COMMONWEALTH OF THE BAHAMAS CLAIM NO. 2017/CLE/gen/FP/00193

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

BETWEEN

TAMIKA GOODMAN

Claimant

AND

THE PUBLIC HOSPITAL AUTHORITY

First Defendant

AND

DR. PAUL WARD

Second Defendant

HEARING DATE:

APPEARANCES: Mr. Wendell A. Smith Jr. c/o Tamika Goodman

Mr. Keith Cargill & Ms. Antonia Rolle c/o Office of the Attorney General

FORBES, J

DECISION

BACKGROUND

1. On or about August 2017, the Plaintiff through her then Counsel filed a Generally Endorsed Writ of Summons against the Public Hospital Authority and Doctor Paul Ward. The Writ alleged that the Defendants breached their statutory duty, committed negligence and also their contractual obligations which resulted in personal injury. The Plaintiff sought relief in the form of damages and cost.

2. On the 27th of September 2017 an Affidavit of Service sworn by Corporal 3687 Stefan Hall was filed. In the Affidavit Corporal 3687 Hall stated he served the Writ of Summons on the Dr. Paul Ward.

3. The Office of The Attorney General filed a Notice and Memorandum of Appearance on behalf of the Public Hospitals Authority in August 2017.

4. A Statement of Claim was duly filed on 5th February 2018. Subsequently, the Attorney General's Office was served with the Statement of Claim on the 5th February, 2018 and the Second Defendant was served with the same on 15th February 2018.

5. The Statement of Claim alleges:

   a. that the Plaintiff was a member of the general public as defined by the Public Hospital Authority Act (PHAA) and was a patient of the First Defendant and Second Defendant.

   b. That the First Defendant is a statutory corporation created pursuant to the PHAA with responsibilities for the operation and management of a medical hospital in the city of Freeport on the Island of Grand Bahama styled the Rand Memorial Hospital (the Rand) and another hospital in the city of Nassau on the Island of New Providence styled The Princess Margaret Hospital (PMH).

   c. That the PHAA owed a statutory duty to the plaintiff; namely (a) to control, regulate and manage all matters related to the management of the said hospitals; and (b) to ensure the application of efficient and appropriate techniques, systems and standards for the

delivery of health care in a hospital; and (c) to operate, construct, equip, finish, maintain, manage and secure and repair all its property, including the said hospital for use by the general public.

d. That the First Defendant owed a non-delegable duty of care to the Plaintiff and to treat the Plaintiff with reasonable care and skill and to ensure that the employees, servants and agents of the first defendant, including the Second Defendant also treat the Plaintiff with reasonable skill and care.

e. That the First Defendant was also contractually bound to the Plaintiff to discharge the statutory duties in favor of the Plaintiff.

f. That the Second Defendant was at all material times a medical doctor in the employ of the First Defendant who had a duty to treat the Plaintiff with reasonable care.

g. That she was admitted to the Rand on 28 August 2016 to undergo a total abdominal hysterectomy to treat uterine fibroids. That on the 29th August 2016 the Second Defendant preformed the total abdominal hysterectomy procedure. That the Plaintiff was subsequently discharged on the 1st September 2016. That the plaintiff had no appetite and began vomiting up fluids she was drinking and between the 1st through the 5th September 2016 the Plaintiff began experiencing increasing abdominal pain and discomfort.

h. That the Plaintiff was transported to the Rand via ambulance on 5th September 2016 and on the 6th September 2016 it was discovered she had an ileal perforation, accompanied by huge phlegmon mass with small bowel contents and old blood in the middle of the phlegmon mass and thick fibrin bands covering the old ileal perforation.

i. That the Plaintiff underwent lysis of the dense adhesions, a right hemicolectomy, resectioning of the left end ileostomy. That on the 7th September 2016 underwent a re-exploration of the abdomen to address ascetic fluid, aedematous distended ileum and jejunum and necrotic distal. That on the 8th September 2016 the Plaintiff was transferred to PMH where she received further medical attention. However, those records have not been made available.

j. That the Plaintiff contends that prior to the Second Defendant performance of abdominal hysterectomy procedure she had no symptoms which would have indicated ileal perforation. That ileal perforation was caused by the act or neglect of the Second Defendant while performing the total hysterectomy on the plaintiff on 29th August 2016.

