

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2020/CLE/gen/1362**

**BETWEEN**

**KENDAL SMITH JR.**

**Claimant**

**AND**

**POLICE CONSTABLE 3988 DERRON LEWIS**

**First Defendant**

**AND**

**POLICE CONSTABLE 3746 DEREK BURROWS**

**Second Defendant**

**AND**

**THE COMMISSIONER OF POLICE**

**Third Defendant**

**AND**

**THE ATTORNEY GENERAL OF THE BAHAMAS**

**Fourth Defendant**

**Before:** Assistant Registrar Jonathan Z.N. Deal

**Appearances:** Al-Leecia Delancy for the Claimant

Antoine Thompson and Tommel Roker Stuart for the Defendants

**Hearing date(s):** 1 August 2024 and 16 August 2024

**RULING**

## ASSISTANT REGISTRAR DEAL

[1.] By Notice of Application filed on 1 August 2024, the Defendants applied for an extension of time within which to file and serve their Defence and an order that the period be extended notwithstanding that the application was made after the expiration of the said period. The application was filed by the Defendants in response to an application for leave to enter Judgment in Default filed by the Claimant and was supported by an Affidavit sworn by Luana Ingraham filed on 1 August 2024 (the “Luana Ingraham Affidavit”). On 16 August 2024, I delivered an oral ruling dismissing the application. Upon being requested to do so, I promised to provide a written ruling. I now do so.

### Background

[2.] These proceedings were commenced by the Claimant by a generally endorsed Writ of Summons filed on 21 December 2020. In these proceedings, the Claimant seeks to recover damages for assault and battery, aggravated damages, exemplary damages, relief for breach of his constitutional right to protection from degrading treatment or punishment under **Article 17** of the **Constitution**, interest and costs stemming from an assault and battery alleged to have been perpetrated by the First and Second Defendants at the Luna Nightclub on 21 December 2019 while they were in the employment of the Third Defendant.

[3.] Paragraph 5 of the Claimant’s Statement of Claim, as presently amended, captures the crux of the Claimant’s claim:

“5. On Saturday the 21<sup>st</sup> December, A.D., 2019, at about 12:36 am, while at Luna Nightclub, [the First Defendant] and [the Second Defendant] wrongfully assaulted and beat the [Claimant] by striking him on the head and body with their fists, by punching him in my jaw, neck and right eye with their fists, by seizing him by his clothes (i.e. shirt, trousers and underwear) and violently hitting him until he collapsed and fell to the ground. After this, [the First Defendant] pulled out his gun, cocked it back, pointed it at the [Claimant] and threatened to shoot him, causing him to fear a further immediate attack. [The First Defendant] then told the [Claimant] that he better push out before he die and get smoke.”

[4.] The Fourth Defendant, who issued pursuant to **Section 12** of the **Crown Proceedings Act**, was initially sued as the sole defendant and was served with the Claimant’s generally endorsed Writ of Summons in December 2020. The Fourth Defendant entered an unconditional appearance in response to the Writ of Summons on 14 January 2021. The Claimant filed a Statement of Claim on 12 September 2022 and served it on the Fourth Defendant on 1 November 2022. The Fourth Defendant failed to respond to the Statement of Claim, but an application for leave to enter Judgment in Default against the Fourth Defendant made by Summons filed on 9 September 2022 was dismissed on 29 November 2022.

[5.] The Deputy Registrar who dismissed the Claimant's application for leave to enter Judgment in Default appears to have raised the issue of the joinder of additional defendants and, on 5 July 2023, leave was granted to the Claimant to join the First through Third Defendants and to amend the Writ of Summons and the Statement of Claim to advance claims against them. The Writ of Summons and the Statement of Claim were amended by the Claimant on 17 July 2023. The amended pleadings were served on the First through Third Defendants on 18 July 2023 and on the Fourth Defendant on 19 September 2023 (not 17 September 2023 as I stated in my oral ruling.)

