COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2017/CLE/gen/00505

BETWEEN

BAF FINANCIAL & INSURANCE (BAHAMAS) LTD.
Formerly
BRITISH AMERICAN INSURANCE COMPANY OF THE BAHAMAS
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 Senior Justice Indra H. Charles

Appearances: Ms. Glenda Roker of Davis & Co. for the Plaintiff
Mr. Harvey Tynes KC with Tanisha Tynes-Cambridge for the Fourth Defendant

Hearing Date: 27 April 2022

Practice and procedure – Leave to appeal – Stay of Proceedings - Application to set aside default judgment –Whether the order was a final order which does not require leave to appeal – Whether the Court properly exercised its discretion to refuse to set aside default judgment – Whether the correct test was applied to an application to set aside default judgment – Court of Appeal Act, sections 9 and 11 (f)

On 24 April 2017, the Plaintiff commenced this action, asserting against the Fourth Defendant professional negligence arising from her failure to stamp and record a mortgage which resulted in loss of security. The Specially Indorsed 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. As a result, the Plaintiff filed a Judgment in Default of Appearance ("the Default Judgment") on 6 July 2017. The Default Judgment was served on the Fourth Defendant 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 alleged 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.

By Ruling delivered on 25 May 2021, this Court refused the Fourth Defendant's application to set aside the Default Judgment. On 27 May 2021, the Fourth Defendant filed an application seeking leave to appeal the said Ruling.

HELD: Refusing the application for leave to appeal and stay pending appeal with costs awarded to the Plaintiff fixed at $5,000

1. Accepting that there is no statutory provision with respect to when an order is final or interlocutory, the position in England should obtain. The English practice for determining whether a judgment or order is final or interlocutory was set out clearly in **Salaman v Warner** [1891] 1 QB 734: the question is whether it finally disposes of the matter. This position was also adopted by the Bahamas Court of Appeal in **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** [2014] 2 BHS J. No. 73. Applying that test, the decision to refuse to set aside the Default Judgment was a final judgment because it disposed of the matter finally. Accordingly, leave is not required to appeal the decision.

2. Whether there is an arguable defence and the reason for the Default Judgment having been entered regularly are not pre-conditions, but considerations to the exercise of the discretion to set aside a Default Judgment. However, the question of whether the defendant has a good and arguable defence is the primary consideration in exercising the discretion: **Evans v Bartlam** [1937] 2 All ER 646 relied upon.

3. “A real prospect of success” and “some degree of conviction” are substantially the same as “prima facie” defence, “serious” defence and whether the defence has “merits to which the Court should pay heed”. The test applied in the Ruling was merely differences in nomenclature but, essentially, they mean the same thing.

4. It was reasonable for the Court, at the preliminary stage, to determine that the Fourth Defendant did not have a good and arguable defence. There was documentary evidence that the Fourth Defendant would not have been able to make out her defence that the Firm had not been paid for the stamping and recording of the mortgage.

5. By having regard to the Fourth Defendant’s delay in applying to have the Default Judgment set aside, the Court did not make a moral judgment as to her behaviour. It was a valid consideration: **MacDonald v Thorn** [1999] All ER (D) 989 applied; **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., the Saudi Eagle** [1968] 2 Lloyd’s Rep 221 distinguished.

6. The test for whether leave to appeal ought to be granted is whether there is a realistic prospect of success: **Robert Adams (a beneficiary of the estate of Raymond Adams) v Gregory Cottis** 2018/PRO/cpr/00035 applied. The Court has a discretion to grant or refuse an application to stay proceedings. Unless the Plaintiffs could show that the discretion was wrongly exercised or the Court failed to take relevant factors into consideration or took irrelevant factors into consideration, the judge has the discretion to refuse the stay.

RULING

Charles Snr. J:

Introduction

[1] By Summons filed 27 May 2021, the Fourth Defendant, Monique V.A. Gomez d.b.a Monique V.A. Gomez & Co. formerly Bain, Gomez & Co. (“Attorney Gomez”) applied for leave to appeal this Court’s Ruling refusing to set aside the Judgment in Default of Appearance entered against her on 6 July 2017 (“the Default Judgment”).

[2] The Plaintiff (“BAF”) opposes the application, asserting that the Court correctly exercised its discretion to uphold the Default Judgment. BAF contends that the Ruling was well reasoned and the grounds of appeal disclose no error in law. As such, there is no prospect of the appeal succeeding. BAF further contends that, as the Order was a final order, it does not require leave of the Court.

