,845.58"*, with no indication as to how this latter figure was derived. Again, the table provided, does not bring clarity to this situation because it too lack specificity. While the interest rate for the period May 2005 to April 2007, was stated as 18% per annum (years) the same was not indicated for the contract period May 2007 – November 2005, and as such Rule 8.7 (3) (b) (ii) was flouted.

[17] The claim form did not state the percentage applied to the contract period May 2007 – November 2008; and so, it could not be affirmed that *"the total amount of interest claimed to the date of the claim is 18%."* Neither did the claim form

speak to "the daily rate at which interest will accrue after the date of the claim." As such, the provisions of 3(b) (v) of Rule 8.7 have not been satisfied.

[18] I feel compelled to make my observations of the table known because it seems to bring confusion rather than clarity to the claim sought. For instance, it indicates "(December – April months)" in bold with no year attached, and to what do those months refer? Are they in relation to GCT? Therein lies the uncertainty. Mention is made of 18% per annum (2 years) for the period May 2005 – April 2007. Does this mean that 18% is applied to each year or is it that both years collectively attracted 18%? This table engenders speculation.

[19] In relation to Rule 8.9 which, among other things, states that:

> (1) The claimant must include in the claim form ... a statement of all the facts on which the claimant relies.
>
> (2) Such statement must be as short as practicable.

The arguments already advanced lend support to the conclusion that all the facts were not included in the claim form and the Table was also deficient. Thus, Rule 8.9 (1) and (2) were not observed by the claimant. The claim form served on the 1st defendant, being bereft of pertinent information to ground the claim, should have been accompanied with a particulars of claim. Therefore, the non-service of the particulars of claim amounts to an irregularity, and so, as of right, judgment in default of defence is to be set aside. But whether or not this position is embraced, an analysis of the other issues raised by the parties ought not to be ignored; one such is the defendant's prospect of successfully defending the claim.

[20] This brings to the fore the provisions of Part 13 of the CPR. Rule 13.3. as amended in 2006 states:

"13.3 (1) The Court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under the rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

[21] It is evident that in the exercise of its discretionary powers in setting aside a default judgment regularly obtained, the court's primary concern is whether the defendant has a real prospect of successfully defending the claim. Now what is meant by 'real prospect?' This principle was highlighted in the English case of ***Swain v Hillman and another (2001) 1 ALL ER 91*** wherein relation to a *summary judgment, the court said the defence must have a "real" and not a "fanciful*" prospect of succeeding.

[22] In ***Marcia Jarrett v South east Regional Health Authority and Robert Wan and the Attorney General****, Claim no. 2006 HCV00816,* at para 10, McDonald Bishop J (Ag) as she then was stated:

> ***"The defence must be more than arguable to be such as to show a real prospect of success.***

But how will a court determine if the defendant has a real prospect of success? That question was explored in ***Victor Gayle v Jamaica Citrus Growers and***

Anthony McCarthy, Claim NO. 2008 HCV05107, where Edwards J (Ag.) as she then was said:

> ***"Certainly the court must look at the claim as well as the draft defence. Whilst the court will not embark on a mini-trial, it must conduct some analysis, some evaluation of what is placed before it for consideration.***"

[23] In coming to its decision regarding the setting aside of default judgment, it is evident that the court's primary concern is whether the defendant has a real prospect of successfully defending the claim. Nonetheless, the court must also consider the provisions of Rules 13.3(2)(a) and (b). This captured the attention of McDonald Bishop J Ag (as she then was) supra, where at paragraph 12 she stated:

> ***"I think it would be safe to argue that the consideration for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence, the period of delay between the judgment and the application made to set it aside; the reasons for the defendant's failure to comply with the provisions of the rules as to filing of a defence and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the Default Judgment is set aside...."***

[24] It is with this guidance in mind, that I now proceed to assess the 1st defendant's case.

Does the 1st defendant have a real prospect of success?

