JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 73 & 80/89

BEFORE: The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.
The Hon. Miss Justice Morgan, J.A.

BETWEEN	**MARK SOMMERVILLE**	DEFENDANT/APPELLANT
AND	**RONALD DAVID COKE** **ETHLYN COKE**	PLAINTIFF/RESPONDENTS

R. Manderson-Jones for Defendant

Gordon Robinson & David Henry instructed by Nunes, Scholefield DeLeon & Co for Respondents

November 7, 8 & December 18, 1989

FORTE, J.A.

These are appeals from two orders made by Learned Judges in Chambers which are as follows:

1. An order made by Reckord J on 10th August, 1989 refusing a stay of proceedings, and

2. An order made by Langrin J on the 2nd October, 1989 refusing an application by the appellant to set aside a judgment against the appellant entered in default of appearance.

By consent of counsel for the parties, these appeals were heard together on the 7th and 8th day of November, 1989 on which date we reserved our decision. This we now deliver.

To set the issues involved in the appeal in their proper prospective, some brief reference to the factual bases is necessary. The appellant on the 14th July, 1989 entered into a written agreement with the respondents for

the lease of premises 21 Jacks Hill Road for a period of two years. The lease provided for abatement of the rental in certain circumstances which will be detailed later in this judgment, in the event of damage to the premises by virtue of an Act of God. It provided also the method by which the amount of abatement would be determined. In September 1988, Hurricane Gilbert swept over the island of Jamaica, leaving behind extensive damage to properties, among them the house at 21 Jacks Hill Road. Notwithstanding this, up to the time that this appeal was heard no steps had been taken by either party to put in motion, the procedure provided for in the lease which would determine the amount by which the rent should be abated. Repairs were however done to the house, by the respondents and it appears that all has been done except for some relatively minor repair.

The respondents, not having secured any payments in respect of rental for the period since the hurricane, filed a specially indorsed writ of summons in the Supreme Court on the 27th April, 1989 claiming as follows:

> "The Plaintiffs' claim is against the Defendant to recover the sum of EIGHTY ONE THOUSAND SEVEN HUNDRED AND SEVENTY FIVE DOLLARS AND TWENTY SEVEN CENTS ($1,775.27) due and owing by the Defendant to the Plaintiff under a Lease of Agreement dated the 14th day of July, 1988 for the Lease of premises 21 Jacks Hill Road, Kingston 6 in the parish of Saint Andrew by the Defendant from the Plaintiff and in particular being the amount due for rent, interest on overdue rent, Water Rates and Telephone Bills particulars of which are as follows;

" Six (6) months rent due for period 11th November, 1988 to 10th May, 1989 inclusive at $8,500.00 per month	$51,000.00
Interest on overdue rent at 12½% per annumn to the 10th of May, 1989 (rent due 11th November, 1988 to 11th March, 1989)	1,328.13
Water Rates	7,331.00
Telephone Bills	22,116.14
	$81,775.27

AND THE PLAINTIFFS CLAIM further interest on the sum of FIFTY ONE THOUSAND DOLLARS ($51,000.00) at the rate of 12½% per annum from the 10th day of May, 1989 to the date of Judgment or payment."

On the 6th June, 1989 no appearance having been entered by the appellant, Judgment was entered in default of appearance for the total sum claimed i.e. $81,775.27 and costs.

On the 28th July, 1989, the appellant purported to enter appearance, and at the same time filed application by summons to stay the proceedings by virtue of section 5 of the Arbitration Act.

On the 19th September, 1989 this application was heard and refused by Reckord J.

On the 15th September, 1989 the appellant filed application by summons, to set aside the judgment in default of appearance and on the 2nd October, 1989 the application was heard and refused by Langrin J.