[6.] On 30 October 2023, no Defence having been entered by any of the Defendants, the Claimant applied by Notice of Application filed on 30 October 2023 for leave to enter Judgment in Default once more, this time against all of the Defendants. That application was supported by an Affidavit of Search filed on 9 September 2022, an Affidavit made by the Claimant filed on 9 September 2022, a Supplemental Affidavit made by the Claimant filed on 15 November 2022, the Affidavit of Richard Johnson Sr. filed on 21 July 2023, an Affidavit of Search filed on 27 October 2023 and the Affidavit of Sgt. 2735 R. Miller filed on 30 October 2023.

[7.] The Claimant's application for leave to enter Judgment in Default was fixed to be heard by Deputy Registrar Stuart Bastian on 1 August 2024 and the Claimant's Notice of Application was served on the Office of the Attorney-General on 25 July 2024. Before the hearing, the Claimant's application was re-assigned to me and I provided notice of the re-assignment on 29 July 2024. Shortly before the scheduled hearing on 1 August 2024, Counsel from the Office of the Attorney-General provided unfiled copies of the Defendants' Notice of Application for an extension of time and the Luana Ingraham Affidavit for use at the hearing.

[8.] The Luana Ingraham Affidavit stated (among other things):

"1. That I am Senior Counsel in the Office of the Attorney General; the principal legal advisor to the Government of The Bahamas, responsible for the administration of legal affairs, and legal proceedings for and against the State in the Bahamas.

2. That I am duly authorized by the Attorney General to make this Affidavit and save where otherwise stated, I depose to facts within my own knowledge. Where the contents hereof relate to factual matters within my knowledge they are true; and where such contents consist of information given to me by other persons or contained in documents I have not prepared, they are true to the best of my knowledge and belief.

...

9. That a review of the file indicates that Counsel who previously had carriage of this matter in the Office of the Attorney General, wrote to the Commissioner of Police of the Royal Bahamas Police Force on the 25<sup>th</sup> day of November 25<sup>th</sup> A.D. 2022, and again on the 11<sup>th</sup> day of October A.D. 2023, requesting the attendance of the First and Second Defendants at the Office of the Attorney General for interviews in regard to the allegations in this matter. A copy of the letter of 11<sup>th</sup> day of October A.D. 2023 is attached and marked as 'Exhibit LI-1'.

10. That there is no indication that there was any response to the said correspondences from Counsel.

11. That I am advised that sometime in May 2022, before the service of the Statement of Claim, and the Amended Writ of Summons the First Defendant in this matter ..., was interdicted by the Royal Bahamas Police Force, and to date, remains interdicted and is thus not able to be compelled by the [Third Defendant] to provide information in this matter

...

13. That I am informed by Counsel who recently assumed carriage of this matter, that he has reached out to the Royal Bahamas Police Force, and interviewed the Second Defendant, in this matter,..., in regard to the full extent of the allegations of the Claimant, in order to draft a proper Defence in this matter. The Draft Defence is attached hereto and marked 'Exhibit LI-2'

...

16. The Defendants aver that they have a good and arguable Defence which has merit and should be brought before the Honourable Court to consider.

...

18. That the contents of this Affidavit are correct and true to the best of my knowledge, information and belief.”

[9.] The letter of 11 October 2023 exhibited to the Luana Ingraham Affidavit as “Exhibit LI-1” stated in pertinent part:

“I write further to my Memorandum of 25 November 2022, to request your assistance in arranging interviews with [the First Defendant], and [the Second Defendant], who are the named tortfeasors in this action. To remind you, the matter concerns allegations by the [Claimant], that on 21 December 2019, while at Luna Night Club, he was approached and beaten by two police officers who struck him about his body, and on the head with their fists; seized him by his clothing, pointed a gun at him and threatened to shoot him.

I remind you to also supply us with the police file(s), and any record(s), correspondences, or other documentation relative to this matter.”