Salient facts

[3] The Court has, in the Ruling, outlined the procedural history that led to the Default Judgment. Some salient facts will be helpful for a better understanding of this Ruling.

[4] BAF agreed to loan the First Defendant a sum of money. The Second and Third Defendants were, at the material time, directors and officers of the First Defendant.

[5] BAF instructed Attorney Gomez to prepare a mortgage by which legal title to two (2) properties would be legally held by BAF as security for the loan. Attorney Gomez prepared the mortgage.

[6] It later came to BAF's knowledge that the mortgage had not been stamped or recorded. As a result, one of the properties held as security under the mortgage was conveyed by the Third Defendant.

[7] By Specially Indorsed Writ of Summons filed on 24 April 2017, BAF commenced this action seeking, among other things, damages against the four Defendants including Attorney Gomez arising from a mortgage dated 24 October 2008. BAF asserts negligence on the part of Attorney Gomez for her failure to complete instructions on its behalf which resulted in its loss.

[8] 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.

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

[10] As a result, BAF filed a Default Judgment .which was served on Attorney Gomez on 19 July 2017. She acknowledged service in a letter dated 19 July 2017. An Affidavit of Service of Sergeant 1903 Garvin Rolle was filed on 3 April 2019.

[11] 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. The Court granted the Order sought by BAF and the Defendants were ordered to pay their respective judgment sums within 90 days thereof.

[12] According to Ms. Roker, as at the date of the hearing of the application to set aside the Default Judgment, there had 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, on 2 February 2021, Attorney Gomez filed the present application seeking to set aside the Default Judgment which was entered on 6 July 2017.

[13] By Ruling dated 25 May 2021, the Court refused the application by Attorney Gomez to set aside the Default Judgment ("the Ruling"). Attorney Gomez filed an Affidavit on 2 February 2021 with six (6) exhibits which supported the application to set aside the Default Judgment. She also relied on her Supplemental Affidavit filed on 25 February 2021 which exhibited her draft Defence ("the Defence") and an Affidavit of the Third Defendant filed on 7 April 2021.

Grounds of appeal

[14] The intended grounds of appeal can be broadly grouped as follows:

a. The Judge's conclusion that Attorney Gomez did not have a good and arguable defence was wrong;

b. The evidence showed that there were intervening acts of BAF breaking the chain of causation and;

c. The quantum of damages claimed by BAF failed to take into account the effect of the primary legal mortgage of Scotiabank (Bahamas) Ltd.

Preliminary issue: Whether leave is required for the Order?

[15] Learned Counsel Ms. Roker who appeared for BAF raised the preliminary point that the order upholding the Default Judgment was a Final Order for which leave is not required to appeal.

[16] In **Old Fort Bay Property Owners Association Limited v Old Fort Bay Company Limited; Matthew Chance Hudson and Zsuzsanna Marta Foti v Old Fort Bay Company Limited and New Providence Development Company Limited; Old Fort Bay Company Limited v Old Fort Bay Property Owners Association Limited** 2014/CLE/gen/773 consolidated with 2014/CLE/gen/0889 and 2017/CLE/gen/00014, this Court was confronted with the same issue and, at paragraphs 39-42, stated the law related to matters that require leave to appeal:

> **"[39] Section 11 of the Court of Appeal Act, Part III deals with the appellate civil jurisdiction. Section 10 references appeals from the Supreme Court in civil proceedings and section 11 places six restrictions on civil appeals. Section 11 (f) provides:**
>
> > **No appeal shall lie –**
> >
> > > **(f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except –**
> > >
> > > > **(i) where the liberty of the subject or the custody of infants is in question;**
> > > >
> > > > **(ii) where an injunction or the appointment of a receiver is granted or refused;**
> > > >
> > > > **(iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;**
> > > > **(iv) in the case of an order in a special case stated under the Ch. 181 Arbitration Act;**

> **(v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Ch. 308 Companies Act in respect of misfeasance or otherwise; or**
>
> **(vi) in such other cases to be prescribed as are in the opinion of the authority having power to make rules of court, of the nature of final decision."**

"[40] The test for determining whether an order is final or interlocutory was set out by Lord Esher MR in Salaman v Warner [1891] 1 QB 734 as follows:

