IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 103 of 2014

BETWEEN : **RAJ DUTT of Navakai, Nadi, Fiji Retired.**

PLAINTIFF

AND: **SUNIL DUTT** of Navakai, Nadi, Fiji, Supervisor in his personal capacity and as one of the Administrator of the **ESTATE OF RUDRA DUTT** father's name Badal of Navakai, Nadi, Fiji, Cultivator and as one of the Executor and trustee in the **ESTATE OF SHEELA** father's name Angu Prasad of Navakai, Nadi, Domestic Duties.

FIRST DEFENDANT

AND : **RAM DATT** of Navakai, Nadi, Fiji, Carpenter in his personal capacity as one of the Administrator of the **ESTATE OF RUDRA DUTT** father's name Badal of Navakai, Nadi, Fiji, Cultivator and as one of the Executor and trustee in the **ESTATE OF SHEELA** father's name Angu Prasad of Navakai, Nadi, Domestic Duties.

SECOND DEFENDANT

AND : **ANIL DATT** of Navakai, Nadi, Fiji, Driver in his personal capacity as one of the Administrator of the **ESTATE of RUDRA DUTT** father's name Badal of Navakai, Nadi, Fiji, Cultivator and as one of the Executor and trustee in the **ESTATE OF SHEELA** father's name Angu Prasad of Navakai, Nadi, Domestic Duties

THIRD DEFENDANT

AND : **MANJULA WATI** of Navakai, Nadi, Fiji, Domestic Duties in her personal capacity as one of the Administrator of the **ESTATE OF RUDRA DUTT** father's name Badal of Navakai, Nadi, Fiji, Cultivator and as one of the Executor and trustee in the **ESTATE OF SHEELA** father's name Angu Prasad of Navakai, Nadi, Domestic Duties.

FOURTH DEFENDANT

AND : **DIRECTOR OF LANDS**

FIFTH DEFENDANT

The Plaintiff is in Person.
Mr. Hari Ram for the first Defendant .
The Second, Third and Fourth Defendants are in Person.
Mr. John Samson Pickering (State Counsel) for the 5th Defendant.

Date of Hearing :- 02nd April 2015
Date of Ruling :- 22nd June 2015

RULING

(A) INTRODUCTION

(1) Before me is the first Defendant's Notice of Motion pursuant to Order 13, rule 10 and Order 19, rule 9 of the High Court Rules, 1988 and the inherent jurisdiction of the Court seeking the grant of the following Orders:-

(a) *An **ORDER** that the Judgment In Default entered against the First Defendant on the 14th day of July 2014 be set aside and or dissolved and or discharged.*

(b) *An **ORDER** that the execution of the said Judgment In Default entered by the Honourable Court on the 14th day of July 2014 be stayed.*

(c) *An **ORDER** that leave be given to the First Defendant to file Acknowledgment of Service and Statement of Defence.*

(d) *An **ORDER** that the Plaintiff pays for the cost of this application.*

(2) The application is supported by the Affidavit of David Sachindra Reddy, the legal executive, Rams Law, Solicitor for the first Defendant.

(3) The Plaintiff filed an Affidavit in Opposition opposing the application.

(4) The Plaintiff and the first Defendant were heard on the Notice of Motion. They made oral submissions to court. In addition to oral submissions, the first Defendant filed written submissions for which I am most grateful.

(B) THE LAW

An application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action has never been heard on the merits.

A Defendant against whom judgment in default has been entered may apply for it to be set aside under Order 13, rule 10 or under Order 19, rule 9 of the High Court Rules.

In situations where the Defendant has failed to file in the first instance, notice of intention to defend, then order 13 procedure is the correct process.

Order 19 is applicable only where, after notice of intention to defend is filed, no statement of defence had followed.

❖ THE PRINCIPLES OF SETTING ASIDE DEFAULT JUDGMENTS

A default judgment can be obtained regularly or irregularly and both of these forms of judgments can be set aside.

However, there is a distinction between setting aside a default judgment for irregularity and setting aside a judgment which was in fact regular.

Fry L J in **Alaby –v- Praetorious [1888] 20 QBD 764** at 769 succinctly drew the distinction as follows:-

> *"There is a strong distinction between setting aside a default judgment for irregularity in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular has been obtained through some slip or error on the part of the Defendant in which case the court has a discretion to impose terms as a condition of granting the Defendant relief."* (emphasis added).

This principle was adopted and applied by the Fiji Court of Appeal in **"Subodh Kumar Mishra v Rent-a-car"** (1985) 31 FLR 52. Thus, where an irregular default judgment is entered (for example time for acknowledging service or for serving a defence had not expired by the time the default judgment was entered) which irregularity cannot be cured the Defendant is entitled as of right to have the judgment set aside.

