COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2017/CLE/gen/505

BETWEEN

BAF FINANCIAL & INSURANCE (BAHAMAS) LTD
Formerly
BRITISH AMERICAN INSURANCE COMPANY OF THE BAHAMAS LIMITED

Plaintiff

-AND-

KENDAL WILLIAMS CONSTRUCTION CO.LTD

First Defendant

-AND-

KENDAL WILLIAMS

Second Defendant

-AND-

JENNIFER WILLIAMS

Third Defendant

-AND-

MONIQUE V.A. GOMEZ d.b.a. MONIQUE V.A. GOMEZ & CO.

Formerly

d.b.a. BAIN, GOMEZ & CO

Fourth Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Wayne Munroe QC and Ms. Glenda Roker for the Plaintiff
Mr. Damian Gomez QC for the Fourth Defendant

Hearing Dates: 8 May 2021 – Heard on written submissions

Practice and Procedure – Negligence of Attorney – No appearance or defence - Default Judgment - Regular Judgment – Application to set aside Default Judgment after over three years – Does Attorney have a good and arguable defence with a real prospect of success – Delay – No explanation given for delay

By Specially Endorsed Writ of Summons filed on 24 April 2017, the Plaintiff commenced this action seeking, among other things, damages against four Defendants including the Fourth Defendant, an attorney-at-law, arising from a mortgage dated 24 October 2008. The Plaintiff claims negligence on the part of the Fourth Defendant for her failure to complete instructions on its behalf which resulted in loss to the Plaintiff. The Writ of Summons was served on the Fourth Defendant on 1 June 2017. An Affidavit of Service was filed on 13 June 2017 confirming that she was served. She did not enter an appearance or file a defence in the action. As a result, the Plaintiff filed a Judgment in Default of Appearance on 6 July 2017 ("the Default Judgment"). The Default Judgment was served upon her on 19 July 2017 and she acknowledged service in a letter dated 19 July 2017.

On 5 February 2020, in the presence of the Fourth Defendant, the Court ordered the Defendants to pay their respective judgment sums within 90 days thereof. The Fourth Defendant appeared before this Court again on 9 November 2020 and expressed an intention to settle the debt. She then did a *volte face* when, on 2 February 2021, she applied to set aside the Default Judgment. She alleges that she has a real prospect of success and attached a draft Defence. The Fourth Defendant gave no reason for the delay of over three years in bringing this application.

The Plaintiff alleges that the draft Defence of the Fourth Defendant, which raises two discrete issues namely (i) whether the action is caught by limitation pursuant to section 5(1)(a) of the Limitation Act and (ii) whether the Fourth Defendant was negligent, has no real prospect of success at a trial. In addition, the Plaintiff alleges that the Fourth Defendant, a senior and skillful attorney, offered no reason for her delay in bringing this application.

HELD: Dismissing the application to set aside the Default Judgment with costs to the Plaintiff to be taxed if not agreed.

1. Order 13 rule 8 of the Rules of the Supreme Court, 1978, provides that the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

2. The Court is obliged to set aside a default judgment which has been wrongly entered. The Court may also set aside or vary a default judgment which has been regularly entered if the defendant has a good and arguable case with a real prospect of success and there is a good reason or explanation why the judgment should be set aside. In addition, such application ought to be brought within a reasonable time: **Hanna & another v Lausten** SCCivApp No. 3 of 2014 applied.

3. In the instant case, the application to set aside the Default Judgment was brought over three years since it was entered. No reason was given for the delay and the Fourth Defendant, who was sued for professional negligence, has provided a draft defence which does not raise a good and arguable case. The draft defence has no real prospect of success on the two discrete issues of limitation under section 5 (1)(a) of the Limitation Act and negligence (causation). In other words, the defence proposed by the Fourth Defendant is not convincing enough for this Court to exercise its discretion to set aside the Default Judgment entered against her on 6 July 2017.