[10.] The draft Defence, exhibited as “Exhibit LI-2” to the Luana Ingraham Affidavit stated at paragraphs 9, 10 and 11:

“9. Save and except that it is admitted in Paragraph 2 of the Amended Statement of Claim that the First and Second Defendants were employed by the Royal Bahamas Police Force, it is denied, firstly, that they caused injury to the Claimant, and secondly, that they were in the course of duty as agents or servants of the Third Defendant at the time of the alleged assault upon the Claimant, as they both were off duty when they attended the private event at the Luna Nightclub in their own clothing, as patrons of the event that was happening at the said nightclub.

10. Save and except that it is in admitted in Paragraph 4 of the Amended Statement of Claim that the Fourth Defendant is the authorized government official by whom the Claimant sues, it is denied that they are whom the injuries of the Claimant have been carried out.

11. The Defendants deny the contents of Paragraph 5 and in reply thereto aver that at all relevant times the First and Second Defendant never assaulted, or pulled a gun on the Claimant, and repeat that any activity that would have occurred in regard to the First and Second Defendant was not in

the course of duty as agents or servants of the Third Defendant at the time of the alleged assault upon the Claimant. The Claimant is put to strict proof that the First and Second Defendant were in the course of duty while attending the said event.”

[11.] At the hearing on 1 August 2024, both the Claimant’s application for leave to enter Judgment in Default and the Defendants’ application for an extension of time were adjourned to 16 August 2024. At the conclusion of the hearing, I gave directions for the service of the Defendants’ Notice of Application and the Luana Ingraham Affidavit on the Claimant and for skeleton submissions to be lodged. I also granted liberty to apply for further directions. No further directions were requested.

[12.] At the hearing on 16 August 2024, the parties agreed that the Court should hear the Defendants’ application for an extension of time first. Based on the agreement of the parties, I proceeded to hear the Defendants’ application before the Claimant’s. Before dealing with the applications, I confirmed that the First through Third Defendants were aware of the proceedings and consented to their representation, as no acknowledgment of service was filed on their behalf.

[13.] In the course of the hearing on 16 August 2024, in response to questions from the Court about the adequacy of the Luana Ingraham Affidavit, the Defendants requested an adjournment to file a witness statement from the Second Defendant that it was said was in existence. That request was strenuously objected to by the Claimant. For reasons given at the hearing, the request for an adjournment was refused.

### **Submissions**

[14.] Counsel from the Office of the Attorney-General lodged written submissions dated 12 August 2024 in support of the Defendants’ application for an extension of time and supplemented those written submissions with oral submissions. Counsel for the Claimant lodged written submissions dated 1 August 2024 and 12 August 2024 and supplemented those submissions with oral submissions. I outline the parties’ submissions below.

#### **The Defendants’ Submissions**

[15.] Mr. Thompson on behalf of the Defendants submitted that, where a defendant seeks to file a Defence after the prescribed period of time, **Rule 10.3(8) of the Civil Procedure Rules, 2022** permits the defendant to apply to the Court for an extension of time.

[16.] Relying on the decision of Charles J (as she then was) in **Petrona Russell and another v Anthony Thompson and another** [2021] 1 BHS J. No. 1, Mr. Thompson submitted that a Defence served after the expiration of the prescribed time but before judgment has been given cannot be disregarded and operates so as to prevent judgment in default from being given. Mr. Thompson submitted that the Defendants’ Defence served with the Luana Ingraham Affidavit ought to have

prevented the Claimant from entering judgment, although he accepted that the Defendants might be ordered to pay the costs occasioned by their delay, which is something the Court could fix.

[17.] In **Petrona Russell and another v Anthony Thompson and another**[2021] 1 BHS J. No. 1, Charles J (as she then was) stated at paragraphs [28] and [29]:

“28 As the Plaintiffs correctly submitted, the Australian decision of *Wiedenhofer v The Commonwealth* [1970] HCA 54; (1970) 122 CLR 172, is instructive relative to instances where the Court is faced not only with an application for judgment in default but also with an application for an extension of time for the filing of a defence. There, Gibbs J stated at paragraph 8 that:

‘...In the present case, where I have before me not only a motion for a judgment but also a motion for extension of time for filing the defence, and where a defence has in fact been delivered although out of time, and there is no ground to suggest that this defence is merely frivolous or filed for the purpose of delay and an explanation has been given of the failure to deliver it within time, in my opinion it would lead to injustice to take any other course than to grant a reasonable extension of time and to refuse the motion for judgment.’

