

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

**Civil Case
No. 22/1342 SC/CIVL**

**BETWEEN: iCount House Limited (formerly known
as PKF House Limited)**

Claimant

AND: Guan Kai

Defendant

Date: 26 February 2024
Before: Justice V.M. Trief
Counsel: Claimant – Mr M. Hurley
Defendant – Mr S. Kalsakau

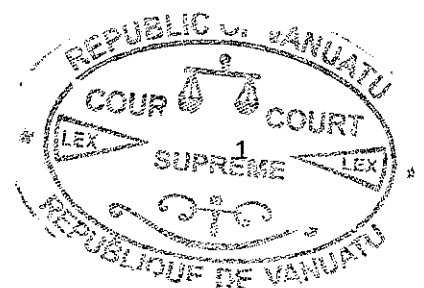
DECISION AS TO APPLICATION TO SET ASIDE DEFAULT JUDGMENT

A. Introduction

1. This was a contested application to set aside the default judgment entered on 14 June 2023.

B. Background

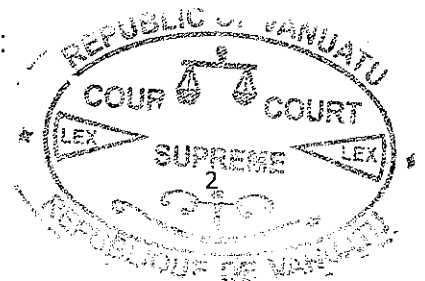
2. The Claimant iCount House Limited ('iCount') is alleged to be the registered proprietor of the premises known as the iCount Building Kumul Highway, Port Vila, Efate (the 'Premises').
3. On 1 August 2019, the Defendant Mr Guan Kai entered into a written Tenancy Agreement (the 'Agreement') with iCount in which he agreed to rent the ground floor of the Premises for a 3-year term commencing on 1 September 2019 (the 'Term').



4. Mr Kai occupied the ground floor of the Premises from 1 September 2019 until 31 August 2022.
5. iCount's case is that in breach of the clauses of the Agreement pleaded at para. 5 of the Claim, upon expiration of the Term of the Agreement, the Premises were not returned to iCount in good and substantial repair and condition, and that despite demand, Mr Kai did not reinstate the Premises at his cost (pleaded at para. 7 of the Claim).
6. iCount delivered a letter to Mr Kai dated 12 October 2022 in which it demanded payment of VT2,500,000 as a contribution towards the cost of reinstatement of the ground floor of the Premises. Mr Kai did not respond to this letter.
7. On 22 December 2022, iCount filed the Claim in this proceeding against Mr Kai for the recovery of damages, interest and costs for Mr Kai's alleged breaches of the Agreement.
8. On 5 April 2023, Mr Kai was personally served the Claim and the Response form.
9. On 6 April 2023, Orders were made by the Court for the Claim to be renewed with effect from 22 March 2023, for service of those Orders on Mr Kai, and that Mr Kai file and serve a Defence by 4 May 2023. On 18 April 2023, those Orders were personally served on Mr Kai and proof of service filed.
10. No response or defence was filed.
11. On 14 June 2023, the Court entered Default Judgment in favour of iCount with damages to be determined by the Court.
12. Subsequently, the Default Judgment, an Urgent Application for Injunctive Relief and other documents were personally served on Mr Kai. On 26 September 2023, the Court granted the interlocutory orders sought.
13. On 13 October 2023, Mr Kai's lawyer Mr Sakiusa Kalsakau filed a Notice of Beginning to Act.
14. On 8 December 2023, Mr Kai filed an Application to Set Aside Default Judgment pursuant to rule 9.5 of the *Civil Procedure Rules* ('CPR') (the 'Application') and his supporting Sworn statement. He filed his Additional Sworn statement on 20 December 2023.

C. Discussion

15. The starting point is rule 9.5 of the CPR which provides as follows:



9.5 (1) A defendant against whom a default judgment has been signed under this Part may apply to the court to have the judgment set aside.

(2) The application:

- (a) may be made at any time; and
- (b) must set out the reasons why the defendant did not defend the claim; and
- (c) must give details of the defendant's defence to the claim; and
- (d) must have with it a sworn statement in support of the application; and
- (e) must be in Form 14.

(3) The court may set aside the default judgment if it is satisfied that the defendant:

- (a) has shown reasonable cause for not defending the claim; and
- (b) has an arguable defence, either about his or her liability for the claim or about the amount of the claim.

16. Rule 9.5(3) of the CPR contains two criteria that the Court is to be satisfied of however as stated by the Court of Appeal in *ANZ Bank (Vanuatu) Ltd v Dinh* [2005] VUCA 3:

If there were a case where an unanswerable defence was demonstrated, but reasonable cause was not demonstrated, the rules would permit the default judgment to be set aside, but not for the reasons advanced by counsel for the Respondent. The purpose of the rules is to further the administration of justice. The rules should not be applied so as to cause or perpetuate injustice. In the extreme case postulated, the answer would lie in the application of rule 18.10 which deals with failure to comply with the rules, applied in light of Overriding Object 1.2(1), namely that the overriding objectives of the rules is to enable the courts to deal with cases justly.

(my emphasis)

17. Justice Harrop applied the approach outlined by the Court of Appeal in *ANZ Bank v Dinh* in *Mandel v Makin* [2015] VUSC 20.