6. The Plaintiff itemized and particularized the instances of negligence as they are related to both the first and second defendant. The Plaintiff also particularized the allegations of breaches of the first defendant's statutory duty, also particularized the loss and injuries sustained by the Plaintiff and claimed general damages for pain and suffering and loss of amenities. Diminution of enjoyment of life, general damages for loss of income, earning capacity, general damages for handicap on Labour market, medical expenses and special damages for future medical expenses, special damages for future non-medical specialty food/supplements/ nutrition expenses. Also seeking punitive and or exemplary damages, interest and cost and such relief as the court may deem just.

7. A judgement in Default of Defence was entered against the Second Defendant, in March 2018. Further, it was served on the Second Defendant on the 9th March 2018. The Plaintiff then moved the Court for its cost and filed its Bill of Cost, Notice of Taxation and its Statement of Particulars pursuant to Order 59 Rule 19(5) (a) of the Rules of the Supreme Court (RSC).

8. In May 2018, the Office of the Attorney General (OAG) filed a Summons to set aside Default Judgement and to stay taxation and for leave to extend to file an Appearance and Defence out of time.

9. A Notice of Intention to proceed was filed on the 22nd March 2021, pursuant to order 3 Rule 5 of the RSC. This Notice was served on the Second Defendant on 24th March 2021. A Notice of Change of Attorney was filed on the 11th July 2023.

10. On the 5th January 2024 the Plaintiff filed an application for leave to enter judgement in default for failure of the first defendant to file a Defence pursuant to the Rules 12.5 and 65.6 of the Supreme Court Civil Procedure Rules 2022(CPR). An Affidavit in support of the application was filed on the 5th January 2024 and sworn by Kiajah Williams. Williams avers that she is a legal secretary for the Plaintiff's Counsel and that the facts deposed are based on her own knowledge. That she has not been previously employed by any of the parties to the Proceedings. That the Affidavit is made in support of the Notice of Application. That the action was commenced by a Writ of Summons filed on 18th August 2017 and a Statement of Claim filed on the 5th February 2018 which were subsequently served on the Office of the Attorney General and refers to the exhibited Affidavit of Service of Melissa Selver. That the then Attorney for the Claimant caused a search to be made at the Registry of the Supreme Court Freeport, Grand Bahama and New Providence for the purposes of discovering whether the First Defendant had filed a defence. It was

discovered that no defence had been filed on behalf of the First Defendant. That the Affidavit was filed in support of the Claimant's application for an order that the Claimant be granted leave to enter Judgement in Default with damages to be accessed if not agreed.

11. The OAG filed a Notice of Application 17th April 2024 pursuant to Rule 65.5(1), Rule 10.3(8), Rule 26.3(b) and Rule 19.2(4) of the CPR seeking:

a. leave for the Defendants to have the judgement in default of defence filed on 18th March 2018 set aside on the grounds that it was irregularly obtained as the Plaintiff had entered Judgement without leave of the Court pursuant to Rule 65.5(1),

b. That the Defendants be granted an extension of time to file their defence.

c. That the Plaintiff's Notice of Application filed on 5th January 2024 be struck out.

d. That Dr. Paul Ward cease to be a party to these proceedings.