29 The decision of *Wiedenhofer* is consistent with the law that where a defence is served after expiration of the prescribed time but before judgment has been given, the defence cannot be disregarded and will generally prevent the plaintiff from entering judgment, even though it is not served until after the plaintiff has served his summons or notice of motion for judgment but the defendant may be ordered to pay the costs occasioned by his/her delay: see *Gill v Woodfin* (1884) 25 Ch.D.707, CA and *Gibbings v Strong* (1884) 26 Ch.D. 66, CA. In such a case, the Court will have regard to the contents of the defence served out of time and deal with the case in such a manner that justice can be done. In the latter case of *Gibbings*, Earl of Selbourne LC stated at page 69 that:

‘...[A]nd if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. If it were found to contain nothing, which, if proved, would be material by way of defence, the Court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the Court will not take the circuitous course of giving a judgment without regard to it, and obliging the defendant to apply, under rule 14, to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits.’”

[18.] The Defendants also referred to the summary of Fraser SJ’s decision in **Captain Joseph J. Moxey v Bahamasair Holdings Limited and Bahamas Airline Pilots Association** 2023/COM/lab/00010 (10 October 2023) provided at page 104 of the **Supreme Court Civil Procedure Rules, 2022 Practice Guide January 2024**:

“the Court will not extend time where it would be unjust and an abuse of the Court’s process; an extension of time may be granted where the applicant can demonstrate it can set up a bona fide defence to the claim on the merits or a difficult point of law is involved or there is dispute as to facts which ought to be tried or there ought for some other reason to be a trial on the claim; it is necessary to consider the overriding objective; the injustice or prejudice that would be caused to the respondent is relevant; the extent of the delay in applying and the merits of the intended defence are also relevant, and important, considerations; an application for an extension of time to file a defence may be made to regularize a defence that is belatedly filed.”

[19.] In addressing whether an extension of time should be granted, Mr. Thompson submitted that the Claimant did not vigorously prosecute this matter. Mr. Thompson pointed to the fact that the Claimant did not file a Statement of Claim until 12 September 2022 and the fact that the Claimant's Notice of Application filed on 30 October 2022 was filed over 1 year after filing his Statement of Claim. Mr. Thompson submitted that, having regard to the Claimant's failure to vigorously prosecute this matter, an extension of time would have been reasonable in the circumstances. Mr. Thompson submitted, in addition, that the Claimant suffered no prejudice or injustice as a result of the Defendants' delay in filing a defence.

[20.] Mr. Thompson further submitted that there were serious questions to be defended and tried in this matter, and that the Defendants should not be driven away from the judgment seat. Mr. Thompson submitted that the Defendants raised two issues for determination by the Court in their draft Defence: (i) firstly, whether the alleged assault or battery said to have been committed by the First and Second Defendants occurred at all and (ii) secondly, whether the First and Second Defendants were acting in the course of duty as agents or servants of the Third Defendant at the relevant time (it being their case that the First and Second Defendants were at the nightclub as private patrons). The Defendants did not attempt to develop the various "preliminary objections" made in their draft Defence at paragraphs 2, 3 and 4 in their submissions.

#### The Claimant's Submissions

[21.] Ms. Delancy on behalf of the Claimant accepted that a defendant can apply for an order extending the time for filing a Defence under **Rule 10.3(8)** of the **Supreme Court Civil Procedure Rules, 2022**. However, Ms. Delancy drew the Court's attention to the commentary at page 104 of the **Supreme Court Civil Procedure Rules, 2022 Practice Guide January 2024** and emphasized those parts of it which suggest that a defendant who has failed to file a Defence in time ought to approach a claimant to agree an extension of time before lodging an application for an extension and that any such application should be made promptly. Ms. Delancy submitted that there was no evidence that any Defendant ever sought the Claimant's agreement to an extension here.