1. **APPLICATION TO STAY PROCEEDINGS**

The appellant through his counsel filed and argued nine grounds of appeal all of which complained of the learned judges reasons for refusing the application. In coming to his conclusion, the learned judge as revealed in the note of his judgment, stated as follows:

> "On the preliminary point that the filing of the Appearance has come too late, I rule that the Appearance has come too late. I therefore uphold the preliminary point. All discretionary judgments must be judicially exercised and I rely on Section 61 of the Judicature (Civil Procedure Code) Law. Although I am quite aware that appearances have been entered after judgments in the cases of applications to set them aside, I do not think that the filing of an appearance after Judgment in this case is a basis for granting an application for a stay under the Arbitration Act."

The preliminary point referred to the fact that the appearance had been entered after judgment, and consequently it would not be valid for the purposes of staying the proceedings in pursuance of section 5 of the Arbitration Act. As the submissions unfolded before us, the issues to be decided, developed into the following:

1. Can appearance be entered after Judgment, without leave of the Court.

2. If so, can it be entered for the purpose of an application to stay proceedings under section 5 of the Arbitration Act.

Question 1: In determining this question, reference to section 61 of the Judicature (Civil Procedure Code) Act is necessary. It States:

> "A defendant may appear at any time before judgment. If he appears at any time after the time limited by writ for appearance he shall not unless the Court or a Judge shall otherwise order, be entitled to any further time for filing his defence, or for any other purpose, than if he had appeared according to the writ."

There is no provision in the Civil Procedure Code which expressly permits the entering of appearance after judgment has been entered. It appears, then, (in my view) that an appearance entered after judgment would require, leave of the Court.

In the case of Stern v. Friedmann (1953) 2 All E.R. 565 which was cited and relied on by Counsel on both sides, Danckwerts J, examined the practice in England where at that time R.S.C. Order 12 r.22 was in the exact terms of section 61 of the Civil Procedure Code. He referred to the Annual Practice 1953 page 141 and the note appearing under the rule:

> "Appearance after judgment. In Chancery Division leave to enter appearance after judgment is obtained on special motion or summons Daniels Chancery Practice page 295."

He referred also to Order, Seton's Decree and Orders page 23:

> "In Queens Bench Division appearance tendered after judgment signed will be accepted if the defendant desires to enter it. Such appearance would stand in the event of the judgment being set aside."

In another reference to Daniels Chancery Practice 8th edition volume 1 page 295 it is stated in this way:

> "After judgment an appearance cannot be entered by a defendant except by leave of the court which may be granted, either with discharge of the judgment, leaving the defendant free to defend on payment of costs thrown away, or without setting aside the judgment on defendants submitting to be bound by it."

Mr. Manderson-Jones, distinguishes these references from the present case and contends that whereas in the Chancery Division it is necessary to apply for leave to enter appearance after judgment, in the Queens Bench Division, no leave was necessary, and the appearance will stand until an order to strike it out has been made.

He contended that there are no Divisions in Jamaica, but in any event, the present action was not in Chancery, and consequently no leave is required.

Mr. Gordon Robinson in reply, contended that even allowing for the distinction advanced by counsel for the appellant, appearance after judgment can only be entered for the purpose of setting aside the judgment, or the defendant's submission to it.

In my view, after final judgment has been entered, the filing of an appearance, though accepted by the Registrar, cannot be of any effect unless and until the judgment is set aside, or in cases where the defendant enters appearance for the purpose of submitting to it. An example of this would be in a matrimonial case where the judgment orders that the matrimonial home be sold and the proceeds shared. The party not appearing at the time of judgment may wish, subsequently to submit to the judgment but wish to make an application that he/she be allowed to purchase the home. The effect is therefore, that filing of an appearance per se cannot allow the defendant any right to be heard, and can only be used as a basis for an application either (i) to restore the status quo of the suit to where it was before the entering of judgment or (ii) to allow the defendant to submit to the judgment so as to participate in any issues which are still to be resolved after the judgment.

Question 2: In the instant case, the appellant entered appearance for the purpose of applying to the Court for a stay of proceedings; an application which was in pursuance of section 5 of the Arbitration Act which reads:

> "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."