However, where the default judgment had been entered regularly, the Court has a wide discretion and neither Order 13, rule 10 nor Order 19, rule 9 of the High Court Rules impose any restriction in the manner in which the discretion is to be exercised.

The rationale for the unconditional discretion that allows the court to intervene is explained by Lord Atkin in **"Evans v Bartlam"**, 1937 DC 473 as follows;

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

Lord Atkins pronouncement was endorsed and followed by the Fiji Court of Appeal in **The Fiji Sugar Corporation v Mohammed Ismail** FLR Vol 34, p75.

The Principles applicable for analysis of the merit of an application to set aside a default judgment are well known and settled. The leading authority is **Evans –v- Bartlam** [1937] 2 All E.R. 646. The following passage from the judgment of Lord Atkin in **"Evans v Bartlam"** is pertinent in the subject of principles on which a court acts where it is sought to set aside a regular Default judgment;

> *"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication..... The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

The principles of that case have been widely adopted in Fiji, and by the Fiji Court of Appeal in **Pankanji Bamola & Anor. –v- Moran Ali** Civil Appeal No. 50/90 and **Wearsmart Textiles Limited –v- General Machinery Hire & Anor** Civil Appeal No. ABU0030/97S.

In **"Pankaj Bamola & Anor v Moran Ali"** (supra) the Court of Appeal held;

> *It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the court must form a provisional view of the probable outcome of the action.*

In **Russell v Cox 1983 NZLR 654, McCarthy J** held;

> *"In approaching an application to set aside a judgment which complies with the rule, the Court is not limited in the considerations to which it may have regard, but three have long been considered of dominant importance. They are;*
>
> 1. *That the defendant has a substantial ground of defence;*
> 2. *That the delay is reasonably explained;*
> 3. *That the plaintiff will not suffer irreparable injury if the judgment is set aside.*

A useful summary of the factors to be taken into consideration is to be found under notes to Or. 13 r9/14 of **THE SUPREME COURT PRACTICE 1995** Vol. I at p.142 and which is, inter alia, as follows:-

> *"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgement if the defendant has no defence, and because,*

if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred.

Therefore the judicially recognised "Tests" may be conveniently listed as follows;

(a) Whether the Defendant has a substantial ground of defence to the claim.

(b) Whether the Defendant has a satisfactory explanation for the default judgment.

(c) The promptness with which the application is made.

(d) Whether the setting aside would cause prejudice to the Plaintiff.

The same legal tests apply under the Magistrate Court rules.

❖ THE DEFENCE ON THE MERITS

The major consideration on an application to set aside a default judgment is whether there is a defence on the merits. The purpose is to avoid injustice. The Defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with the rules; this is not something which the court will do lightly.

In **Shocked v Goldsmith** (1998) 1 All ER 372 at 379ff Legatt LJ said:

"These cases relating to default judgment are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and any delays, as well as against prejudice to the other party."

The leading case is **Evans v Bartlam** [1937] 2 All 646, [1937] AC 473. In this case, the defendant had suffered judgement to be entered against him in default of appearance. The Court of Appeal ([1936] 1 KB 202) allowed an appeal from the judge's order setting aside the judgement. But the House of Lords reversed the decision of the Court of Appeal and restored the Judge's order.

Lord Wright ([1937] 2 All ER 646 at 656, [1937] AC 473 at 489) expressed the conclusion;

"In a case like the present, there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown,

the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication... The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion, is empowered by the rule to impose."

In **Vann V Awford** (1986) 130 SJ 682, the judge declined to set aside a judgment given against the second defendant in default of appearance, and also a judgement given against him when damages were assessed in his absence. The Defendant had lied when he said on oath that he had no knowledge of the proceedings. On appeal **Dillon LJ** considered that, despite the prejudice to the plaintiffs, as there were ample arguable defences the award should be set aside and there should be a fresh hearing. He added: "Even for lying and attempting to deceive the court, a judgement for £53,000 plus is an excessive penalty if there are arguable defences on the merits."

This case was followed two weeks later by **The Saudi Eagle [1986] 2 Lloyd's Rep 221**. After reviewing **Evans v Bartlam and Vann v Awford**, Sir Roger Ormrod came to the conclusion that the defendants in the case before the court had failed to show that their defence enjoyed a real prospect of success.

These cases relating to default judgments are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party.