[22.] Ms. Delancy submitted that, in deciding whether to grant an extension of time under **Rule 10.3(8)** of the **Supreme Court Civil Procedure Rules, 2022**, the Court should adopt the more rigorous approach adopted by the Court when exercising its discretion in applications for relief from sanctions. Ms. Delancy commended to the Court the approach taken by the English High Court towards an "out of time" application for an extension of time to file a Defence in **Billington v Davies** [2016] EWHC 1919 (Ch). At paragraph [21] of **Billington**, Master Pickering held that he was bound to consider the principles governing relief from sanctions (formulated in England and Wales in **Denton v TH White Ltd** [2014] 1 WLR 3926) in deciding the application to extend time before him.

[23.] The Claimant, like the Defendants, relied on the summary of Fraser SJ's decision in **Captain Joseph J. Moxey v Bahamasair Holdings Limited and Bahamas Airline Pilots Association 2023/COM/lab/00010** (10 October 2023) provided in the **Supreme Court Civil Procedure Rules, 2022 Practice Guide January 2024**. However, the Claimant also relied upon the case of **Arawak Homes Limited v Bastian et al CLE/gen/783** of 2006, which Fraser SJ referred to at paragraph [23] of the **Captain Joseph J. Moxey** case:

“23.BAPA's counsel also provides the case of **Arawak Homes Limited v Bastian et al CLE/gen 783** of 2006 (“**Arawak Homes**”) where Albury J recognized the Court's authority to extend time for a Defendant to file its Defence. BAPA's counsel posits that Albury J made it abundantly clear that the Court will not extend time where it would be unjust and an abuse of the Court's process. Albury J opined:

‘[28] As to the defendant's application for an extension of time to file a defence it is undisputed that the defendants had, notwithstanding service of the Writ of Summons on them in 2006, up to the date for hearing of the plaintiffs summons, more than two years later, failed to enter an appearance, I find that the reasons advanced by the first defendant for that inordinate delay were wholly without merit.

[29] Accordingly I hold the view that, given such inordinate delay by the defendants, to grant them an extension of time for filing a Defence would constitute an abuse of this court's process.

[31] Further, a review of the defendants' intended defence shows that contrary to the defendant's assertion, it does not indicate a high probability of success. That intended defence is obviously without merit and not sustainable.’”

[24.] Addressing the circumstances of this case, Ms. Delancy characterized the Defendants' delay in filing their Defence as inordinate. Ms. Delancy submitted that the inordinate delay began in 2022 when the Claimant's Statement of Claim was served. Ms. Delancy answered Mr. Thompson's submission that the Claimant had failed to vigorously prosecute the matter by submitting that the rules of court did not place the onus on the Claimant, that there was delay by the Defendants after the Claimant filed his Statement of Claim, and that, as soon as the Claimant's Statement of Claim was filed, the Defendant or Defendants had the opportunity to make an application to the Court to have it struck out for want of prosecution. Ms. Delancy also objected to the point on procedural grounds.

[25.] Ms. Delancy submitted that the reasons offered by the Defendants for their delay were “wholly without merit” and “would constitute an abuse of the Court's process”, particularly taking into account the overriding objective and the duty of counsel under the **Supreme Court Civil Procedure Rules, 2022**. Ms. Delancy submitted that the Defendants by their own admission “blatantly neglected the just progress of this mater” and “failed to actively obtain instructions from the First through Third Defendants” but “now wish to vigorously and comprehensively defend this action”. Ms. Delancy submitted that there was no evidence before the Court to explain the delay.



[26.] Ms. Delancy criticized the Defendants' draft Defence as having failed to clearly set out the Defendants' defence in accordance with **Rule 10.5** of the **Supreme Court Civil Procedure Rules, 2022**, as having failed to provide any facts offering a different version of events than that of the Claimant, as having failed to provide documentary evidence that ought to have been in their possession, as having consisted of "bare denials", as having disclosed no reasonable cause of defence, and as being an abuse of the process of the Court. The Claimant's position was well summarised at paragraphs [16] to [18] of the Claimant's written submissions dated 12 August 2024.