It is obvious, in perusing this section that the whole purpose of its provisions is to enable a party to respond to the claim by entering an appearance, but taking no further step in the action before applying to the Court for a stay of proceedings so that the matter in dispute can be dealt with in Arbitration, as provided for in the agreement between the parties. In my view the section does not and could not have been intended to relate to circumstances where final judgment has already been entered in the action. If this were so, the resulting situation would be that a defendant could succeed in entering appearance after judgment, successfully apply for a stay of proceedings and have the matter referred to Arbitration. In such a case the Arbitrator would be asked to adjudicate on a matter already adjudicated on by the Court, a situation which in my view would be untenable.

It follows then that the provisions of section 5 of the Arbitration Act cannot be applicable to the circumstances of this case, and can only become so if the judgment be set

aside. In any event, for the reasons stated in the answer to question 1 i.e. that appearance can only be entered after judgment effectively in circumstances where the judgment has been set aside or for the purpose of submitting to it - I would also hold that an appearance entered for the purposes of section 5 of the Arbitration Act, if entered after judgment, would be ineffective and of no value, and could not therefore form a basis for an application to stay the proceedings under that Act.

Some arguments were advanced as to whether the Arbitration Clause in the Lease Agreement would be applicable to the circumstances of the case i.e. whether the issues arising under Clause 4 (a) would be a matter upon which a stay of proceedings could be granted under the terms of Clause 4 (1) and by virtue of section 5 of the Arbitration Act.

As this application was decided on a preliminary point, and as a result no arguments were advanced in respect of this substantive question before the Judge in Chambers and having regard to my findings later in this judgment, in respect to the application for setting aside the judgment, I find it appropriate, to refrain from expressing any views on this question at this time.

For the reasons heretofore advanced, I would dismiss the appeal in relation to the application for a stay of the proceedings.

2 **APPLICATION TO SET ASIDE JUDGMENT**

Langrin J. dismissed the application to set aside the judgment entered in default of appearance on the ground that the defence was without merit. Mr. Manderson-Jones though filed fourteen grounds of appeal, in the process of his submissions relied mainly on his contention that the

learned Judge fell into error when he found that there was no merit disclosed in the draft defence and therefore no triable issues emerged therefrom.

In coming to his conclusion Langrin J. referred to paragraph 10 of the Appellant's affidavit in support of his application; and thought that the content "elegantly summarised the salient facts" relied on by him. It reads:

> "That there has been no agreement between myself and the Plaintiffs on the amount of the abatement. There has been no appointment of an independent assessor either by the Plaintiffs and myself or by the President of the Jamaica Bar Association for the time being. That, therefore, there is no sum certain due and payable under the agreement."

The learned judge was concerned that "setting aside the Judgment would result in injustice to the Plaintiff since the defendant would be living in the premises without paying any rent;" and found that this could never have been the intention of the parties and indeed contrary to any reasonable construction which may be placed on the agreement.

In the draft defence which is incorporated by the affidavit of the appellant and which was exhibited by the appellant, he denies in paragraph 1 that he owed the amount claimed by the respondent.

By paragraph 8 he makes reference to Clause 4 (a) of the Agreement (supra) and in paragraph 9 alleged as follows:

> "In breach of Clause 4 (a) the Plaintiff has refused to allow any abatement of the rent and insists on charging the defendant the original rent under the agreement."

He also maintains that the plaintiff has failed to provide professional valuation of damage so as to determine the appropriate abatement (paragraph 10), and that up to date of Draft Defence, the repairs to the house had not yet been completed.

Of importance to the determination of the issues in this appeal is paragraph 13 which states:

> "Further and in the alternative the rent of $8,500.00 set in the agreement is in excess of the standard or maximum permitted rent chargeable under the Rent Restriction Act and pursuant to the proviso of that Act the Defendant is entitled to recover from the Plaintiff the difference which is not less than $4,500.00 per month for four months amounting to $18,000.00. The Defendant will seek to set off the said sum or so much of the said sum as may be necessary in satisfaction or in extinction of the Plaintiff's claim herein."