Through the mouth of its managing director - Leicester Levy - the 1st defendant in a draft defence, flatly denied owing any part of the maintenance claimed.

The said defendant brought into the picture Item 8 of the First Schedule of the lease agreement which states:

> "Maintenance shall be $498,604,00 ($41,550.33 per month) subject to review from time to time during the lease term

> against the actual cost increases which shall be pro-rated between Lessor and Lessee based on existing allocation"

In light of this clause, the 1st defendant was adamant that it was not in breach as *".... the percentage of the maintenance which is stated by the claimant as being payable (i.e. 21.5%) is not admitted and is inaccurate as based on the 1st defendant renting 2,455 square feet out of a total area of 13,347.33 square feet, the percentage of the area rented .... would be 18.39%, and this is the basis on which any actual cost increase should be pro-rated and payable by the 1st defendant."*

[25] Conversely, the claimant's attorney Miss Minto submitted that this defendant's reliance on 18.39% was without basis. According to her, *"... the claimant's letter of December 20, 2008 sets out the basis of the calculation... the defendant's are occupying 2455 square feet (rental space inside the building) plus 415 square feet for parking = 2870). When the total square feet occupied (2870) is calculated as a percentage (/100) of 13,347,33 the total square feet for maintenance purpose is 21.5%..."*

[26] Evidently, this disagreement between the parties regarding the percentage to be applied to the actual cost increase, stems from the non-inclusion of this calculation in the maintenance clause of the lease agreement. This omission is one for which both claimant and 1st defendant should accept responsibility. Miss Minto, however, stated that the claimant's letter of December 30, 2008 sets out the basis of the calculation, (Exhibit 4). But having assessed the contents of that letter, I find that it describes the entire rental space applicable to the 1st defendant and at paragraph (a) states *"you pay 21.5% of all maintenance expenses."* The tone of this letter does not suggest that any meeting of the minds took place between the parties, in respect of the percentage quoted. In fact, *"you pay 21.5% of all expenses"* seems more a directive than a request. The lack of 'understanding' of the maintenance charge may not have arisen had

the lease agreement included the method of calculation and/or the percentage to be applied. Furthermore, the claim form filed speaks to 15% per annum.

[27] However, the 1st defendant's discontentment is not confined to the percentage difference. This company is saying it owes nothing for maintenance and it had never agreed to pay interest at the rate 18% per annum. In this case, each party is accusing the other of being in breach of the contract i.e. maintenance clause of lease agreement and therefore this is an issue which requires ventilation and resolution before a tribunal. The focus at this time though, is not to determine if the defence will succeed, but to see whether it has a real prospect of success. Having now assessed the claimant's case and the defendant's draft defence, I am compelled to conclude that the latter has satisfied Rule 13.3(1) of the CPR. But the matter does not end there, as I am bound in duty to consider whether Rules 13.3 (2) (a) and (b) were observed by the 1st defendant.

Was the Application made properly?

[28] It is the assertion of the 1st defendant that the judgment in default of defence, obtained on August 3, 2011 and served on Mr. Kent Gammon, its attorney on August 22, 2013, never came to its attention and neither did the judgment summons. It had remained in a state of ignorance regarding these judgments entered against it, until the bailiff arrived at its offices on September 9, 2015 to enforce the order for seizure and sale of goods which was issued on August 13, 2015.

[29] This awareness led to the application to set aside the default judgment among other things, and this was filed on September 23, 2015. There was no argument from the claimant countering the defendant's promptitude in applying to set aside the default judgment, as soon as it came to its attention. However the reasons offered for the delay in filing a defence have attracted severe criticism from the claimant. In her submissions Miss Minto stated ".... *the defendants literally waited until the bailiff was on their door step before they took any step*

whatsoever, for a period of six years, three months and six days after acknowledging service. No new document was served on the defendants in the interim (save for the judgment). Therefore, the defendants were aware of the matters being raised now before this court, since 2009."

Now what were the reasons for the delay which the 1st defendant offered?