18. Rule 1.2(1) of the CPR provides as follows:

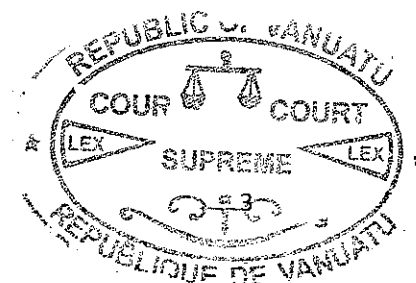
1.2 (1) *The overriding objective of these Rules is to enable the courts to deal with cases justly.*

19. Rule 18.10 of the CPR provides as follows:

18.10 (1) *A failure to comply with these Rules is an irregularity and does not make a proceeding, or a document, step taken or order made in a proceeding, a nullity.*

(2) *If there has been a failure to comply with these Rules, the court may:*

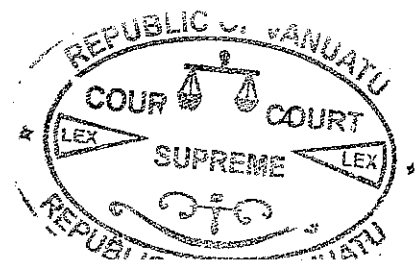
- (a) set aside all or part of the proceeding; or
- (b) set aside a step taken in the proceeding; or



- (c) declare a document or a step taken to be ineffectual; or
- (d) declare a document or a step taken to be effectual; or
- (e) make another order that could be made under these Rules; or
- (f) make another order dealing with the proceeding generally that the court considers appropriate.

(3) If a written application is made for an order under this rule, it must set out details of the failure to comply with these Rules.

20. The reasons given by Mr Kai for not defending the Claim are that when he received the Claim, he was busy dealing with his business issues and travelling overseas to China. Further, that he lost focus of the Claim and the other documents served on him, and had completely forgotten about the Claim so that he only retained legal counsel in October 2023 when he was served with the default judgment.
21. With respect, Mr Kai being busy with his business and travelling overseas is irrelevant and is not a reasonable cause for failing to defend the Claim. There is no evidence otherwise from Mr Kai as to why he omitted to take any of the appropriate steps one would expect of a reasonable and responsible defendant in his position, prior to Mr Kalsakau filing his Notice of Beginning to Act on 13 October 2023. For the reasons given, I am not satisfied that Mr Kai has shown reasonable cause for not defending the Claim.
22. iCount's case is that Mr Kai breached the Agreement by failing to return the Premises to iCount in good and substantial repair and condition because he did not remove any fixtures, fittings and additions, and that despite demand, Mr Kai did not reinstate the Premises at his cost.
23. Mr Kai attached as **Attachment "GK3"** to his Additional Sworn statement a copy of his proposed defence in which he denies the alleged failure to return the Premises in good and substantial repair and condition, and that he is liable for any damage as a result of the alleged breaches.
24. Mr Kai's proposed defence absolutely denies/disputes the alleged breaches of contract and liability for the alleged breaches as set out in the Claim. It is an arguable defence.
25. Standing back and considering both limbs of rules 9.5(3), 1.2(1) and 18.10 of the CPR, I consider that the interests of justice require the setting aside of the Default Judgment. Even though there is no reasonable cause for Mr Kai for not having filed a defence, he has an arguable defence and as the Court of Appeal observed in the *ANZ Bank v Dinh* case, rule 18.10 can properly be applied, and I do apply it, to excuse Mr Kai's failure to file a defence, having regard to the overriding objective of the CPR, namely, to enable the Court to deal with the case justly. I am satisfied that there is an arguable defence to the Claim and that both parties should be given their



“day in Court” rather than to have the matter determined on a procedural knock-out. I consider therefore that there is a risk of injustice if the Default Judgment is not set aside.

26. In addition, I adopt the following words of Harrop J in the *Mandel v Makin* case at [36] as applicable to the present matter, with the reference to a defamation case to be read as applying to a breach of contract case (which the present proceedings are), and the reference to Mr Mandel as referring to iCount:

36. *It is also relevant to my decision to set aside the default judgment that it was only a judgment as to liability. That meant there was always going to be a substantial trial on the question of damages. In assessing the appropriate damages, the Court would inevitably have had to consider in a back-handed way the extent to which there was any liability. In the absence of an earlier considered (rather than default) judgment as to liability, the interests of justice in a defamation case which is both seriously advanced and seriously defended require that all issues are dealt with at once. The current judgment being one as to liability only is, in and of itself, of no value to Mr Mandel until it is followed up with an award of damages.*

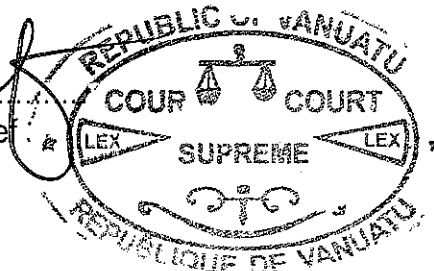
27. For the reasons given, I am satisfied having regard to all the circumstances of the case that the Default Judgment should be set aside.

D. Result and Decision

28. The Defendant's Application to Set Aside Default Judgment filed on 8 December 2023 is **granted** and it is ordered that the Default Judgment dated 14 June 2023 is **set aside**.
29. I will hear counsel as to the costs of the Application at the next conference.

**DATED at Port Vila this 28th day of February 2024
BY THE COURT**

VM Trief
Justice Viran Molisa Trief

The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written along the top and bottom inner edges of the circle. Inside the circle, the words "COURT" appear on either side of the scale, and "SUPREME" is written below it. The word "LEX" is written in two small boxes on either side of "SUPREME".