In effect then, the appellant sets out to show in his defence, that the respondents are not entitled to the amount of rental calimed because:

> "(i) The amount claimed being based on the original rental agreed in the lease has not taken into account the provisions of Clause 4 (a) which it is agreed would in the circumstances entitle him to an abatement of the rental i.e. a reduced rental for the period up to the time of the conclusion of the repairs. Indeed he pleads that the respondents have refused to allow any abatement; and
>
> (ii) the amount of rental is in excess of the standard rental chargeable under the Rent Restriction Act."

In my view there are matters which merit a hearing on the issues, and which the appellant, having given an explanation for his failure to enter appearance within the required time, should be allowed to develop in further detail

in the context of a trial. In short, there are triable issues disclosed in the draft defence and in the affidavit of the appellant. For these reasons, I would allow the appeal and order that the judgment in default of appearance be set aside, and the appellant be given leave to file his defence within 30 days. Though finding that Langrin J. came to to the wrong conclusion, I share his apparent concern that the appellant has been living in the same premises without having paid any rental for the period and would therefore in all the circumstances of the case, not the least of which is the tardiness in setting in motion the procedure to ascertain the quantum of the abated rental, order that the setting aside of the judgment be conditional on the appellant paying 50% of the rental agreed in the lease, into Court within 14 days hereof.

DOWNER, J.A.:

Mark Sommerville a tenant of the Cokes' is the appellant in both these interlocutory appeals. They were heard together before us but it is convenient to treat them separately so as to delineate the issues which are to be considered.

Proceedings before Langrin, J., to set aside default judgment and prayer to file defence (C.A. 80/89)

In considering whether there was any merit in the pleaded defence of the appellant, Langrin, J., decided against him and dismissed his summons. Thus the respondents' Statement of Claim for $81,775.00 in respect of recovery of rent, water rate, telephone and interest stood and this appeal is to decide whether the default judgment ought to be set aside and the appellant be given leave to go to the Supreme Court to seek a stay of proceedings under Section 5 of the Arbitration Act and set in motion certain other proceedings or to file his defence. The appellant entered an appearance on 28th July, 1989 while the default judgment was entered on the 6th June, 1989. This was a classic instance of an appearance which will be allowed to stand in the event of the judgment being set aside. See Stern v. Friedmann [1953] 2 All E.R. 565 at page 567.

In considering whether the defence has any merit, it is necessary to determine whether the pleaded defence raised a triable issue. The lease which governs the tenancy was exhibited and the clause which the tenant relies on to abate the rental of $8,500.00 per month claimed, is clause 4(a) which it was contended applied to determine the amount

of rent if there is to be an abatement. That clause reads as follows:

> "4. IT IS HEREBY MUTUALLY AGREED AND DECLARED as follows:-
>
> (a) In the event that the leased premises are rendered unfit for occupation by the Lessee due to damage or destruction by fire, lighting, earthquake, hurricane, windstorm, flood or other Act of God or the country's enemies, or riot, civil commotion or other cause the term shall determine as of the same date. If the leased premises are damaged by any of the aforesaid causes but not to an extent to render them wholly or substantially unfit for occupation for the use of the Lessee then the rent shall abate proportionately to the damage done until the same shall have been repaired by the Lessor. Failing agreement between the parties as to the amount of such abatement the same shall be determined by an independent valuer or assessor to be appointed by the parties hereto if they can agree upon one and if they are unable to agree, by a valuer or assessor to be appointed by the President of the Jamaica Bar Association for the time being. PROVIDED HOWEVER in the event that the Lessor shall not proceed within thirty (30) days of such damage to make good the damage to the leased premises the Lessor or the Lessee may terminate the term by one month's notice in writing to the other and the Lessee shall pay to the Lessor rent accruing (if any) to the date of termination the rent in such case being considered accruing from day to day."