That the grounds relied upon are that (a) pursuant to Rule 65.5(1) No application against the crown shall be made under Part 15 for summary judgement or for specific performance in any proceedings against the Crown.

a. The judgement in default of defence was irregularly obtained, the plaintiff entered judgement without leave of the Court contrary to Rule 65.6(1)
b. (b) pursuant to Rule 10.3(8) of the CPR the defendants
c. Seek an order of this Honourable Court for an extension of time to file and serve their defence.
d. (c) Pursuant to Rule 26.1(2)(k) this Honourable Court may extend or shorten the time for compliance with any rule of the Court even if the application for an extension of time is made after the time for compliance has passed.
e. (d) Pursuant to Rule 19.2(4) the Court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.

12. In support of this Application, the OAG filed an Affidavit on the 19th April 2024 sworn by Antoinette Glinton who avers that she is a legal manager in the Legal Department of PHA and that the contents of the Affidavit is deposed from her capacity. That she refers to the Writ of Summons and the Notice and Memorandum of Appearances which are exhibited to the Affidavit. At paragraph 6 of the Affidavit Ms. Glinton states as follows:

"Since service of the aforesaid Writ on the Defendant's counsel, I am advised and verily believe that the defendants have made request within its offices and its affiliates departments and /or units for the compilation of relevant files, reports, and records to defend the instant matter." At paragraph 7 she continues: *"Due to many logistical challenges with compilation of files and reports and records from relevant authorities within the institution of the Public Hospital Authority, the defendant was unable to file a defence herein within the time period prescribed by the Supreme Court Civil Procedure Rules, Statute Laws of the Bahamas."*

13. The Affidavit was filed in support of the grounds of their application. They also exhibit a draft defence and aside from the basic denial and asserting that they complied with the acceptable medical procedures and protocols at paragraph 8 of the draft defence were these asserted facts:

"The Defendants deny paragraph 8 of the Statement of Claim and avers that on the 29th August 2016, a total abdominal hysterectomy and left ovarian cystectomy was performed on the plaintiff, however the procedure was not performed by the second defendant. The procedure was performed by Dr.'s F. Leon and Dr. S. Bowe, physician employees of the first defendant. The Plaintiff is put to strict proof thereof."

14. Those were the most salient aspects of the draft Defence which will have some relevance when considering the respective Applications.

SUBMISSIONS

15. The Claimant has filed two (2) separate submissions The first submission related to its Application seeking Leave to enter Judgement in Default against the First Defendant. The substance of these submissions are that the First Defendant is a body corporate pursuant to Chapter 234 section 3(2) & (3). It would be noted that the submissions failed to articulate which law was cited at Chapter 234 but it is in fact the PHAA.

16. The Submissions also note the Crown Proceedings Act Chapter 68 and specifically section 12 and contend that the First Defendant does not come within the definition of the Crown Proceedings Act (CPA). And in support of this contention cited the case **Halsbury Chambers(a Firm) v. Water and Sewerage Corporation and another [2022] 1 BHS.J No. 17** Where Snr. Justice Charles (as she then was) who said:

"Notwithstanding that Water & Sewerage is a government department, I agree with Mrs. Green-Smith who appeared as Counsel for the Attorney General that, as the pleadings asserted outstanding payment of legal fees from Water & Sewerage, which is a statutory body that can be sued, it is plain and obvious that there can be no claim against the Attorney General. Had Water & Sewerage not been a body corporate capable of being sued, the Attorney General would have been a proper defendant to the proceedings. However, as it is a body corporate and all of Halsbury's claims were made against it, the Attorney General has no place in the action. As such, the Deputy Registrar was correct to strike out the action against the Attorney General..."

17. The Claimant's Counsel also argue that Rule 12.5 of the CPR have been satisfied and permits the Court the authority to grant the Claimant leave to enter judgement against the First Defendant and sought the relief as prayed and cost to be taxed if not agreed. The Claimant also filed another submission on the 2nd April 2024 in opposition to the Application filed by the OAG the substantive argument advanced noted that the Summons of the Defendant was filed on 3rd May 2018 prior to the implementation of the CPR and therefore that Summons is now subject to the CPR and not the RSC and cited the case of **Syla Lt etal. v. Real Estate Funding Ltd and Power Windsun Ltd 2020/Com/com/00015** a judgement from Madam Snr. Justice Deborah Fraser. Counsel further reiterates the position that the PHA is body corporate and does not come within the definition of the CPA and cites the **Halsbury's case.** Claimant's Counsel argue that the defendant's application is now subject to the CPR and specifically Rule 12.5 and Rule 13.3. The Counsel for the claimant cites the case of **Lux Locations Ltd v. Zhang** [2023]UKPC 3.