❖ THE YARDSTICK THAT HAS TO BE APPLIED IN DETERMINING THE MERITS OF THE DEFENCE

The Defendant must have a case with a real prospect of success, and it is not enough to show a merely arguable defence. **(Alpine Bulk Transport Company v Saudi Eagle Shipping Company, 1986 2 Lloyds Report, P 221).**

It must both have "a real prospect of success" and "carry some decree of conviction". Thus the court must form a provisional view of the probable outcome of the action. Unless potentially credible affidavit evidence demonstrates a real likelihood that a Defendant will succeed on fact, no real prospect of success is shown and relief should be refused. **(Wearsmart Textiles Ltd v General Machinery Hire Ltd, (1998) FJCA 26.)**

A person, who holds a regular judgment even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than merely arguable case is needed to tip the balance of justice to set the judgment aside. **(Moore-Bick J in International Finance Corporation, (2001) CLC 1361).**

The real prospect of success means that the prospects must be better than merely arguable. The word "real" directs the court to the need to see whether there is a

realistic as opposed to a fanciful prospect of success. It saves expense, achieves expedition, avoids the courts resources being used up in cases where that serves no purpose and is in the interest of justice.

There is no room for speculative defences and potentially credible affidavit evidence must demonstrate a real likelihood that a defendant will succeed. Otherwise no real prospect of success is shown and relief should be refused (**Allen v Taylor**) [1992] PLQR 255)

The test was considered in detail in **Swain v Hilman** (2001) (1), All E.R. 91 and the court confirmed that;

> *"The test is the same as the test for summary judgment. The only significant difference is that in a summary judgment application the burden of proof rests on the claimant to show that the defendant has no real prospect of success whereas in an application to set aside a default judgement it is for the defendant to show that his defence has a real prospect of success.*

❖ DELAY

An application to set aside default judgment must be made "promptly" and without "delay".

In **"Pankaj Bamolc and Another v Moran Ali"** FCA 50/1999, a party seeking to set aside an Order had delayed for nearly 08 months. The Court took the view that no adequate explanation had been provided for that and concluded that the application should be refused because it had not been made promptly and without delay.

Promptness will always be a factor of considerable significance and, if there has been a marked failure to make the application promptly, a court may well be justified in refusing relief, Notwithstanding the possibility that the Defendant may well succeed at the trial.

Whether or not there is a defence on the merits may be, the dominant feature to be considered but that does not mean that it cannot be swamped by other features such as unexplained delay in bringing the application to set aside the judgment.

Although the fact that damages have been assessed and a final judgement entered does not deprive the court of jurisdiction to set aside a default judgment; it is highly relevant to the exercise of discretion. It is an aspect of, but separate from, the question of delay. The ***Saudi Eagle*** **case** *(supra)* is clear authority for the proposition that an application to set aside a default judgement can be made notwithstanding that final judgment has been entered.

In **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc (The Saudi Eagle) [1986] 2 Lloyd's Rep** the defendants, believing that they had no assets, deliberately allowed an interlocutory judgment for damages to be assessed to be entered against them by default, and only after damages had been assessed and final judgment entered, realising that they had given security, applied initially to the judge

and then on appeal to the Court of Appeal, unsuccessfully at both hearings, to set aside the judgement and for leave to defend. The application was refused on the merits; but it was not suggested that the judge would not have had jurisdiction to set aside the judgment had it been appropriate to do so. Therefore, it cannot be said that a judgement (by default) for damages to be assessed is spent once damages are assessed; it remains the source of the plaintiff's right to damages. Nor can it be said that in such a case the interlocutory judgment is overtaken or superseded by the final judgment for a liquidated sum; it would be more accurate to say that it is completed and made effective by the assessment.

It cannot be safely assumed in every case that any prejudice to the plaintiff can be met by putting the defendant on terms to pay the costs thrown away by the assessment hearing. There can be no rigid rule either way; it depends on the facts of the particular case.

❖ PROCEDURE

An application to set aside a default judgment which has not been entered wrongly must be supported by evidence. Commonly, a draft defence is attached to the affidavit in support of the application.

A draft defence is not necessary, what is required is the affidavit of merits. **(The Fiji Sugar Corporation Ltd. v Mohammed Civil Appeal No. 28/87.)**

If the Defendant does not have an affidavit of merits, no setting aside order sought to be granted except for some very sufficient reason. **(Wearsmart Textiles Ltd v General Machinery Hire Ltd, (1998) FJCA 26.)**

In ***Wearsmart Textiles Ltd v General Machinery Hire Ltd*** [1998] FJCA 26; ***Abu0030u.97s (29 May 1998)*** the Fiji Court of Appeal cited the following passage f rom the Supreme Court Practice 1997 (Volume 1) at p.143.