4. The Fourth Defendant was present when the Court ordered the Defendants including the Fourth Defendant to pay their respective sums within 90 days thereof. The Fourth Defendant never objected to the Order, Instead, she expressed her intention to settle the matter. She expressed the same intention when she appeared again before the Court some nine months later.

5. The Fourth Defendant did a *volte face* when she brought the present application to set aside the Default Judgment which was regularly obtained.

RULING

Charles J:
Introduction

[1] On 2 February 2021, the Fourth Defendant, Monique V.A. Gomez d.b.a. Monique V.A. Gomez & Co. formerly Bain, Gomez & Co. ("Attorney Gomez") sought an Order to set aside a Judgment in Default of Appearance which was entered against her on 17 October 2017(sic) in this action. On 2 February 2021, Attorney Gomez filed an Affidavit with six Exhibits which supports the application. She also relies on her Supplemental Affidavit filed on 25 February 2021 exhibiting her draft defence ("the Defence") and an Affidavit of the Third Defendant, Jennifer Williams ("the Third Defendant") filed on 7 April 2021.

[2] The Plaintiff, BAF Financial & Insurance (Bahamas) Ltd formerly British American Insurance Company of The Bahamas Limited, ("BAF") opposes the application and relies on the Affidavit of Julian J. Rolle filed on 29 March 2021.

Procedural history

[3] By Specially Endorsed Writ of Summons filed on 24 April 2017, BAF commenced this action seeking, among other things, damages against four Defendants

including Attorney Gomez arising from a mortgage dated 24 October 2008. BAF claims negligence on the part of Attorney Gomez for her failure to complete instructions on its behalf which resulted in loss to BAF.

[4] The Writ of Summons was served on Attorney Gomez on 1 June 2017. An Affidavit of Service was filed on 13 June 2017 confirming that she was served.

[5] An Affidavit of Search filed on 6 July 2017 revealed that Attorney Gomez did not enter an appearance or file a defence to the Specially Endorsed Writ of Summons.

[6] As a result, BAF filed a Judgment in Default of Appearance on 6 July 2017 ("the Default Judgment"). The Default Judgment was served upon her on 19 July 2017 and she acknowledged service in a letter dated 19 July 2017. An Affidavit of Service of Sergeant 1903 Garvin Rolle filed on 3 April 2019 confirmed the same.

[7] On 5 February 2020, learned Counsel for BAF, Ms. Roker appeared before me on an application for an enforcement of the Default Judgment and for a specific time frame to be ordered for payment of the Judgment sum. Ms. Roker indicated to the Court that this application was the last resort after futile efforts were made to settle this matter. Attorney Gomez was present and stated that she represented the Defendants but the Court notified her that she could represent herself but may not be able to represent the other Defendants as she may be conflicted. That said, she was not precluded from making submissions. I granted the Order sought by BAF and the Defendants were ordered to pay their respective judgment sums within 90 days thereof.

[8] Despite her presence at Court, the Order was thereafter served on Attorney Gomez on 10 June 2020 and the Affidavit of Service was filed on 16 June 2020.

[9] According to Ms. Roker, to date, there has been no serious attempts or efforts by Attorney Gomez to settle the outstanding Judgment sum, interest and costs which were ordered against her personally. Instead, she filed the present application

seeking to set aside the Judgment in Default which was entered on 6 July 2017, nearly 4 years ago.

The law on setting aside of default judgment

[10] Order 13 of the Rules of the Supreme Court, 1978 ("RSC O. 13") deals with default of appearance to a Writ of Summons.

[11] RSC O. 13 r. 1(1) provides:

> **"Subject to Order 73, rule 3, where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against the defendant for the sum not exceeding that claimed in the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any."** [Emphasis added]

[12] RSC O. 13 r. 8 provides that the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

[13] Generally speaking, a plaintiff may obtain a default judgment against a defendant who has failed to file an acknowledgement of service or a defence within the time allowed for doing so. The Court is obliged to set aside a default judgment where it has been wrongly obtained, that is to say, where any of the preconditions to the obtaining of such judgment have not been satisfied. For example, a judgment in default of appearance will have to be set aside where it has been obtained before the expiry of the time for service for entering an appearance.