18. Counsel also argues that Rule 12.5 was in fact satisfied and that the Second Defendant must satisfy the Court that pursuant to Rule 13.3 that the Application to set aside the Judgement made as soon as reasonably practicable. The Second Defendant has a good explanation for the failure to file a defence and that the Second Defendant must have a real prospect of success. Counsel contends that the Second Defendant's Application was not made as soon as practicable and was only made after the Notice of Taxation was filed and nor did the Second Defendant seek to have the Summon fixed for hearing. Counsel objected to the Application seeking an extension of time noting that it was in the discretion of the Court and pointed to the overriding objective

found in Part 1.1(f) of the CPR. Further he pointed to the comments made at the Supreme Court Civil Procedure Practice Guide January 2024 page, 104. Counsel also referred the Court to **Hallam Estates Ltd. And another v. Baker** [2012] EWHC 1046. Counsel submits that the application for an extension ought to be refused. Further that the Notice of Taxation be stayed pending an assessment of damages and that the entire Defendants application is to be dismissed with cost to be taxed if not agreed.

19. Counsel for the Claimant also filed Supplemental submissions in opposition to the Defendants application to set aside the Judgement in Default and for extension of time to file and serve a defence on the 23rd April 2024. Counsel notes that the parties had appeared before Deputy Registrar Blatch seeking the reliefs however, the matter was adjourned to permit submissions to be filed. That it submitted that the Defendants are purporting to file a Notice of Application under the guise of the similar relief as the Summons which was filed on the 3rd May 2018. Counsel for the Claimant notes notwithstanding the assertions that the Second Defendant was not the individual that performed the procedure. No evidence was produced which refutes the Claimant's allegations. Further that the Defendant did not obtain leave to have their Notice of Application heard on the papers; however, Counsel for the claimant has no objection to the same being heard as part of the extant applications.

20. Counsel for the Claimant notes the Supreme Court Civil Procedure Guide January 2024 and particular page 104 which says the following:

> *"The Court's express power pursuant to r. 26.1(2)(k) to grant an extension even after the expiry of the relevant deadline is subject to the overriding objective of the Civil Procedure Rules. Accordingly, the onus is on the applicant to seek the extension promptly, as soon as the need for the same is apparent. This obligation can be discerned from the Court's approach to extension applications made both "in time" and "out of time". In cases of the former, the Courts have signaled that the key consideration is the overriding objective, rather than treating the application as one for a relief from sanction. By contrast, instances of the latter are to be approached strictly as a relief from sanction, even where a sanction had not been stipulated. In either event, the relevant factors the Court would consider include: (1) the prejudice to the parties, (2) the merits of the claims, and (3) the circumstances of the case."*

21. Counsel argues that the Defendants must first seek relief from sanctions and thereafter seek an order from the Court to extend time. Counsel points to Rule 26.8 of the CPR and the comments of the **Privy Council in Attorney General v. Universal Projects Limited** [2011] UKPC 37. Counsel further derides that the main argument advanced by Counsel for the Defendants is administrative failures and noted no evidence was provided to support these assertions. Counsel argues that the Claimant has already been prejudiced due to the delay. Claimant's Counsel contends that the Judgment in Default of Defence was regularly obtained and the application to set it aside includes both Rule 13.3 & 13.4. Claimant's Counsel further highlighted the case of **Ramkisson v. Olds Discount.**

22. It is further submitted that the Affidavit of Antoinette Glinton fails to establish not just an arguable case but a real prospect of success. Citing the cases of **Saunders v. Green No. 2005/2868 (a Jamaican Supreme Court case) & ED & F Man Liquid Products Ltd v. Patel [2003] EWCA Civ. 472**, noting that the Defendant must demonstrate real prospect for success and a good reason for the judgement to be set aside. Counsel contends that the Defendants have not raised any issues of law that need to be addressed at trial nor have the Defendants exhibited any evidence save for the draft Defence and the Court ought to dismiss their application with cost to be taxed if not agreed.