> *"Regular judgment – if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason." per Huddleston, B., ibid. p.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v Barnett (1878) 3 Q.B.D. 183, p.363).*
>
> (my emphasis)

> *"it is an (almost) inflexible rule that there must be an affidavit of merit i.e. and affidavit stating facts showing a defence on the merits (FARDEN v RICHTER (1989) 23 Q.B.D. 124)" The Supreme Court Practice 1993 Or 13 r.9 p.137).*

> *"At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason" HUDDLESTON, B in FARDEN ibid p.129).*

❖ **SETTING ASIDE ON CONDITIONS**

In the exercise of Court's discretion, the court may attach conditions to an order to set aside judgment. In some cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In appropriate cases, the court may also require the defendant to pay money into court to await the final disposal of the claim. Such a condition is commonly imposed where,

1. The defendant has satisfied the court that it has a defence with a real prospect of success.

2. The Defendant has an explanation why he neglected to appear after being served.

3. The truth of which is indeed denied by the Plaintiff.

4. The court seeks no reason why the Defendant should be disbelieved in what appears to be a mere conflict on affidavits.

The conditions imposed on setting aside a default judgment are not intended to punish the defendant but to ensure that justice is achieved between the parties (**VIJAY PRASAD v DAYA RAM CIV** APP 61/90 FCA; **SUBODH KUMAR MISHRA s/o Ramendra Mishra v CAR RENTALS (PACIFIC) LTD** CIV APP 35/85 FCA). The said judgments do not lay down any basis upon which the discretion is to be exercised.

In **GARDNER v JAY (1885) 29 Ch.D 52** at p.58 **BOWEN L.J**. said on this aspect that:

> *"... when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the Actor the Rules did not fetter the discretion of the Judge why should the Court do so?"*

(C) THE FACTUAL BACKGROUND AND ANALYSIS

It is necessary to approach the case through its pleadings, bearing all those legal principles in my mind.

(1) The Plaintiff's claim is based on allegations of fraud and false misrepresentation.

(2) In his Statement of Claim, the Plaintiff seeks the following relief

(a) A Declaration that the transfer of Leases issued to the Defendant be declared Nul and Void.

(b) ***THAT*** *the Defendants by themselves, their servants, agents, nominees, whosoever and whatsoever be restrained from entering the said property.*

(c) ***DAMAGES*** *for harassment, intimidation and pain and suffering against the Defendants as a result of the fraud transfers.*

(d) *AN Order that the Defendants and/or their servants and/or agents do pay interest to the Plaintiff pursuant to Miscellaneous Provisions (Births and deaths) Law Reform.*

(e) *AN Order that the Defendants do pay General Damages Punitive and Aggravated Damages to the Plaintiff.*

(f) *AN Order that 1st to 4th Defendants pay the costs of the 3 houses, 2 cars, personal belongings and other items in the sum of $50,000.00 with interest.*

(g) *AN Order that 1st to 5th Defendants do pay costs for loss of all income with interest of 12.5% per annum for loss of life of my wife, costs for pain and suffering, costs for staying in tent for one month (on road) and all costs from 2004 till to date for going to Magistrate's Court, High Court, Fiji Court of Appeal and now back to High Court, costs for all the fees for court filing documents, searches, all expenses that incurred while travelling from Nadi to Lautoka and Suva to attend Court in the sum of $100,000.00.*

(h) *AN Order that 5th Defendant, the Lands Department together with 1st to 4th Defendants as equally the parties pay to the Plaintiff the sum of $650,000.00 with interest.*

(i) *AN Order for the Lands Department to execute proper Residential Title of Quarter area from the 2.24 hectares with proper road consent to water and electricity.*

(j) *Such further and/or other relief that may seem just and proper to this Honorable Court.*

(3) The Plaintiff instituted the proceedings herein against the Defendants on the 26th day of June 2014 and due to the Defendant's failure to file their respective Acknowledgments of Service the Plaintiff obtained a Default Judgment against the 1st Defendant, 2nd Defendant, 3rd Defendant and 4th Defendant on the 17th day of July 2014 which the First Defendant now seeks to set aside.

(4) Reading as best I can, between the lines of the Affidavit in Support of the application, it seems to me, the basis of the application is that;

(a) Due to an inadvertent mistake, the first Defendant could not file the Acknowledgment of Service on time.

(b) The first Defendant has a meritorious defence to the Plaintiff's Statement of Claim.

(5) The proposed Statement of Defence of the first Defendant is attached to the Affidavit in Support of the application to set aside the Default Judgment. Further, the first Defendant has a counter claim based on the Plaintiff's unlawful occupation of the property. The Defendant laid great stress on the strength of the Defence.