> **"The question must depend on what would be the result of the decision of the Divisional Court assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes ofthese rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in theother, will allow the action to go on, then I think it is not final, but interlocutory."**

[41] Our Court of Appeal in *Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd* [2014] 2 BHS.J. No. 73 has adopted Lord Esher's application test expounded in *Salaman v Warner and Others* [1891] 1 QB 734. At paragraph 24, the Court of Appeal determined that:

> **"…[I]f the decision whichever way it is given will, if it stands, finally dispose of the matter in dispute, it is final. If, on the other hand the decision if given one way will dispose of the matter in dispute, but if given in the other, will allow the action to go on, then it is interlocutory."**

[42] This Court was confronted with the same question in *Findeisen and another v The Wahoo Resort foundation and another* [2014] 3 BHS J No 62 as to whether an order was final or interlocutory for the purpose of determining whether leave to appeal was required under 11 (f) of the Supreme Court Act. There, the Court applied the Salaman test and found that the judgment finally disposed of all of the matters. The decision was affirmed by the Court of Appeal."

[17] Mr. Tynes KC however, submitted that the order is not final but interlocutory. According to him, there is no provision in any statute which specifies when a

judgment or order is final or interlocutory. In support, he referred to section 9 of the Court of Appeal Act which states that where there is no special provision related to the jurisdiction related to appeals, the Court should conform to the practice in England. Section 9 provides:

> **"Where in any case no special provision is contained in this or any other Act, or in rules of court, with reference thereto any jurisdiction in relation to appeals in criminal and civil matters shall be exercised by the court as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Criminal Appeal and the Court of Appeal respectively."**

[18] Mr. Tynes also referred to Order 59 Rule 1A (1) in the 1997 edition of the "White Book" which provides:

> **"For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with the following provisions of this rule."**

[19] Subparagraph (6) (bb) provides:

> **"Notwithstanding anything in paragraph (3), but without prejudice to paragraph (5), the following judgments and orders shall be treated as interlocutory – an order setting aside or refusing to set aside another judgment or order (whether such other judgment is final or interlocutory)."**

[20] I accept that section 9 of the Supreme Court Act states that, where there is no special statutory provision regarding the classification of a judgment or order as final or interlocutory, the position in England should obtain. However, the English practice for determining whether a judgment or order is final or interlocutory was set out clearly in **Salaman v Warner** [1891] 1 QB 734: the question is whether it finally disposes of the matter. This position was also adopted by our Court of Appeal in **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd**. [2014] 2 BHS J. No. 73. Applying that test, the decision to refuse to set aside the Default Judgment was a final judgment because it finally disposed of the matter. Accordingly, I agree with Ms. Roker that leave is not required to appeal the Ruling.

[21] In the event that I am wrong to come to this finding, I shall carry on.

The law

Leave to appeal

[22] In **Gregory Cottis (as Executor of the Estate of Raymond Adams) v Robert Adams (a beneficiary of the Estate of Raymond Adams)** SCCiv App & CAIS No. 23 of 2021, Evans JA, in delivering the Judgment of the Court, set out the law on leave to appeal at paras 11-12:

> **"11. In Smith v Cosworth Casting Processes Limited (1997) 4 All ER 840, Lord Woolf, opined as follows:**
>
> > **(1)The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
> >
> > **(2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying".**
>
> **12. In Keod Smith v Coalition to Protect Clifton Bay (SCCivApp No. 20 of 2017, Isaacs JA adopting the guidance from Lord Woolf noted at paragraph 23 of the Judgment:**
>
> > **"The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord 22 Woolf in Smith v Cosworth Casting Process Ltd [1997] 4 All ER 840."[Emphasis added]**

The law on stay pending appeal

[23] At paragraphs 21-28 of **In the Matter of the Contempt of Court of Donna Dorsett-Major on 3 June 2020**, this Court comprehensively set out the law governing stay applications. I can do no better but to simply adopt it.