23. The Defendant filed submissions on the 17th April 2024. The substance of which the defendant Counsel argues that Rule 13.3 of CPR permits them to apply seeking to have time extended for filing a Defence. Counsel for the Defendant cited **Evans v Bartlam [1937] AC 473** and noted the comments of Lord Atkin. Further, it was noted that the Supreme Court has an absolute discretion to extend or abridge time. Counsel for the Defendant referred to the **Saudi Eagle [1986] 2 Lloyds Reports. 221** and noted Winder J's decision in (as he then was) in **Thomas S. McGowan and CSB Management Company Ltd [2018]** which referenced the Court of Appeal Case of **Hanna and another [2018] 1 BHS.J No. 172.** These cases all referenced the discretion of the Court to set aside a default judgement. Counsel noted that the guidelines to be applied were articulated within the Court of Appeal decision of **Glen Alexander Colebrook and Christian Congregation of the Bahamas Jehovah's Witness of the Bahamas v. The National Insurance Board SCCivApp. No 127 of 2008.** The Court notes that this case very specifically concerned an appeal against the decision to extend time for the filing of a Notice of Taxation. Furthermore, that cited passage does not appear at the paragraph cited by Counsel. Further Counsel cites **Throne v.**

McDonald 1999 CPLR CA noting that the principle in whether to set aside a default judgment is whether there is a defence with a prospect of success.

24. The Defendant's Counsel submits that there are triable issues with a high probability of success and cited **McHari Institute (cob. I.C.S. Bahamas) v. Bahamas Telecommunications Corp [1995] BHS J No.3.** As for the reason for the delay Counsel that there has not been an inordinate delay and submits that the Defence was only due for filing and service no later than the 25th August 2021. Clearly Counsel for the Defendant is confusing the factual matrix of this matter and another matter.

25. The Court has already noted the comments made in the Affidavit of Ms. Glinton as for the reasons for the delay. Counsel for the Defendant submits that the Plaintiff will suffer no prejudice should the relief be granted and should the Plaintiff be successful at trial damages would sufficiently compensate the Plaintiff.

26. Finally that Dr. Ward ought to be removed as he was not the attending Physician. Counsel for the Defendant then seeks the Court to exercise its discretion and grant the relief sought in its Application. The Court notes that the Defendant failed in their submissions to respond to any of the assertions made by Counsel in either his submissions on claimant's application or the submissions & supplemental submissions in opposition to the Defendants' application.

LAW

27. The Court must give consideration to the various provisions of the CPR that must be applied in these particular applications. Counsel for the Defendant/OAG seeks to rely upon Rule 10.3 which says as follows:

> *10.3 (1) The general rule is that the period for filing a defence is the period of twenty-eight days after the date of service of the claim form.*
>
> *(2) If permission has been given under rule 8.2 for a claim form to be served without a statement of claim, the period for filing a defence is the period of twenty-eight days after the service of the statement of claim.*
>
> *(3) If the defendant within the period set out in paragraph (1) or (2) makes an application under any relevant legislation relating to arbitration to stay the claim on the grounds that there is a binding agreement to arbitrate, the period for filing a defence is extended to fourteen days after the determination of that application.*

(4) The parties may agree to extend the period for filing a defence specified in paragraph (1), (2) or (3).

(5) The parties may not make more than two agreements under paragraph (4).

(6) The maximum total extension of time that may be agreed is fifty-six days.