[30] In a nutshell, this defendant lays the blame for its inaction at the feet of its then attorney Mr. Kent Gammon. This attorney, it said, failed to inform it of the default judgment which was received by him on 22nd August 2013, having been obtained cn August 3, 2011. According to this defendant, Mr. Gammon seemed to have harboured the view that since the particulars of claim had not been served, the matter could not have proceeded beyond the acknowledgement of service. And to that end, the time for filing the defence had not yet started to run. Notwithstanding this assertion, the 1st defendant had provided no affidavit from Mr. Gammon in support. The Court would have been afforded some assistance had Mr. Kent Gammon filed an affidavit stating the reasons for his inaction upon receiving the claim form and filing acknowledgment of service, and more importantly upon being served with the default judgment.

But should this defendant be penalized for his attorney's lethargy?

[31] The claimant's attorney Miss Minto, in reliance on the dictum of Mrs. Justice McDonald-Bishop in ***Joseph Nanco v Anthony Levy and B& J Equipment Rental Limited*** [2012] 7 JJC0201***,*** opined that *"the defendants cannot claim that an error of counsel in failing to file the Defence, or seeking to set aside the Judgment in Default after becoming aware of same, should deprive the claimant of the fruit of its judgment."* While I regard that opinion of Justice McDonald-Bishop as instructive, I must say that the facts of Nanco's case bears little resemblance to the case under discussion. I glean from my reading of that case that the 2nd defendant's attorney did take an active part in the proceedings.

[32] According to the learned judge at paragraph 59:

> ***"In looking at the conduct of the 2nd defendant and/or counsel on its behalf, it is seen, on unchallenged evidence, that the 2nd defendant took an active part in the hearing for interim payment and was present at the assessment of damages...."***

However, in the present case, apart from the filing of an acknowledgement of service, the 1st defendant's attorney did nothing else. Additionally, the 1st defendant's declaration that it was advised by its attorney that the matter could not have proceeded without the service of a particulars of claim, cannot be used against it, a layperson.

[33] I am also mindful of the approach of Justice Brooks in the ***Attorney General of Jamaica v Western Regional Health and Roshaka Brooks Jnr.*** (a minor)by ***Rashaka Brooks Snr. (his father and next friend) [2013] JMCA Civ 16,*** where at paragraph 12, he said:

> "... a deserving litigant ought not to be shut out because of an error by his attorney at law..."

Therefore, I will now venture to say that in this particular case, the 1st defendant ought not to be penalized for being ill-advised by its counsel.

[34] What emerges next for consideration is whether any prejudice will befall the claimant if the judgment in default is set aside. It is the claimant's position that, *"judgment was served on the defendant's lawful agent and attorney more than two years before the application was filed. The claimant should not be condemned to go back through the courts after a 6 years wait to get to this stage."*

[35] Notwithstanding that concern, the claimant had not indicated to the court, how it would be prejudiced should the application to set aside the default judgment, be countenanced. Furthermore, the claimant could be seen to have contributed to

the delay in this matter moving forward. For instance, the matter was initiated by the service of the claim form on June 1, 2009 and the acknowledgement of service was filed on June 18, 2009. But having observed that the time for filing of the defence had passed and none was forthcoming, the claimant waited approximately 16 months before seeking to obtain a judgment in default of defence. The application for the default judgment was filed on October 27, 2010. The claimant also waited approximately 2 years to serve the default judgment on the defendant's attorney-at-law. Regardless of the delay in responding to an action before the Court, the overriding objective of the CPR cannot be ignored. This principle was highlighted by Lord Atkin in ***Evans v Bartlam [1933] AER Vol. 2 pg. 650*** where he said:

> ***"The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."***

Before I conclude though, I must examine the Arbitration Clause of the lease agreement as it is a prominent feature in the 1st defendant's case.