(6) In *adverso*, the Plaintiff forcefully submits that: (Plaintiff deposes in his Affidavit in Opposition)

> *"That the Plaintiff prays to this Honourable Court that the Application filed by the 1st Defendant be dismissed as they had more than enough time to file the acknowledgment of service and statement of defense but they failed to do so."*

(7) There is no evidence to persuade me that the failure to file the Acknowledgment of Service was both deliberate and tactical.

(8) The first issue to be determined in this application is whether the default judgment was regularly entered. Thus, where an irregular default judgment is entered (for example time for acknowledging service or for serving a defence had not expired by the time the default judgment was entered) which irregularity cannot be cured the Defendant is entitled as of right to have the judgment set aside.

However, where the default judgment had been entered regularly, the Court has a wide discretion and neither Order 13, rule 10 nor Order 19, rule 9 of the High Court Rules impose any restriction in the manner in which the discretion is to be exercised.

(9) The prescribed time for the filing of Notice of Intention to Defend and the Acknowledgment of service of Writ is stipulated under Order 12, rule 4 as fourteen days.

(10) In this instance, the Writ was served on the Defendants on 27th June 2014. The default judgment was obtained on 17th July 2014. Therefore, there was sufficient time to file the Acknowledgment of Service.

(11) **Nevertheless, is the default judgment entered in accordance with the High Court Rules, 1988?**

The answer to this question is obviously "No."

(12) The default judgment reads as follows;

> *"**NO ACKNOWLEDGEMENT OF SERVICE TO PLAINTIFFS WRIT OF SUMMONS AND STATEMENT OF CLAIM** having been filed by the 1st Defendant, 2nd Defendant, 3rd Defendant and the 4th Defendant herein. **IT IS** this day adjudged **That***
>
> *1. **Judgment** be entered against the 1st Defendant, 2nd Defendant, 3rd Defendant and 4th Defendant in the sum of Fj$150,000.00 with interest,*

2. ***Damages*** *for harassment, intimidation and pain and suffering against the Defendants as a result if the fraud transfer.*

3. ***An*** *order that the Defendant and/or their servants and/or agents do pay interest to the Plaintiff pursuant to Miscellaneous Provisions (Births and deaths) Law Reform*

4. *An order that the Defendant do pay General Damages Punitive and Aggravated Damages to the Plaintiff."*

What does the default judgment represent?

It appears that the Plaintiff has obtained a final judgment for unliquidated damages.

The Plaintiff could only obtain an interlocutory judgment for unliquidated damages and not a final judgment.

This is clear under **Order 13, rule 2** which reads;

> *"Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any."*

If the Plaintiff wished to obtain a final judgment then the proper cause was to have its claim assessed by the court.

It is important to bear in mind that the Plaintiff primarily claims that he has suffered financial loss and damages as a result of the fraud transfer of the property. As per the reliefs sought in the Statement of Claim, paragraphs "c" and "e" of the Plaintiff's prayer, are claims for an unliquidated damages.

There is nothing in the material currently before me to show that these damages are FJ $150,000.00. The appropriate procedure for entering default judgment, in view of the reliefs sought in paragraph "c" and "e" of the prayer, in the Statement of Claim, was under **Order 13, rule 2.**

Moreover, as per the relief sought in paragraph (a) of the prayer, it requires a summons.

Paragraph (b) in the prayer in essence is Restraining Order. No default judgment can be administratively entered. Application for injunctions must be made by a Summons or Notice of Motion. Put another way, where equitable relief is sought and the defendant does not defend the claim, a judgment can be obtained only at a hearing before a Judge.

In view of the aforementioned matters, I hold that the default judgment is **irregular.** Therefore, there is no need for me to express any view on the strength of the Defence, since this matter can go no further.

(D) CONCLUSION

Having had the benefit of written submissions for which I am most grateful and after having perused the Affidavits and the pleadings, doing the best that I can on the material that is available to me, I am not hesitant to conclude that the default judgment was entered irregularly by the Plaintiff.

(E) FINAL ORDERS

(1) The default judgment entered against the first Defendant on 17th July 2014, is set aside.

(2) The first Defendant is at liberty to defend this claim unconditionally.

(3) The first Defendant is ordered to file its Acknowledgment of Service within 14 days from the date hereof.

(4) The costs of this application be in the cause.

22/06/2015

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Jude Nanayakkara
Acting Master of the High Court

HIGH COURT OF FIJI LAUTOKA

At Lautoka
22nd June 2015