> **"[21] Order 31A Rule 18(2)(d) provides that the Court may stay the whole or part of any proceedings generally or until a specified date or event.**
>
> **[22] Further, rule 12(1)(a) of the Court of Appeal Rules, 2005 provides:**
>
> > **"(1) Except so far as the court below or the court may otherwise direct:**
> >
> > **(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below."**
>
> **[23] It is well-established that a judge has a wide discretion with regards to the grant of a stay. This is confirmed by the learned authors of Odgers On Civil Court Actions at page 460:**
>
> > **"Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection[…] [The] court has wide powers under the Rules of the Supreme Court."**
>
> **[24] As to how that discretion ought be exercised in these circumstances, the court's considerations have only broadened with the developing case law, beginning, most notably, with the decision of Brett, LJ in the case of Wilson v Church No. 2 [1879] 12 Ch.D. 454 at 459 wherein he stated:**
>
> > **"This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of discretion, <u>that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory</u>."[Emphasis added]**
>
> **[25] This was further developed in Linotype-Hell Finance Ltd. v Baker [1993] 1 WLR 321 wherein Staughton L.J. opined at page 323:**
>
> > **"It seems to me that, if the defendant can say that without a stay of execution he will be ruined and that <u>he has an appeal which has some prospect of success</u>, that is a legitimate ground for granting a stay of execution."[Emphasis added]**

[26] So, where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application if the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

[27] Some additional principles that the Court should be guided by in considering an application for a stay pending an appeal is outlined in the case of Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065 at para 22 *(per Clarke JL and Wall J):*

> ***"*By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. <u>It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.</u> In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"**

[28] Guidance was also given by the English Court of Appeal in Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474. At para 13, Potter LJ said:

> **"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."**

Whether the Judge's conclusion that Attorney Gomez did not have a good and arguable defence was wrong?

[24] Mr. Tynes forcefully argued that the Judge erred in law in that she applied the incorrect test for setting aside of the Default Judgment. This purported error in law

was included in submissions, but was not, however, included in the Draft Notice of Appeal.

[25] Mr. Tynes took issue with paragraph 15 of the Ruling, where I stated that, in applying to have a default judgment set aside, a defendant has to satisfy certain pre-conditions namely (i) the application has to be made within a reasonable time; (ii) the defendant has to give a good explanation for the failure to file an acknowledgement of service or a defence and (iii) whether the defendant has a real prospect of successfully defending the claim. Paragraph 15 of the Ruling reads as follows:

> **"[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."**

[26] According to Mr. Tynes, the correct approach is that these matters are not pre-conditions, but merely considerations to which the Court should have regard in determining whether the judgment should be set aside. He relied on **Hanna et al v Lausten** SCCiv App. No. 2 of 2014, where our Court of Appeal accepted that the principles set out by the House of Lords in **Evans v Bartlam** [1937] 2 All ER 646 are relevant for guiding the exercise of the Court's discretion to set aside a default judgment. In that case, the House of Lords rejected the submissions that to have the default judgment set aside, it is required that the Defendant show: (i) that he has a prima facie defence and (ii) a reasonable explanation for his failure to acknowledge service or file a defence. Mr. Tynes submitted that the House of Lords said that those two (2) matters are merely considerations which does not rise to the level of pre-conditions. At page 651, Lord Russell of Killowen stated:

> **"My Lords, RSC Ord 13, r 10, in its terms is unfettered by any conditions, and purports to confer upon the court or a judge full power to set aside a judgment signed in default of appearance, and, if thought fit, to impose such terms, as a condition of the setting aside, as may be just. 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 face of the wording of the rule. It would be adding a limitation which the rule does 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 conferred on him by the rule, fail to consider 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.**

[27] Mr. Tynes emphasised that the primary consideration is whether there are merits to Attorney Gomez's defence. In **Evans v Bartlam**, Lord Wright has this to say at page 656:

> **"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 pass a judgment on which there has been no proper adjudication."**

[28] I agree with Mr. Tynes that the questions of whether there is a defence to the claim and the reason for Attorney Gomez's failure to enter an appearance or file a defence are not pre-conditions but rather mere considerations to which the Court should have regard in exercising its discretion. That said, the question in determining whether leave to appeal ought to be granted is whether it will be successful on appeal. At paragraph 17 of the Ruling, I stated that *"the primary consideration for the Court is whether the Defence put forward by Attorney Gomez has a real prospect of success."* Thereafter, from paragraph 18 onwards, I proceeded to analyse whether the Defence had a real prospect of success.