[36] This Arbitration Clause states:

> ***"In case of any dispute or difference arising between the parties hereto with respect to the rights, duties or liabilities of either party under this Agreement or otherwise in connection with the foregoing, the matter in dispute shall be settled by reference to a single arbitrator appointed by mutual agreement of the parties or failing such agreement by a single arbitrator by the President of the Jamaica Bar Association. The award of the arbitrator is final and binding on both parties."***

According to the 1st defendant, it had instructed its then attorney-at-law Mr. Kent Gammon, to invoke the arbitration clause as early as June 2009; but it is evident that this was not done. The 1st defendant has expressed its desire to pursue arbitration even at this stage.

[37] In stating its opposition to the involvement of arbitration now, the claimant relied on Section 5 of the Arbitration Act and Rule 10.3(3) of the CPR. Section 5 of the Arbitration Act states:

> **5. "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."**

And **Rule 10.3 (3)** of the **CPR** provides that:

> "**Where the defendant within the period set out in paragraph (1) or (2) makes an application under the Arbitration Act to stay the claim on the grounds that there is a binding agreement to arbitrate, the period for filing a defence is extended to 14 days after the determination of that application.**

The claimant's contention was that the 1st defendant had not complied with the aforementioned Rule as it *"must apply to stay the claim and refer the matter to arbitration within the 42 day period required to file a defence."* However, in defence of its application the 1st defendant sought to rely on the judgment in ***Douglas Wright t/a Douglas Wright Associates v The Bank of Nova Scotia Jamaica Ltd. (***1994) 31 JLR pg. 3J3 and that in ***William Clarke v Bank of Nova Scotia Jamaica Limited [2012] JMCA Civ. 8.***

[38] A plethora of authorities including the two highlighted by the 1st defendant suggest that the Court is loath to interfere where the parties have selected a forum to settle their dispute. I am guided by the posture of Brooks JA in ***William Clarke v Bank of Nova Scotia Jamaica Ltd. [2012] JMCA Civ 8***; where at paragraph 21, he said:

> ***"Where a defendant alleges that the parties have previously agreed that any dispute between them will be dealt with by reference to arbitration another general principle must be introduced into the mix. The defendant is not only saying that another, more appropriate forum exists, but that the parties have already agreed on that forum. The principle, which must also be considered, is that where the parties have agreed that any dispute between them should be referred to arbitration, their agreement should be given effect and that no party should be allowed to renege on that agreement without good cause."***

[39] Mr. Justice Brooks also pointed out that Section 5 of the Arbitration Act gives the Court the authority to stay court proceedings initiated by a *"claimant who had previously agreed to submit a particular dispute to arbitration."* Also of relevance to this discussion is ***Fort v Clarkson's Holiday Ltd. [1971] 3 All ER*** where at pg.459 , Edmund Davis L.J. observed that:

> ***"Once a party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is on the party opposing the application to stay***."

In light of the aforementioned, the claimant's position that the defendant had not complied with Rule 10.3 (3) of the CPR is a procedural non-observance which in my opinion, would not be fatal to the pursuit of arbitration. The claimant also argued that the 1st defendant *"have merely asserted to the court, but has never shown the Claimant that it is ready and willing to proceed to arbitration. For example, although they clearly stated in their acknowledgement an intention to arbitrate, they failed to follow up with a letter to Counsel for the Claimant*

canvassing the names of proposed arbitrators or, suggesting dates, for arbitration. They have taken no step to indicate readiness or willingness as required by the Act." While that view has not been challenged by the 1st defendant, it is worthy to mention that the initiation of a discussion regarding arbitration cannot be seen as the sole responsibility of the 1st defendant, any party to the contract could have prompted such a discourse.

[40] In light of the issues discussed herein, and being mindful of the overriding objective, I now make orders as follows:

1. Judgment in default of defence entered in Judgment Binder No. 752, Folio 226, and all subsequent processes are hereby set aside.

2. The claimant is to file and serve a particulars of claim on the 1st defendant within 14 days from the date hereof.

3. The 1st defendant is to file and serve the defence on the claimant's attorney-at-law within 21 days after the service of the particulars of claim.

4. No order as to cost.