(7) The defendant must file details of an agreement made pursuant to this rule.

(8) A defendant may apply for an order extending the time for filing a defence.

(9) The general rule referred to in paragraph (1) is subject to —

(a) rule 5.17(4);

(b) rule 7.6;

(c) rule 9.7; and

(d) rule 65.2."

28. Counsel for the Defendant/OAG also seeks to rely upon Rule 13.3 which reads as follows:

"13.3 Cases where Court may set aside or vary default judgment.

(1) If rule 13.2 does not apply, the Court may set aside a judgment entered under Part 12 only if the defendant —

(a) applies to the Court as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

(2) In any event the Court may set aside a judgment entered under Part 12 if the defendant satisfies the Court that there are exceptional circumstances.

(3) Where this rule gives the Court power to set aside a judgment, the Court may instead vary it."

Counsel for the defendant/OAG also pointed to Rule 65.6, which reads as follows:

"(1) Except with the leave of the Court, no judgment in default of an acknowledgement of service or of pleading shall be entered against the Crown in civil proceedings against the Crown.

(2) Except with the leave of the Court a party may not enter default judgment against the Crown in third party proceedings. (3) An application for leave under this rule may be made

by interlocutory application and the same must be served not less than seven days before the return day....."

29. Whereas Counsel for the Claimant pointed to Rule 13.4 noting that it must be read in conjunction with Rule 13.3,

"13.4 Applications to vary or set aside judgment – procedure.

(1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence."

30. Counsel for the claimant also pointed to Rule 12.5 which reads as follows:

The claimant may enter judgment for failure to defend if—

(a) the claimant proves service of the claim form and statement of claim or an acknowledgement of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the Court has expired;

(c) the defendant has not —

(i) filed a defence to the claim or any part of it, or the defence has been struck out or is deemed to have been struck out under rule 22.1(6);

(ii) if the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or (iii) satisfied the claim on which the claimant seeks judgment; and

(d) where necessary, the claimant has the permission of the Court to enter judgment."

Counsel also pointed to Rule 26.1(k) and the overriding principle contained in Part 1.1(f). Rule 26.1(k) says as follows:

"(1) The list of powers in this rule is in addition to any powers given to the Court by any other rule, practice directions or any enactment..... extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed;...."

Whereas the Overriding Objective reads as follows: *"(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost..... ....enforcing compliance with rules, practice directions and orders...."*

ANLAYSIS & DISCUSSION

EXTANT SUMMONS

31. The Court will deal with each Application separately.

32. Firstly, the extant Summons filed in May 2018 seeking to set aside the default judgement and to stay the taxation and seeking leave to extend time to file an appearance and defence out of time pursuant to Order 69 Rule (1) of the RSC. It is noted that these Rules have since been repealed and replaced by the CPR. That being said those rules generally required where an application to set aside a judgement either regularly or irregularly obtained that the party must file an Affidavit in support. The Court notes that there is a lack of an Affidavit in support of the Application. There are some problems also with the Judgement in Default as it appears to be a Judgement for unliquidated damages and yet no application for assessment of damages was filed but rather the Claimant's Counsel at the time moved for taxation.

33. Secondly the Judgement was not entered against the First Defendant but rather the Second Defendant for who no appearance was entered. Moreover, the First Defendant is a corporation sole pursuant to section 3 of the Public Hospital Authority Act which reads as follows:

> *"3. (1) There is hereby established a body to be referred to as the Public Hospitals Authority which shall be responsible for the management of the hospitals known as the Princess Margaret Hospital, the Rand Memorial Hospital and the Sandilands Rehabilitation Centre. (2) The Authority is a body corporate having perpetual succession and a common seal, with power to purchase, lease or otherwise acquire and hold and dispose of land and other property of whatsoever kind. (3) <u>The Authority may sue and be sued in its corporate name and may for all purposes be described by such name.</u> (4) The Authority shall not — (a) mortgage, charge or demise any of its immovable property without the approval of the Minister; (b) sell or otherwise alienate the whole of its undertaking or any of its immovable property in fee simple; or (c) sell or otherwise alienate any substantial part of its undertaking..."(emphasis added)*