[14] The common law position with respect to setting aside a default judgment is that where the default judgment has been regularly obtained, the court may still choose to set it aside or vary it if (a) the defendant has a good and arguable defence with a real prospect of success (under the English CPR, in the words of Part 13.3(1)), the Defendant has a real prospect of successfully defending the claim) or (b) it appears to the court that there is some other good reason why - (i) the judgment should be set aside or varied; or (ii) the defendant should be allowed to defend the claim.

[15] However, the application to set aside in any proceedings is pre-conditioned on not only a duty to apply under RSC O.2 r.2 (1) to set it aside "within a reasonable time" but also, to give a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be; and the defendant has a real prospect of successfully defending the claim.

[16] These principles have been restated in the Court of Appeal case of **Hanna & another v Lausten** SCCiv App. No. 3 of 2014 where the cases of *Evans v Bartlam* [1937] A.C. 480 and *The Saudi Eagle* 1986 2 Lloyds Rep. 221 were applied. At paragraphs 82 to 90 of the Judgment, Crane-Scott JA stated:

> **82 As we see it, the starting point for any discussion on the law and practice relating to the discretionary power of a judge to set aside a default judgment whether entered under O. 13 or O. 19 usually begins with the oft-cited 1937 decision of the House of Lords in *Evans v. Bartlam (above).* Although the judgment in *Evans v. Bartlam* was one which was regularly entered in default of appearance, the authority applies with equal force to the exercise of the judicial discretion to set aside a regular judgment entered in default of defence conferred under O. 19.**
>
> **83 In their individual speeches, their Lordships explained that the discretionary power conferred under the rules to set aside a default judgment is unconditional, but that the courts have, however, laid down for themselves rules to guide them in the normal exercise of their discretion.**
>
> **84 Lord Atkin acknowledged the existence of one rule (referred to in some of the older authorities as an (almost) inflexible rule) which requires an applicant to produce an affidavit of merits, meaning that evidence must be produced to satisfy the court that the applicant has a *prima facie* defence. [See also *Farden v. Richter* (1889) 23 Q.B.D. 124; *Hopton v. Robertson* [1884] 23 Q.B.D. 126 *Richardson v. Howell* (1883) 8 T.L.R. 445; and *Watt v. Barnett* (1878) 3 Q.B.D. 183 (mentioned at Practice Note 13/9/7 of Volume 1 of the 1999 Annual Practice) in which the necessity for the application to be supported by an affidavit showing a defence on the merits is discussed.]**
>
> **85 Lord Atkin however doubted the existence of a second rule requiring the applicant to satisfy the court that there is a reasonable explanation why judgment was allowed to go by default. Although accepting that a defendant's explanation as to why he allowed a judgment to go by default and why there may have been delay in applying to set it aside, were matters to which a court may have regard in the exercise of its discretion, Lord Atkin (at page 480)**

justified his position that there was only one requirement in the following terms:

> **"If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of their efficacy. 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 only been obtained by a failure to follow any of the rules of procedure. [Emphasis added]**

86 Lord Atkin even went as far as to suggest that even the rule requiring an affidavit of merits could in rare and appropriate cases be departed from. At page 480 he expressed the following view, with which Lord Thankerton concurred:

> **"But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist." [Emphasis added]**

87 In similar vein, Lord Russell of Killowen (at pages 481-482) explained:

> **"It was argued by counsel for the respondent that before the Court or a judge could exercise the power conferred by this rule, the applicant was bound to prove *(a)* that he had some serious defence to the action and *(b)* that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence or (what amounts to the same thing) to the exercise of the judicial discretion.**
>
> **For myself I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in the face of the wording of the rule. It would be adding a limitation which the rule dos not impose.**
>
> **The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion both *(a)* whether any useful**

purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and *(b)* how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance."[Emphasis added]

88 Lord Wright explained the distinction in substance between the setting aside of an irregular judgment *ex debito justitiae*, and the exercise of the court's discretion on an application to set aside a regular judgment. He further identified the 'primary' question which must be considered whenever a court is exercising its discretion whether to set aside a regular judgment. At page 489, he observed:

> **"A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained. 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 it 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...." [Emphasis added]**

89 In *The Saudi Eagle (above)*, the English Court of Appeal in a judgment delivered by Sir Roger Ormrod, in 1986, clarified what they understood the expression *"primary consideration"* referred to in *Evan v. Bartlam* to mean.

