COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

Common Law and Equity Division
2022/CLE/gen/00484

B E T W E E N

CORDELIA DELORES WARD

First Claimant

AND

LASHONE RODGERS

Second Claimant

AND

FML GROUP OF COMPANIES LIMITED

Defendant

Before:	**The Honourable Madam Senior Justice Deborah E. Fraser**
Appearances:	**Mr. Halston Moultrie for the Claimants**
	Ms. Regina Bonaby for the Defendant
Hearing Date:	**18 July 2024**

Employment Dispute - Civil Practice and Procedure - Judgment in Default of Defence – Part 12 of the Supreme Court Civil Procedure Rules, 2022 - Application to set aside Judgment in Default of Defence - Part 13 of the Supreme Court Civil Procedure Rules, 2022 – Whether Application made within a reasonable time - Good and Arguable Defence – Real Prospect of Success

JUDGMENT

FRASER, SNR. J:

[1.] This is an application set for hearing on 18 July, 2024 brought on behalf of the Defendant, FML Group of Companies Limited ("**FML**"), requesting the Court to set aside a judgement in default of defence entered against it.

Background

[2.] The Claimants are both former employees of FML.

[3.] FML is a registered private limited liability company carrying on the business of Gaming pursuant to the provisions of the Gaming Act, 2014.

[4.] Two (2) Trade Disputes were lodged against FML by the Claimants at the Department of Labour (one on 10 February 2022 and the other on 29 March 2022 alleging wrongful dismissal, unfair dismissal, constructive dismissal and/or failure of FML to properly compensate the Claimants in accordance with FML's statutory and contractual obligations. The Trade Disputes were subsequently submitted to the Industrial Tribunal, however one of them was settled and the other was withdrawn.

[5.] Thereafter, by a Specially Indorsed Writ of Summons against the Defendant alleging wrongful, unfair, constructive dismissal and/or failure of FML to pay redundancy payments. They seek damages, interest and costs.

[6.] As no Defence was filed by FML, the Claimants filed a Judgment in Default of Defence on 26 May 2022.

[7.] On 03 August 2022, FML filed a Memorandum and Notice of Appearance along with a Summons requesting that the Judgment in Default of Defence entered against it be set aside.

[8.] On 23 May 2023, a Notice of Change of Attorney was filed by FML.

[9.] Subsequently, on 12 December 2023, and on 04 January 2024 FML filed a Notice of Application requesting the Judgment in Default of Defence be set aside for the following reasons:

(i) That the application is made as soon as reasonably practicable after finding out that judgment has been entered pursuant to Rule 13(3)(a) of the Supreme Court Civil Procedure Rules, 2022 ("**CPR**").

(ii) That there is a good explanation for the failure to file a defence pursuant to Rule 13(3)(b) of the CPR.

(iii) That there is a real prospect of successfully defending the claim pursuant to Rule 13(3)(c) of the CPR

Issue

[10.] The issue that the Court must determine is whether the Judgment in Default of Defence ought to be set aside?

Evidence

Claimants' Evidence

[11.] The Claimants filed the Affidavit of Errol McKinney ("**McKinney Affidavit**") on 23 November 2023, which provides that: (i) On 29 March 2022, the Claimants filed their Writ (the Writ is exhibited) (ii) On 12 April 2022, the Claimants served the Writ on Sears & Co – as Sears & Co is the registered agent of FML; (iii) On 26 July 2022, the Claimants served the Writ on Munroe & Associates to the attention of Attorney Regina Bonaby; (iv) an Affidavit of Search was prepared evidencing that a search was conducted at the Registry on 26 May 2022 which confirmed that the Defendant did not a Defence; and (v) Judgment of Default of Defence was served on the Defendant on 27 May 2022.

FML's Evidence

[12.] FML filed the Affidavit of Kenya Wells ("**Wells Affidavit**") on 10 February 2022, which provides that: (i) The Claimants' first Originating Application for NP2021-065 was dismissed on 10 February 2022 as the alleged unilateral variation was settled before the Claimants commenced their action; (ii) The Claimants' second Originating Application for NP 2022-016 was withdrawn on 29 March 2022; (iii) On 26 July 2022, the Claimants' Writ was served on Munroe & Associates; (iv) A Notice of Appearance, Memorandum of Appearance and Summons were filed by Munroe & Associates on 03 August 2022, respectively; (v) The Defendant changed counsel, which caused a delay in the exchange of the file and the conveyance of instructions for the matter to proceed; and (vi) The Defendant filed this application with a draft defence exhibited to the affidavit.

Law, Discussion and Analysis

Preliminary Point – Application of the CPR

[13.] For the avoidance of doubt, this application (being filed 12 December 2023 and again on 04 January 2024), and all further proceedings in this action, are governed by

the CPR as no trial dates have been fixed for this matter, and the CPR has been promulgated since 01 March 2023 (see ***Practice Direction No. 9 of 2023***).