34. Clearly, the Statute contemplated the Authority being sued in its own capacity and not affiliated with the Crown Proceedings Act. Thus argument that leave should be sought is without merit. The issue, however, is that the second defendant according to the filed Statement of Claim was an employee of the First Defendant. He was not sued in his personal capacity but rather as an employee. As such the judgement in default would appear ill conceived. Further, Claimant's Counsel perused taxation as opposed to an assessment.

NOTICE OF APPLICATION FOR LEAVE TO ENTER JUDGEMENT IN DEFAULT

35. The Claimant's application sought to rely on Rule 12.5 and Rule 65.6 and the Practice Guide speaks as follows to both rules and their applicability as for Rule 12.5 it says as follows:

> *"It should be recognized that proof of service is integral, along with the requisite period having been expired before judgment in default is entered. Where the request for default judgment is administratively done or made in court, the following requirements must be satisfied: (a) The claimant must prove service of the claim form and particulars of claim on the defendant (see* ***E J Cato & Sons Ltd v Attorney General (2012) HC No. 384 of 2009 [Carilaw VC HC 31]*** *(b) The period for filing an acknowledgment of service or defence, as the case may be has expired; (If no acknowledgment of service (or defence) is filed within 14 days after the date of service as required by the CPR, then a defence filed within 42 days of the date of service of the claim does not prevent the entry of judgment in default of acknowledgment of service of the claim form)* ***(RBC Royal Bank (Jamaica) Ltd v Howell (2013) Supreme Court Jamaica, No 94 of 2012 [Carilaw JM 2013 SC 21;*** *(c) The defendant has not satisfied the claim in full; and (d) Where the claim is for a specified sum of money, the defendant has not filed an admission of liability together with a request for time to pay it."*

Rule 65.6 says as follows:

> *"Part 65.6 provides that except with the leave of the Court, no judgment in default of an acknowledgement of service or pleading or in third party proceedings shall be entered against the Crown. Moreover, an application for leave under this rule is required to be made by interlocutory application and must be served not less than seven days before the return day. See Practice Direction No. 10 of 2023 on Default Judgment. Halsbury's Laws of England/Crown and Crown Proceedings (Volume 29 (2019))/2. Crown Proceedings/(5)*

Practice and Procedure/112. Summary judgment and judgment in default. - Any request for a default judgment in civil proceedings against the Crown must be considered by a Master or District Judge, who must in particular be satisfied that the claim form and particulars of claim have been properly served on the Crown in accordance with the Crown Proceedings Act 1947 and rules of court. Cases: CPR 65.6 JUDGMENT IN DEFAULT ***Lynch v Attorney General [2015] JMCA Civ 35*** *at paragraph 32 - Rule 12.1(1) of the CPR gives a claimant the right to apply for judgment in default where a defendant has failed to file an acknowledgment of service or a defence within the time frame provided for by the CPR. However, where the claim has been brought against the Crown, permission must be sought and granted by the court before an application for default judgment may be pursued. It is a procedural requirement that this permission is sought and granted before the application is permissible and failure to adhere to this rule will result in the application being faulty."*

36. The Rule appears to require leave when dealing with a Government entity that is grounded by the Crown Proceedings Act, however, the Court has already noted that the PHA is founded under the PHAA and that Act gives it the authority to be sued in its capacity.

NOTICE OF APPLICATION FILED BY THE DEFENDANTS

37. The Defendants are relying on Rules 65.5, 10.3(8), 26.3(b) and 19.2(4). Firstly Rule 65.5 speaks to that no default judgement can be made against the Crown without leave of the Court and they contend that the Judgement obtained in March 2018 was so obtained without the required leave. It is noted that the Judgment was obtained against Dr. Paul Ward and not the PHA. Unless the contention is that Dr. Ward was an extension of the PHA and hence vicarious liability applies, which would not be the case when applying the previous decided cases and law.