[27.] At paragraph [16] of the Claimant's written submissions dated 12 August 2024, the Claimant referred to page 11 of the decision of the Jamaican Court of Appeal in **D & L H Services Limited et al v The Attorney General and the Commissioner of the Jamaica Fire Brigade** (Supreme Court Civil Appeal No. 53/98). There, Harrison JA referred to **Farden v Richter** (1889) 23 QBD 124, **Ramkissoon v Olds Discount Co.** (1961) 4 WIR 73 and **Evans v Bartlam** [1937] 2 All ER 646 and the requirement for an affidavit of merits revealing a *prima facie* defence on the merits to be sworn to by someone who can swear to the facts where an application is made by a defendant to set aside a regularly entered default judgment.

[28.] When asked by the Court to elaborate upon the submission that the Defendants' draft Defence consisted of bare denials, Ms. Delancy contrasted paragraphs 9, 10 and 11 of the Defendants' draft Defence (extracted at paragraph 10 above) with the "very specific" allegations in paragraph 5 of the Claimant's Amended Statement of Claim (extracted at paragraph 3 above) and contended that the Court and the Claimant did not have "the full extent" of the Defendants' Defence, only that their position is that the First and Second Defendants did not assault and batter the Claimant and, if they did, they did not do so in the course of duty.

[29.] Ms. Delancy submitted that, in all the circumstances of the case, the Court should not grant the Defendants an extension of time for filing their Defence. Ms. Delancy referred in her written submissions to the Claimant being "unduly prejudiced by the Defendants' failure to comply with the rules" and submitted on her feet that it would be an abuse of the Court's process to allow an extension of time at this point. Ms. Delancy contended that to do so would "dismiss the whole purpose of the rules of court", which ought to be abided by all parties and which exist to ensure justice is done on both sides and matters can be dealt with promptly and at the least cost.

## **Discussion**

[30.] **Rule 10.3(8)** of the **Supreme Court Civil Procedure Rules, 2022** provides that "a defendant may apply for an order extending the time for filing a defence." Furthermore, while not cited in the Defendants' Notice of Application filed on 1 August 2024, **Rule 26.1(2)(k)** of the **Supreme Court Civil Procedure Rules, 2022** provides that "[e]xcept where these rules provide

otherwise, the Court may — 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”.

[31.] The **Supreme Court Civil Procedure Rules, 2022** do not circumscribe the considerations that the Court may take into account in deciding whether to extend time. The discretion of the Court must be exercised to achieve justice in the particular case and to give effect to the overriding objective. The overriding objective, which is specified in **Rule 1.1(1)** of the **Supreme Court Civil Procedure Rules, 2022**, is to deal with cases justly and at proportionate cost. **Rule 1.1(2)** specifically enjoins the Court to consider “(a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate to — (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders”.

[32.] In considering whether to grant an extension time to file a Defence under **Rule 10.3(8)** of the **Supreme Court Civil Procedure Rules, 2022**, factors relevant to the exercise of discretion include the length of the delay, the explanation for the delay, prejudice, the merits of the Defence or intended Defence and the importance of enforcing compliance with rules, practice directions and orders. There is no question of implied sanctions: **Attorney General v Keron Matthews** [2011] UKPC 38. Therefore, the approach taken in deciding whether to grant relief from sanctions strictly does not apply. It is for the Court to weigh all of the circumstances.