As for a suggested analysis or this clause, it is proper to say it was not disputed that the tenant has remained in occupation although there was damage done to the house by hurricane 'Gilbert'. The tenancy was therefore not determined by this clause in the lease. The next aspect of this clause is that of the amount of the abatement which the lease stipulates should abate proportionately. The respondents admit this is an outstanding issue and since it is patent that there was no agreement on this issue between the parties, the lease makes provision for the parties to appoint an independent valuer and if they cannot agree, a valuer is to be appointed

by the President of the Jamaica Bar Association for the time being. To round off this analysis of clause 4(a), it is necessary to point out that the proviso did not apply as neither party took steps to terminate the lease within thirty (30) days of the damage done.

Neither side has sought to put the machinery of clause 4(a) of the lease in motion but the respondents have invoked the jurisdiction of the Supreme court by entering a Writ of Summons with an endorsed Statement of Claim. As for the failure of the appellant to enter an appearance and file a defence within the appropriate time, he stated in his affidavit that in addition to the Statement of Claim, there are also recovery proceedings in the Resident Magistrate's Court against him and that he had wrongly assumed, that the Writ of Summons was to be heard simultaneously with the plaint on 4th August, 1989.

Has the appellant raised the issue of clause 4(a) in his proposed defence? By referring to paragraphs 8 and 9 of his defence and counter-claim exhibited to his affidavit, I think he has pleaded a set off. Paragraphs 8 and 9 read as follows:

> "8. Clause 4(a) of the agreement provides that in the event that the premises are damaged by hurricane, windstorm, flood but not to an extent to render the premises wholly or substantially unfit for occupation by the Defendant, then the rent shall abate proportionately to the damage done until the premises shall have been repaired. Further, that failing agreement between the parties as to the amount of such abatement the same shall be determined by an independent valuer or assessor to be appointed by them if they can agree upon one or to be appointed by the President of the Jamaica Bar Association."

and then he continued thus:

> "In view of those authorities, I think that the present case is one where, on the facts set out in the affidavit, the Court of Chancery would clearly have allowed the defendant's claim as an equitable set-off against the plaintiff's claim."

Here it should be noted that in the appellant's affidavit, paragraphs 9 and 10 were the bases of the set-offs in paragraphs 8 and 9 of the defence and counter-claim (supra). Then subsequently in Morgan, Cohen, L.J., on page 114 said:

> "Once Mr. Hale conceded, as, in my view, he was constrained by the authorities to which we were referred, in particular by the decision in Piggott v. Williams 6 Madd. 95, to concede, that the facts alleged in the affidavit sworn for the defendants, if proved at the trial, would establish a good equitable set-off, then it followed that the appeal must succeed."

There is yet another fact sworn to in the appellant's affidavit which has been properly pleaded in his defence. Paragraph 12 of his affidavit reads in part:

> "12. THAT serious disputes and differences have arisen and exist between myself and the Plaintiffs, including but not limited to the Plaintiffs liability for breach of Clause 3 (c);"

This is how the matter was pleaded in paragraphs 6 and 7 of the defence and counter-claim -

> "6. By Clause 3(c) of the said agreement the Plaintiff covenanted to keep and maintain the main structure and exterior of the buildings of the premises wind and water tight and to maintain structural parts in good condition and a proper state of repairs.
>
> 7. In breach of Clause 3(c) the Plaintiff failed to maintain the roof in good condition and a proper state of repair and also failed on 11th and 12th September, 1989, to keep the building wind and water tight as a consequence whereof the roof of the premises was blown away and there was extensive flooding of the premises by rain causing serious damage to the Defendant's personal effects and putting the Defendant to great expense and inconvenience.