90 At page 223 the Court of Appeal interpreted all of the judgments of the House of Lords in *Evan v. Bartlam* as clearly contemplating that a defendant who is asking the court to exercise its discretion to set aside a default judgment in his favour *"should show that he has a defence which has a real prospect of success".* Their Lordships outlined the nature of the task which is to be undertaken by the court which is exercising the discretion in the following terms:

> **"In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence**

> **developed. <u>The "arguable" defence must carry some degree of conviction</u>."**[Emphasis added]"

[17] So, the primary consideration for the Court is whether the Defence put forward by Attorney Gomez has a real prospect of success.

Does the Defence have a real prospect of success?

[18] It is important that I examine the Defence proposed by Attorney Gomez vis-à-vis the Statement of Claim to determine whether it has a real prospect of success at trial. Put differently, does the Defence have some degree of conviction?

[19] Paragraphs 1 to 4 of the Statement of Claim is admitted. Attorney Gomez omitted to refer to paragraph 5 of the Statement of Claim which alleges that BAF advanced the sum of $640,000 by way of commercial loan to the First Defendant. Notwithstanding that she was the Attorney who prepared the Indenture of Mortgage, Attorney Gomez makes no admission to the averment in paragraph 6 of the Statement of Claim which states that the loan was secured by an Indenture of Mortgage dated 24 October 2008 between the First Defendant of the one part as the Borrower and the Second and Third Defendant of the second part as Guarantors and the Plaintiff of the third part as lender wherein the First, Second and Third Defendants granted and conveyed two lots of land as security for the sum of $640,000 which was loaned.

[20] Attorney Gomez admits paragraph 7 of the Statement of Claim which alleges that BAF instructed her by letter dated 6 October 2008 with the accompanying commitment letter to (i) confirm that the First, Second and Third Defendants had good and marketable title to the Civic Industrial Property as well as the Bahamia Property (“the Properties”) and (ii) prepare a legal demand mortgage executed by the First, Second and Third Defendants in favour of BAF. She further alleges that it was an implied term of the contract for legal services between BAF and herself that BAF would inform her of any steps it intended to take so as to enable her to protect BAF’s interest by rendering advice in respect of the intended actions connected to its intended mortgage with the First Defendant.

[21] In paragraph 7 of her Defence, Attorney Gomez makes no admission to the allegations contained in paragraphs 8 and 9 of the Statement of Claim. Essentially, she denies what is stated therein but proffered no reasons for her non-admission.

[22] It is well established that where there is a denial of an allegation, it must be accompanied by the defendant's reason for the denial. If he does not admit what is alleged, he cannot simply say "I make no admission". If he wishes to put forward a different version of events given by the plaintiff, he must state his own version: **M.1.5 Investigations Limited v The Centurion Protective Agency Limited** (Civil Appeal No. 244 of 2008] [Trinidad & Tobago –per Mendonca JA referred to in **Ralph Gooding (In his capacity as Widower, Heir-at-Law and Administrator of the Estate of Coral Gooding, Deceased) v (1) Elizabeth Ellis and (2) National Workers Co-operative Credit Union Ltd (NWCCU)** (2020/CLE/gen/00272), Ruling of Charles J. delivered on 29 April 2021.