38. Rule 10.3(8) speaks to 28 days from the date of service of the Statement of Claim and that a Defendant may apply for an order extending time. Whereas that Rule is entirely clear as to extension, it is unclear how it would apply to the current application under the RSC which applied to the judgement having been served and the required time being fourteen (14) days to make an application. There was direct evidence of service and an Affidavit of search to confirm whether any Defence had been filed within the timeframe permitted under the RSC.

39. Moreover, the Defendants are seeking to have the Statement of Claim struck out pursuant to 26.3(b) but the Court does not recall any arguments being advanced for that position. The Court refers to the Practice Guide and the Case of John Russell which is illustrative of what is required.

> ***John W. Russell (in his capacity as Administrator of the Estate of William Russell) v Bahamas Agricultural and Industrial Corporation 2019/CLE/gen/00093***... *The Court* ***held that striking out is reserved for plain and obvious cases. The Court held that, in applying Order 18, rule 19(a) RSC or CPR 26.3(1) (b), the statement of claim should be read on its face without a consideration of the evidence and assuming all the allegations it contains are true.*** *The Court was satisfied that, approached on this basis, the statement of claim disclosed a reasonable cause of action.* ***The Court held that a pleading is scandalous if it imputes dishonesty, bad faith or other misconduct against the defendant or a third party and the allegations are immaterial or irrelevant.*** *The Court noted that* ***the issue of whether a pleading is frivolous or vexatious depends on all the circumstances and considerations of public policy and the interests of justice may be "very material".*** *The Court was not persuaded that the claim was frivolous or vexatious. Nor was the Court persuaded that the statement of claim or claim were an abuse of process. The Court noted under its inherent jurisdiction it could consider evidence but even taking into account the evidence there was no evidence to show how the Crown was able to lease the land to the defendant.)"*

40. In this instance Counsel, though having provided a draft Defence, has not established any evidence to prove that any portion of the Plaintiff's claim is frivolous, vexatious or otherwise an abuse of process of the Court. The Court having considered the Claim on its face has not seen any reason to strike out any part of the Plaintiff's claim without any evidence. As it stands now, there are triable issues that have not been proven as frivolous, vexatious or an abuse of process.

41. Counsel also refers to Rule 19.2(4) which allows the Court to substitute or add or remove a party from the proceedings. In this case the Application is seeking to remove Dr. Paul Ward as it was contended he was not the attending physician and Counsel for the Claimant asserts rightly no evidence was lead to establish that fact. However, as the Court noted he was cited as an employee in the Statement of Claim and was not sued in his personal capacity, so the question why was he sued outside of his relationship as an employee of the first defendant. The Court regards the addition of Dr. Paul Ward as superfluous and unnecessary.

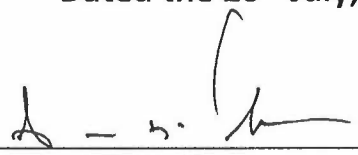
42. The Court notes that there was an in ordinate delay. However, there is a case to be tried with a real arguable case with a prospect of success. Therefore, to enter a Default Judgement and deny the Defendants an opportunity to answer this action would be an abuse of the Court's process. This delay can be cured with costs and is not one which would lead to irreparable harm.

DISPOSITION

43. For the reasons mentioned above. The Application by the Defendants is dismissed in part. The Court will only remove Dr. Paul Ward as a party in this action and set aside the Default Judgement. The Defendants leave to extend the time to file a defence is granted and must do so within three (3) days to file their defence. The Claimant's Application for Judgement in Default of Defence is also dismissed.

44. Given the delay by the defendant to move this case forward the Court will award cost to the Plaintiff to be taxed if not agreed.

Dated the 26th July, 2024



Andrew Forbes
Justice of the Supreme Court