[29] In my judgment, the incorrect classification as a pre-condition (a nomenclature used in the most Caribbean countries that have implemented the new Civil Procedure Rules) rather than a consideration has a limited effect on the conclusion to refuse to set aside the Default Judgment. Although the Court incorrectly termed the existence of a defence and the reason for the Default Judgment being entered "pre-conditions", they were still relevant considerations. In fact, Mr. Tynes correctly submitted that one of the matters namely whether there is a reasonable defence or a triable issue, is the most important consideration. It follows that, in determining the application, the Court giving weight to it (although it incorrectly labelled it a "pre-condition") did not materially affect the reasoning. Further, the other considerations were also in favour of refusing to set aside the Default Judgment.

[30] While the reason that Attorney Gomez failed to enter an appearance and/or file a defence does not rise to the level of a pre-condition to having the discretion exercised in favour of setting aside a Default Judgment, it is relevant. In any event, the reason given for why an appearance had not been entered fell very short of satisfactory. Attorney Gomez's evidence as to why she did not enter an appearance or file a defence was that she instructed Counsel, but he failed to enter an appearance on her behalf. The Third Defendant, who filed an Affidavit on behalf of Attorney Gomez, swore that she attempted to settle the matter with BAF. She proposed to settle the matter by transferring the properties.

[31] While the existence of a defence is not a pre-condition, Mr. Tynes himself correctly stated that whether Attorney Gomez has a good and arguable defence is the *primary consideration* to the exercise of the Court's discretion. The Ruling thoroughly examined the draft defence. It reasoned that it would not defeat BAF's claim. This was the most significant consideration to the determination of the application. However, Mr. Tynes contended that the Court came to the wrong conclusion with respect to the viability of the defence; that the Court should have concluded that Attorney Gomez has a good and arguable defence as evidenced by her Affidavit and that of the Third Defendant.

[32] Mr. Tynes submitted that the test applied to the adequacy of the defence was incorrect. The test applied in the Ruling was “a real prospect of success” or “some degree of conviction”. However, Mr. Tynes submitted that the correct test is whether the defendant has a “prima facie” defence, or a “serious” defence, or whether the defence has “merits” to which the Court should pay heed”.

[33] This submission is untenable. The tests applied in the Ruling are merely differences in nomenclature but they mean the same thing.

[34] Mr. Tynes contended that it could not, at the preliminary stage, be determined that Attorney Gomez did not have a defence to justify setting aside the Default Judgment. He argued that the Affidavits filed on behalf of Attorney Gomez and the draft defence contained factual assertions that could not be determined to be true or untrue at the hearing of the setting aside application. The letter of instructions issued by BAF and the failure of the First through Fourth Defendants to put Attorney Gomez in funds had the effect of negating either the contractual or common law duty of Attorney Gomez to stamp and record the mortgage of BAF. By reason of that evidence, Attorney Gomez has a good and arguable case.

[35] BAF alleged professional negligence against Attorney Gomez. In that Ruling, I comprehensively considered the draft defence. I stated that the issues that arose from the Statement of Claim and the draft defence are: (i) whether the claim brought by BAF is statute barred and (ii) whether Attorney Gomez is negligent on the evidence adduced thus far. Attorney Gomez does not take issue with the Court’s reasoning and conclusion with respect to the limitation period issue.

[36] BAF’s assertion was that Attorney Gomez’s actions fell below the standard of a reasonable and prudent attorney when she failed to stamp and record the mortgage over the properties that was their security for the loan. The crux of Attorney Gomez’s defence to this was that she had not been paid the funds required for stamping and recording the mortgage by BAF or the other Defendants. BAF, on the other hand, asserted that they had in fact settled the Statement of

Account which included the fees for stamping and recording. In the Ruling, I stated that there is contemporaneous documentary evidence which showed that the fee had been paid. At para 41, I stated:

> **"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."**

[37] It was possible and reasonable to conclude that, by the draft defence and evidence adduced by Attorney Gomez, the defence would not defeat BAF's claim. The question was and still is whether she had (has) a defence to the negligence alleged: failing to stamp and record a mortgage. To my mind, the negligence is manifestly clear. Attorney Gomez failed to stamp and record the mortgage. Her defence that they had not paid for it to be done is starkly inconsistent with the documentary evidence which proved that they had in fact paid. Plainly, Attorney Gomez's defence is tenuous and unconvincing in light of contemporaneous documentary evidence. Failing to stamp and record a mortgage is negligence because, by failing to do so, there was no notice of the encumbrance, which was why the Third Defendant was able to convey one of the properties, depriving BAF of part of its security for the loan.