[23] In paragraph 8 of her Defence, Attorney Gomez stated:

> **"Save and except for the allegation that the Plaintiff paid the Fourth Defendant $17,236.00 or any money at all, which is denied, the Fourth Defendant admits paragraph 10 of the Statement of Claim filed herein. At trial the Fourth Defendant intends to rely on her bank records to show that she did not receive any money from the Plaintiff as alleged at paragraph 10 of the Statement of Claim herein. Moreover, the Fourth Defendant advised the Plaintiff of the existence of a mortgage of Scotiabank (Bahamas) Limited affecting the title to the properties identified in paragraph 7 of the Statement of Claim filed herein."**

[24] Put differently, she alleges that she was not paid for her services which runs counter contemporaneous documentary evidence which I shall come to momentarily. She also alleges that she advised BAF of the existence of a mortgage which was within her remit so to do since one of her instructions was to confirm that the First, Second and Third Defendants had good and marketable title to the Properties.

[25] At paragraph 9, Attorney Gomez states that BAF was negligent in paying the Second Defendant the sum of $640,000 well knowing of the pre-existing mortgage

of Scotiabank (Bahamas) Limited ("Scotiabank"). She further avers that "in paying the Second Defendant the said sum of $640,000.00 with knowledge of the said first mortgage, BAF assumed the risk that the Second Defendant would fail or refuse to pay Scotiabank which risk materialised". She reiterates that BAF was wholly at fault and responsible for the consequences of the failure of the Second Defendant to pay Scotiabank. Alternatively, she alleges that BAF is contributorily negligent for the loss of the mortgaged property. Further, Attorney Gomez alleges that BAF failed to pay the stamp duty and recording fees associated with the mortgage deed and guarantee deed and that BAF breached the contract by failing to pay her the sum of $17,236.00. Accordingly, she says that BAF is wholly responsible. She also relies on section 5(1)(a) of the Limitation Act alleging that any negligence claimed by BAF against her would have occurred within a reasonable period subsequent to 24 October 2008 and more than six years have expired.

[26] In written submissions, learned Queen's Counsel Mr. Gomez, who appeared for Attorney Gomez, argues that BAF was negligent in failing to have the mortgage stamped and recorded. He maintains that Attorney Gomez' firm did not receive payment from either BAF or the other Defendants for the stamping and recording of the mortgage. He also contends that the Third Defendant swore an affidavit in April 2021 in which she deposed that Scotiabank exercised its power of sale by advertising the Property which was the subject of both mortgages because of the failure of the First, Second and Third Defendants to repay Scotiabank's loan. In the course of the foreclosure exercise by Scotiabank, the Third Defendant was permitted by Scotiabank to sell the Property. The Property was sold and all of the proceeds were paid to Scotiabank to satisfy the Scotiabank mortgage. BAF admitted on affidavit that it gave a cheque directly to the Second Defendant without informing Attorney Gomez. The subsequent Scotiabank foreclosure exercise had nothing to do with her alleged failure to stamp and record BAF's Mortgage Deed but by BAF's own negligence. Mr. Gomez QC further submits that, on the admissions of BAF by pleadings and affidavits, it must fail in showing a cause of

action in negligence and that BAF's claim against Attorney Gomez ought to be properly struck out.

[27] Further, Mr. Gomez QC argues that, in a negligence claim, the plaintiff (BAF) must prove (i) the existence of a duty; (ii) that the defendant owed the said duty to the plaintiff; (iii) the breach of that duty by the defendant and (iv) the causation by the breach of the defendant's said duty: **Ann v Merton London BC** [1978] AC 728 relied upon.

[28] Mr. Gomez QC submits that the Court has a very wide discretion to vary or set aside a judgment entered pursuant to Order 13. In this regard, he cited the cases of **Evans v Bartlam** and **The Saudi Eagle** (supra). According to Mr. Gomez QC, Attorney Gomez has a real prospect of success in her Defence. He urges the Court to set aside the Default Judgment.

[29] In Supplemental Submissions, Mr. Gomez QC submits that BAF has failed, on the issue of causation, to prove that it suffered any damage by reason of any act or omission of Attorney Gomez. He next submits that based on case law and the affidavit evidence, Attorney Gomez has a strong arguable defence on the issue of causation and therefore, she ought to be granted leave to defend the claim.