[14.] The Claimants' Counsel also submitted that, prior to hearing any application by the Defendant to set aside the Judgement in Default, leave of the Court was required as the time for filing a memorandum and notice of appearance had expired. Counsel relies on Order 12 rule 5 of the Rules of the Supreme Court, 1978 ("**Old Rules**") which provides:

> "5. (1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the Court."

[15.] As I have explained earlier, this matter is governed by the CPR. I am unaware of any rule, under the CPR, which requires leave of the Court to enter an appearance/acknowledgement of service prior to considering an application to set aside a Judgment in Default of Defence. This matter would be considered an action for unliquidated damages under the Old Rules and judgment in Default of Defence would be available to the Claimants pursuant to Order 19 Rule 2. Even if the Old Rules were to apply, by virtue of Order 19 Rule 9 of the Old Rules, the Court is still empowered to vary or set aside a Judgment in Default of Defence. The rule provides:

> "9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

[16.] Accordingly, and in any event, the argument has no merit. I will now consider the application that is before me.

Whether the Judgment in Default of Defence ought to be set aside?

[17.] A Judgment in Default of Defence is a procedural means by which a Claimant may enter judgment against a Defendant for its failure to file a Defence within the requisite time prescribed by the Rules. The Court, therefore, does not assess the actual merits of the claims presented. According to **rule 12.1(1) of the CPR**, if a Defendant does not submit a defence within twenty-eight (28) days of receiving the claim form, the Claimant can request a default judgment without going to trial. Furthermore, if a defendant fails to file an acknowledgment of service indicating his or her intention to contest the case, the Claimant can still seek a default judgment as outlined in the rules.

However, the Claimant is required to provide an affidavit as evidence that the Defendant was personally served.

[18.] According to **Rule 12.4 of the CPR**, when a Defendant fails to acknowledge service:

> "The claimant may enter judgment for failure to file an acknowledgement of service if —
> (a) evidence has been filed proving service of the claim form and statement of claim on the defendant;
> (b) the defendant has not filed —
> (i) an acknowledgement of service; or
> (ii) a defence to the claim or any part of it;…"

[19.] Under **Rule 12.5 of the CPR**, the Claimant must satisfy the following conditions if a Defendant fails to defend the action:

> "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 he only claim is for 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."

[20.] Further, page 125 of the **CPR Practice Guide, January 2024** ("**Practice Guide**") provides guidance on what the Court should consider when analyzing the conditions of Rules 12.4 and 12.5of the CPR:

> "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."

[21.] The Claimants have indeed evidenced that the Writ was duly served on FML's registered office as well as on its then attorneys, Munroe & Associates. Furthermore, the period of twenty-eight days for FML to file its Defence had also elapsed prior to the filing of the Judgment in Default of Defence. Also, FML has not satisfied the claim or filed any admission of liability together with a request for time to pay.

[22.] It, however, must be noted that the Court has wide discretionary powers to set aside or vary a Default Judgment pursuant to **Part 13 of the CPR**. According to **Rule 13.3 of the CPR**:

(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."

[23.] In considering whether a default judgment entered should be set aside, the court must determine if the conditions set out in rule 13.3(1) of the CPR have been complied with. In **Kenrick Thomas v RBTT Bank Caribbean** Civil Appeal No 3 of 2005, Justice Deny Barrow at paragraph 7 outlines that the rules specifies three conjunctive preconditions for setting aside a default judgment (as noted above). His Lordship further notes at paragraph 10 of the judgment that:

"If the preconditions are not satisfied the court has no discretion to set aside. The rule maker ordained a policy regarding default judgments. It is as simple as that."

[24.] In determining whether to set aside a Judgment in Default, the Court's primary consideration in upholding justice is predicated upon the Defendant's real prospect of success in defending the claim. The **Saudi Eagle** [1986] 2 Lloyd's Rep 221 ("**Saudi Eagle**") case discusses the importance of a party's realistic prospect of successfully defending the claim. Here, the Court outlines that primarily, a Defendant must have a substantive, rather than just an arguable, defence for the Court to consider setting aside a default judgment in his favour. Moreover, in the ***Saudi Eagle*** case, Sir Roger Ormrod states the following about a Defendant seeking to set aside a regular default judgment:

"... Evans v Bartram ... clearly contemplated that a Defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success… Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiffs assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction."

[25.] Not only must the Defendant satisfy the three preconditions outlined under Rule 13.3(1) of the CPR, and have a real prospect of defending the claim, the Defendant must also act promptly in making his application. The case of **Evans v Bartlam** [1973] AC 473 sheds light on whether a Defendant's delay obviates a default judgment from being set aside. At page 489, Lord Wright made the following pronouncements:

"In a case like the present there is a judgment which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not prima facie desire to let judgment pass on which there has been no proper adjudication. Here the appellant shows merits… He clearly shows an issue which the court should try. He has been guilty of no laches in making the application to set aside the default judgment, though as Atwood v. Chichester (1878) 3 QBD 122 and other cases show, the court, while considering delay, have been lenient in excluding applicants on that ground. The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that

respect can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered by the rule to impose."