"SPECIAL DAMAGE

Damage to clothing, drapes, pictures, and other personal effects = $7,500.00"

Paragraph 11 of the defence makes odd reading. It speaks of the rent of $8,500.00 per month reserved in the lease being in excess of the maximum chargeable under the Rent Restriction Act. It does not suggest that a standard rent has been determined. Nor does it refer to a certificate from the Rent Board so that the court could determine its force and effect. More seriously, I can find no aspect of this issue raised in the appellant's affidavit. Langrin, J., did not approach the matter by examining the affidavit and matching it with the proposed defence. He concentrated on the appellant's conduct. At page 36 of the record he said:

> "The applicant has not himself taken the necessary steps provided in Clause 4(a) to have the abatement determined. His apparent loss is therefore self induced."

As for the cases cited before him, he said:

> 'The cases cited by Defendant's Attorney are not relevant to the case before me. Accordingly, I find no merit in the defence and dismiss the application."

I think the learned judge used the wrong approach so I would allow the appeal, and set aside the order made in the Court below so that the default judgment and other consequential orders go. The appellant should be given leave to seek a stay under the Arbitration Act, or file his defence, but be put on terms.

Was the order made by Reckord, J., against the appellant correct? What is the status of that order now? (C.A. 73/69)

The proceedings before Reckord, J., were prior to those before Langrin, J. It could be argued that had the appropriate procedures been adapted before Reckord, J., then there may well have been no need for the subsequent hearings before Langrin, J. It is, therefore, necessary to make an enquiry as to the nature of this initial proceeding. Faced with the Statement of Claim endorsed on the Writ, for the arrears of rent etc., amounting to $81,775.27 the appellant failed to enter an appearance and the judgment in default was entered against him. As the judgment was perfected, the Bailiff sought to levy on his possessions under a Writ of Seizure and Sale. The correct response of the appellant was to have sought to set aside the default judgment and in his affidavit supporting such a Summons he would have exhibited his proposed defence.

The appellant, however, did not do that. What he did was to issue a summons to have a stay of proceedings pursuant to Section 5 of the Arbitration Act. His affidavit makes it clear that his contention at that stage was that, the machinery to determine abatement in clause 4(a) of the lease previously adverted to should have been put into motion. He also sought to have the issues in dispute resolved by arbitration, pursuant to clause 4(i) of the lease which reads:-

"Arbitration

4 (i) In the event of any dispute or difference arising between the parties herein such dispute or difference shall be referred to

> "Arbitration in accordance with the Arbitration Act of Jamaica and such Arbitration shall be a condition precedent to any litigation hereunder."

Apart from the abatement, what dispute did the appellant advert to as being appropriate for arbitration? Clause 3(c) was adverted to in paragraph 12 of his affidavit and clause 3(c) reads as follows:

> "To repair structure etc.
>
> (c) Subject to clause 2(d) to keep and maintain the main structure and exterior of the buildings on the leased premises wind and water tight and to maintain such main structural parts thereof including drains, gutters, pits, external pipes and boundary walls and fences in good condition and proper state of repair (save and except any damage which the Lessee is liable to repair) PROVIDED ALWAYS that the Lessor shall not be obliged to do minor repairs to the buildings such as fixing leaking faucets or clearing chokes or to repair destruction or damage caused by lighting, windstorm, fire, earthquake, flood or other Act of God or the country's enemies or riot or civil commotion which shall render the leased premises wholly or substantially unfit for the occupation of the Lessee."

It was in those circumstances that the respondent took a preliminary point against the appellant and here is how Reckord, J., treated the matter:

> "On the preliminary point that the filing of the Appearance has come too late, I rule that the Appearance has come too late. I therefore uphold the preliminary point.
>
> All discretionary judgments must be judicially exercised and I rely on Section 64 of the Judicature (Civil Procedure Code) Law.
>
> Although I am quite aware that appearances have been entered after Judgments in the cases of applications to set them aside, I do not

> "think that the filing of an appearance after Judgment in this case is a basis for granting an application for a stay under the Arbitration Act."