[30] Stripped to its bare essentials, the Defence raises two discrete issues namely (i) whether the claim brought by BAF is statute barred and (ii) whether Attorney Gomez is negligent on the evidence adduced thus far.

Whether the claim is statute barred?

Discussion

[31] In her Defence, Attorney Gomez relies on section 5(1)(a) of the Limitation Act alleging that any negligence claimed by BAF against her would have occurred within a reasonable period subsequent to 24 October 2008 and more than six years have expired.

[32] Therefore, a good starting point is to look at section 13 and 14 of the Limitation Act ("the Act") which provide special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.

[33] Section 13 provides as follows:

> **"(1) This section shall apply to any action for damages for negligence, other than one to which section 11 or 12 applies, where the starting date for reckoning the period of limitation under subsection (4) (b) falls after the date on which the cause of action accrued.**
>
> **(2) Section 5 shall not apply to an action founded on tort to which this section applies.**
>
> **(3) An action to which this section applies shall not be brought after the expiry of the period applicable in accordance with subsection (4).**
>
> **(4) Such period as aforesaid is either —**
>
> > **(a) six years from the date on which the cause of action accrued; or**
> >
> > **(b) three years from the starting date as defined by subsection (5), if that period expires later than the period mentioned in paragraph (a).**
>
> **(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4) (b) is the earliest date on which the plaintiff or any person in whom the cause of action had earlier vested had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.**
>
> **(6) In subsection (5), "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both —**
>
> > **(a) of the material facts about the damage in respect of which damages are claimed; and**
> >
> > **(b) of the other facts relevant to the current action mentioned in subsection (8).**
>
> **(7) For the purposes of subsection (6)(a), the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify the institution of proceedings for damages against**

a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) are —

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5).

(10) For the purposes of this section and section 15, a person's knowledge includes knowledge which such person might reasonably have been expected to acquire —

(a) from facts observable or ascertainable by such person; or

(b) from facts ascertainable by such person with the help of appropriate expert advice which it is reasonable, in the circumstances, to seek,

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as that person has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice".

[34] Section 14 provides as follows:

(1) An action for damages for negligence, other than one to which section 11 or 12 applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission —

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) applies notwithstanding that —

(a) the cause of action has not yet accrued; or

(b) where section 13 applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred,

before the end of the period of limitation prescribed by this section".

[35] BAF submits that its claim against Attorney Gomez is grounded in negligence and is within the limitation as prescribed. BAF correctly submits that the earliest date of knowledge which may be applicable is 21 February 2012 when the Conveyance over the Bahamia Property was recorded in the Registry of Records. The Writ of Summons was filed in this matter on 24 April 2017, some 5 years after the lodgement of the Conveyance over the Bahamia Property and nearly 3 years as to the actual date of knowledge of the failure to stamp and record the security. Further, as the security continues to remain outstanding, save for this action, there is no notice to the world of any encumbrance to the second property. BAF relies on section 14 (1) of the Act and states that the limitation period extends to 15 years from the date there accrued an act or the omission. Alternatively, section 13 (13) (4) (a) of the Act in that six years had not elapsed from the lodgment of the Conveyance over the Bahamia Property to the institution of the action.

[36] In my judgment, this action is not statute-barred. Both sections 14(1) and 13(13)(4)(a) are favourable to BAF. It follows that, on this issue, Attorney Gomez has no real prospect of success should the matter proceed to trial.

Negligence

[37] BAF alleges that there is a cause of action grounded in professional negligence as against Attorney Gomez and her Defence has no real prospect of success. BAF having been satisfied that a First Legal Demand Mortgage was executed and that all fees associated thereon were acknowledged as paid by Attorney Gomez disbursed the loan proceeds as instructed by the First Second and Third Defendants.