[26.] In the UK Court of Appeal decision of **ED&F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472, Potter J notes that the Defendant must prove the reasons for setting aside a default judgment. At paragraph 9, his Lordship opined:

> *"…real prospect of successfully defending the claim' in r 13.3(1) is a similar test to that when the Claimant applies for summary judgment…The only significant difference between the two rules is that on an application for summary judgment the overall burden of proof rests on the Claimant to establish that there are grounds for his belief that the Defendant has no real prospect of success; whereas on an application to set aside judgment entered in default the burden rests upon the Defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside."*

[27.] The Claimants relied on the McKinney Affidavit which evidenced that the Defendant acknowledged service when the Writ was served on 12 April 2022 to Sears & Co and the Claimants produced an Affidavit of Search, which was served on the same firm on 27 May 2022. However, in the interim, there was a Notice of Change of Attorney filed by FML on 23 May 2023 appointing Bonaby & Bonaby to act on the Defendant's behalf instead of Munroe & Associates. I also note that on 03 August 2022 FML's then attorneys Munroe & Associates filed a Memorandum and Notice of Appearance along with a Summons to set aside the Judgment in Default. Based on the evidence, Munroe & Associates made these filings eight (8) days after being served with the Writ, which according to the evidence was served on 26 July 2022.

[28.] Further, according to FML's evidence, they changed counsel and its new counsel filed their Memorandum of Appearance and Notice of Appearance along with their application to set aside the Judgment in Default of Defence, on 23 May 2023. FML, however, did not file its application until 04 January 2024. The reason for the delay, according to their evidence, was the delay in the transfer of FML's file from Munroe & Associates to FML's new counsel and its new counsel's inability to obtain instructions any sooner.

[29.] I also note that, according to the draft Defence, FML avers that it has already paid funds owed to the Claimants prior to the filing of this action. They also reference

that one of the trade disputes were settled and two others were withdrawn. Having reviewed the draft Defence, other evidence and the circumstances of this case, I believe that the Defendant has a real prospect of defending the claim, and FML's failure to defend the claim was through no fault of FML. Therefore, it would be unfair, unjust and unreasonable not to set aside the Judgment in Default of Defence against the Defendant when the Defendant was not allowed to defend the claim in the Writ and has a good and arguable Defence.

[30.] Before concluding the matter, the Defendant's attorney raised a critical issue of the Claimants' attorney notarizing one of the McKinney Affidavits on the Claimants' behalf. It must also be noted that it is common practice for attorneys not to swear or notarize Affidavits on their own clients' behalf. This has been the usual and accepted practice for some time now. In fact, doing so is strictly forbidden under the CPR (Rule 30.5(3) of the CPR). Klein J in **Re Finethic Limited et al** [2022] 1 BHS J. No. 179 at paragraphs 117, 122 and 124 also provides a thorough discourse on The Bahamas' position with respect to counsel swearing an affidavit in contentious proceedings which he himself is a part of (known as the 'self-witnessing rule'). I shall only summarize what His Lordship stated. In essence, affidavits that may be subject to cross-examination ought not be sworn by counsel or counsel of the same firm presenting the application. Such practice is frowned upon and should be avoided at all costs.

[31.] Further, **Practice Direction No. 1 of 1995** speaks to The Attorney as a Witness:

> "Instances have occurred where, in matters heard in Chambers, an attorney has sought to rely on affiavits sworn by himself, as to contentious matters between the parties.
>
> While there may be little objection to affidavits sworn by an attorney deposing to purely formal matters, it is well to bear in mind the following instruction which appears at paragraph 3 of the Commentary to Rule VIII of The Bahamas Bar Code of Professional Conduct:
>
> "If the attorney is a necessary witness he should testify and the conduct of the case should be entrusted to another attorney."
>
> An Attorney who is acting as an advocate in a case, should therefore advise himself accordingly."

[32.] Thus, the affidavit that the Claimant's Counsel seeks to rely on cannot be used as evidence in the matter. In any event, it does not change my decision on the matter.

[33.] Based on the foregoing, I accede to FML's application and set aside the Judgment in Default.

CONCLUSION

[34.] In the circumstances and based on the evidence and current state of the law, I exercise my powers under Rule 13.3(1) of the CPR and set aside the Judgment in Default of Defence. Accordingly, I make the following order:

a. The Judgment in Default of Defence against the Defendant is hereby set aside.

b. Leave is granted to the Defendant to file an acknowledgement of service and a defence as provided in the draft defence exhibited to the Affidavit of Kenya Wells filed on 04 January 2024 within fourteen (14) days from the date of this ruling.

c. The Claimants may file a Reply to the Defence within fourteen days from service of the filed Defence. FML shall pay the costs for any Reply to the Defence filed by the Claimants, to be assessed if not agreed.

d. Costs for this application shall be costs in the cause.

Dated this 3rd day of September 2024

Deborah E. Fraser
Senior Justice