Interesting authorities as Stern v. Friedman [1953] 2 All E.R. 565 and Fisk v. Assimakis [1958] 3 All E.R. 182 pertaining to when and how an appearance can be entered after a judgment were cited. Also there were submissions on the construction of Section 5 of the Arbitration Act. It does seem, however, that the order below dismissing the summons can be justified on the ground that it would be impossible to grant a stay pursuant to Section 5 of the Arbitration Act when there was subsisting a default judgment which it was not sought to be set aside. So considered the order below dismissing the summons on a preliminary point was correct.

What now remains to be considered is the status of the order in the light of these decisions. The appellant is given leave to go to the Supreme Court to request a stay of proceedings under Section 5 of the Arbitration Act or to file his defence. As the order was correct when made, the respondents have succeeded on this appeal and should have their costs. I agree with the order proposed.

MORGAN, J.A.:

I have had the opportunity of reading the draft judgment of Forte, J.A. and Downer, J.A. and agree that Section 5 of the Arbitration Act is not applicable for a stay of Proceedings in the circumstances of this case and for the reasons as set out by him. I would therefore dismiss this appeal with cost to the Respondents.

With respect to the appeal against the refusal to set aside the judgment and to stay Execution, Forte, J.A. has quoted excerpts from the proposed defence as filed and I agree that there is on the face of it an arguable defence with merit sufficient to go to trial.

The appellant does not deny that rent is due. It is due and continuing. His defence is that the judgment is in excess of the rent due. It is only just, that the respondents should feel secure in at least a part of the recovery of their rent which they now seek to obtain.

I agree with my learned brothers that the appeal be allowed and agree with the order about to be delivered.

FORTE, J.A.:

It is ordered:-

1. The default judgment is set aside and all consequential orders flowing therefrom, on the following terms.

2. That the appellant pay into Court the sum of $25,500.00 being 50% of the rental due within 30 days of the date hereof to abide the result of this action.

3. Leave granted to appellant to file and deliver his defence if required within 14 days of the payment into Court.

4. Costs thrown away by the Respondent in the Court below occasioned by the default judgment and execution be agreed and taxed and to be Respondents.

5. No order as to Costs either here or below.

> "9. In breach of Clause 4(a) the Plaintiff has refused to allow any abatement of the rent and insists on charging the Defendant the original rent under the agreement."

It will be for a trial court to try this issue. What is the basis for trying this issue? The case of Morgan & Son, Ltd., v. S. Martin Johnson & Co. Ltd. [1949] 1 K.B. 107 is instructive. The headnote reads:

> "Held, that, as the facts set out in the defendants' affidavit would have supported a claim to an equitable set off against the plaintiffs' claim, the judge should have given the defendants unconditional leave to defend the action, and should not have allowed the plaintiffs to sign judgment."

In the course of his judgment, Tucker, L.J., at pages 112-113 said:

> "It may be helpful also to mention, on this question of equitable set-off, Rawson v. Samuel [1839] Cr. & Phil. 161, 179, and the passage in the judgment of Lord Cottenham L.C. [1839] Cr. & Phil. 161, 179, where he refers to some of the previous authorities. He said: 'several cases were cited in support of the injunction; but in every one of them, except Williams v. Davies [1829] 2 Sim. 461, it will be found that the equity of the bill impeached the title to the legal demand. In Beasley v. Darcy [1800] 2 Sch. & Lef. 403n the tenant was entitled to redeem his lease upon payment of the rent due; and in ascertaining the amount of such rent, a sum was deducted which was due to the tenant from the landlord for damage done in cutting timber. Both were ascertained sums, and the equity against the landlord was that he ought not to recover possession of the farm for non-payment of rent whilst he owed to the tenant a sum for damage to that same farm. In O'Connor v. Spaight [1804] 1 Sch. & Lef. 305, the rent paid formed part of a complicated account; and it was impossible, without taking the account, to ascertain what sum the tenant was to pay to redeem his lease'."

Further on the same page the learned Lord Justice said:

> "In Piggott v. Williams (1821) 6 Madd. 95 —and this is the case most in point, I think— "the complainant against the solicitor for negligence went directly to impeach the demand he was attempting to enforce."