[38] Some years later, it came to BAF's knowledge that Attorney Gomez had failed to have the security documents stamped and lodged for recording thus there was no

notice of the encumbrance to the world. According to Ms. Roker, Attorney Gomez also failed and/or refused to make the efforts of a prudent attorney of forwarding the unstamped and unrecorded documents along with the title documents to each parcel to BAF or executing an Affidavit of Loss annexing the documents in the event that they were unable to be located. As she did not stamp and record the Indenture of Mortgage dated 24 October 2008, there was no notice of the assurance and the Third Defendant was able to convey the Bahamia Property to Cedric and Stacey Beckles by Indenture of Conveyance dated 15 November, 2011. Accordingly, BAF cannot be said to be contributorily negligent for Attorney Gomez's failure to ensure that the security was valid and enforceable. I agree.

[39] In addition, says Ms. Roker, Attorney Gomez simply did not discharge her duty as a reasonable and prudent attorney acting on behalf of BAF to have the security perfected. To date, she has failed and/or refused to forward original documents and has offered no excuses for the same.

[40] In fact, in a letter to BAF dated 24 October 2008 (Exhibit "JJR-2"), she acknowledged that once the mortgage is stamped and recorded, it will represent a valid and enforceable security. Yet, she failed to do so and now attributes culpability at the feet of BAF when effectively, it is the other way around. She was attorney acting on behalf of BAF.

[41] In her Defence and also in submissions, Attorney Gomez alleges that, at trial, she would prove that she was not paid the $17,236.00 which were required for the stamping and recording of the mortgage by either by BAF or the other Defendants. However, there is contemporaneous documentary evidence stamped "paid" and initialed by one S. Stewart of her firm: See Exhibit "JJR-3". The S. Stewart is "Sandra Stewart" who signed for Monique V.A. Gomez on the letter dated 24 October 2008 to Mr. & Mrs. Williams enclosing "our Statement of Account in connection with Re: Mortgage on Lot 9B, Block "SS-1" Civic Industrial Area and Lot 30, Block "T", Section 1, Bahamia Subdivision, Freeport, Grand Bahama." The Statement of Account is for $17,236.00.

[42] Further, Attorney Gomez relies on the ingredients of the tort of negligence and submits that BAF has failed to address her submissions on the issue of causation alleging that the Plaintiff is unable to prove that it suffered any damage by reason of any act or omission of her. She insists that such damage suffered by BAF has been caused by its own intervening acts. In this regard, she relies on a plethora of judicial authorities: see paragraph 3 of her Supplemental Written Submissions. She submits that she has a strong arguable case on the issue of causation. Having considered these submissions, in my considered opinion, this issue has no real prospect of success at trial. The claim brought against her is grounded in professional negligence.

Delay

[43] Attorney Gomez has not provided a reason for the inordinate delay in filing an acknowledgement of service in accordance with the Rules.

[44] Although not substantial to the exercise of the court's discretion, it is a factor to mention. She has appeared before the Court on at least two occasions, one of which being the occasion when the application for the enforcement of the Order was made against her on 5 February 2020. She was permitted to speak and she demonstrated, in my opinion, an interest to have this matter settled. She appeared once again on 9 November 2020 and reiterated her intention is to settle this matter amicably. At that hearing, she informed the Court that her client, Jennifer Williams intends to sell some properties to pay off the debt. She then appeared again on 18 February with this *volte face* application – shifting the culpability to BAF.

[45] Attorney Gomez has waited for nearly 4 years from the institution of the Default Judgment and nearly 1 year from the application for enforcement to bring the present application to set aside the Default Judgment. She offered no reasonable or any excuse at all for the delay in bringing this application. As Ms. Roker correctly stated, Attorney Gomez is a senior, respectable and skilled member of the legal profession and is possessed with the requisite knowledge that she ought to have moved quickly to have the Default Judgment set aside. The dilatory conduct on

her part and the length of the delay are additional factors which militate against the Court exercising its discretion to set aside the Default Judgment.

Conclusion

[46] In the premises, I will dismiss the Summons to set aside the Default Judgment with costs to BAF to be taxed if not agreed.

Dated this 25th day of May, A.D., 2021

Indra H. Charles
Justice