[33.] Turning to the circumstances of this case, I considered the Defendants’ delay in filing and serving a Defence to be inordinate. Mr. Thompson himself described the delay as “great”. The Fourth Defendant’s delay was in substance a delay of approximately 1 year and 8 months and the First through Third Defendants’ delay was a delay of approximately 11 months. A Defence ought initially to have been filed by the Fourth Defendant by 30 November 2022. After the joinder of the First through Third Defendants, a Defence ought to have been filed by them by 15 August 2023. The service of amended pleadings on the Fourth Defendant gave the Fourth Defendant, in effect, a second opportunity to file a Defence. However, no Defence of any description was forthcoming until 1 August 2024 after notice was given of the hearing of the Claimant’s application for leave to enter Judgment in Default, the second such application by the Claimant. In the case of the Fourth Defendant, it appeared to me that the delay was comparable to that in **Arawak Homes Limited v Bastian** CLE/gen 783 of 2006, which Albury J considered would have led to the extension of time being an abuse of process, though there was also a failure to enter an appearance in that case.

[34.] I also considered that the Defendants' delay in filing and serving a Defence was not justified by any good excuse. The evidence given of the attempts made to obtain instructions suggested that limited steps were taken on behalf of the Defendants to obtain the necessary information to file and serve a Defence during the period prescribed by rules of court to do so and the evidence did not demonstrate that satisfactory efforts were made. The Luana Ingraham Affidavit referred to only two attempts made to obtain the necessary information, by correspondence nearly a year apart. Faced with the impending fixture for the Claimant's application for leave to enter Judgment in Default, the Defendants evidently had no difficulty completing their draft Defence. The defence articulated by the Defendants was not a complex one, and, in the absence of a clear explanation, ought to have been capable of being formalized much earlier.

[35.] With respect to prejudice, while I found that there was no specific evidence of prejudice to the Claimant, I considered that prejudice could be inferred from the delay in the context of this particular case, a claim for personal injuries and other loss and damage arising out of an assault and battery said to have occurred on 21 December 2019. If an extension of time had been granted to the Defendants to file their draft Defence, the matter would have proceeded to case management and the Claimant would have had to await the trial of his claim some further time hence.

[36.] As to the merits of the Defence or intended Defence, I considered that the Luana Ingraham Affidavit provided insufficient material upon which I could conclude that the Defendants had a defence with a realistic prospect of success or that there were serious issues to be tried. The Defendants did not identify any serious issue of law required to be determined. The Defendants applied for an extension of time after inordinate delay without good excuse in the face of an application for leave to enter Judgment in Default. In that context, the Defendants ought to have provided cogent evidence of merit to support the justness of their request for an extension of time. The Luana Ingraham Affidavit, sworn by counsel, simply stated that the Second Defendant had been interviewed, that a draft Defence had been prepared (which was exhibited) and that the Defendants averred they had a good and arguable Defence; it did not depose to any facts underpinning the Defendants' intended defence, it did not attest to the veracity of the Defendants' draft Defence and it provided nothing to substantiate that there was merit behind the Defendants' intended defence.

[37.] The length of the delay, the lack of a satisfactory explanation for the delay, the failure to provide evidence showing a defence with a realistic prospect of success in the form of a proper affidavit of merits, the fact that no exceptional circumstances were identified and the desirability of enforcing compliance with the rules of court together led me to conclude that the Defendants' application for an extension of time ought to be refused in the exercise of my discretion. I gave serious consideration to whether an extension of time ought to have been granted to the Defendants with costs thrown away to the Claimant, as Mr. Thompson proposed, but concluded that such a

course of action would have been indulgent in the circumstances. I therefore dismissed the Defendants' application.

### **Conclusion**

[38.] In accordance with the usual rule that the unsuccessful party must pay the costs of the successful party, enshrined in **Rule 71.6 of the Supreme Court Civil Procedure Rules, 2022**, the Defendants were ordered to pay the Claimant's costs of the Defendants' unsuccessful application, which the parties agreed in the sum of \$1650 inclusive of VAT. After my oral ruling dismissing the Defendants' application for an extension of time, the parties proceeded with the Claimant's application for leave to enter Judgment in Default. I acceded to that application after hearing from the parties, there being nothing novel raised by them, and awarded costs to the Claimant, to be assessed if not agreed.

Dated the 28<sup>th</sup> day of August, 2024



Jonathan Z.N. Deal  
Assistant Registrar