[38] Mr. Tynes submitted that in addressing the delay on the part of Attorney Gomez in applying to set aside the default judgment, the Ruling improperly made a moral judgment about her as the defendant and used it a basis to refuse to set aside the default judgment. At para 45 of the Ruling, I stated:

> **"[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."**

[39] In support, Mr. Tynes relied on **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., the Saudi Eagle** [1968] 2 Lloyd's Rep 221 where the Court of Appeal stated that, in exercising its discretion to set aside or refuse to set aside a default judgment, the fact that the defendants deliberately did not defend the action since it had no assets was not a valid consideration for the determination of the application. The Court of Appeal stated that the trial judge had incorrectly considered the moral behaviour of the defendant rather than making "*an assessment of the justice of the case between the parties."*

[40] Mr. Tynes further submitted that, as there was no complaint by BAF that the delay resulted in unavailability of witnesses or evidence, the delay was not a relevant consideration for the Court.

[41] The Ruling did not make a moral observation of Attorney Gomez's behaviour. I merely made an observation with respect to the delay in bringing the application to set the Default Judgment aside, which is a relevant consideration to the determination of the application: see **MacDonald v Thorn** [1999] All ER (D) 989, where it was made clear that although delay prior to the institution of the proceedings was not a consideration, the Court was entitled to consider delay of the defendant thereafter. The observation that she took nearly four (4) years from the institution of the Default Judgment and nearly one (1) year from the application for enforcement to bring the application to set aside the Default Judgment is quite different from the moral judgment in **Alpine** where the trial judge took into account the defendant's attitude toward the default judgment. The Court of Appeal did not state that delay (the fact of it and the extent thereof) was an irrelevant consideration. It stated that it was incorrect for the trial judge to consider what he

believed to be disrespectful/insouciance of the defendants toward the Court. Here, I merely observed that Attorney Gomez took years to bring the application and that she ought to have known better since she is a seasoned attorney.

Whether there were intervening acts of BAF breaking the chain of causation of its claim against Attorney Gomez?

[42] The Draft Notice of Appeal stated that there were intervening acts of BAF that broke the chain of causation of BAF's claim. Mr. Tynes did not particularize what those acts are but from a reading of the Affidavits, it seems as though he relied on the fact that she was not aware that BAF had forwarded the proceeds of the loan to Scotiabank without advising her or the firm. As a result, Attorney Gomez said that she was unable to follow up with Scotiabank on preparing the satisfaction of the Scotiabank mortgage on the Bahamia property. This is contrary to conveyancing practice, the purpose of which is to enable her to give advice and control funds in the protection of the client's best interest. The other act that Attorney Gomez must have relied on as an intervening one was that she wrote to BAF's attorney, Ms. Roker, with an offer of settlement on 5 May 2020. BAF filed a Notice of Motion for sequestration before requesting an appraisal on the properties and not giving her the opportunity to have the property appraised.

[43] Neither of these acts break the chain of causation of the professional negligence claim. The distribution of the proceeds directly to Scotiabank to satisfy the loan that it had over the Bahamia property is not relevant to Attorney Gomez's negligence in failing to stamp and record the mortgage which she prepared. With respect to the offer of settlement and the Notice of Motion for sequestration being filed before requesting an appraisal of the properties, it was related to BAF's conduct in the litigation, but not to the actual negligence alleged.

[44] For all of the foregoing reasons, there is no realistic prospect that the intended appeal will succeed on appeal. In any event, as stated in **Robert Adams** [supra], if there is any doubt that should leave be granted, the safe course is to refuse leave

as it is always open to the Court of Appeal to do so. Attorney Gomez' application for leave to appeal as well as a stay is refused.

The quantum of damages claimed by BAF failed to take into account the effect of the primary legal mortgage of Scotiabank (Bahamas) Ltd.

[45] Attorney Gomez contends that the quantum of damages claimed by BAF is incorrect because it fails to take into account the effect of the primary legal mortgage of Scotiabank. This issue falls away based on the Ruling.

Costs

[46] As the successful party, costs are awarded to BAF. At the hearing, the issue of costs to the successful party was discussed. It was agreed that if BAF were successful, its costs will be fixed at $5,000 which is reasonable. I therefore award costs to BAF in the sum of $5,000.

Dated this 28th day of September 2022

Indra H. Charles
Senior Justice