COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2023/CLE/gen/00748

BETWEEN:

LINDA ELIZABETH LAM

First Claimant

MICHAEL LAM

Second Claimant

(T/A MIKE'S STAINLESS STEEL MANUFACTURING COMPANY)

AND

OSPREY CONSTRUCTION COMPANY LTD.

Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mr. Ferron Bethel, K.C. for the Claimants**
	Mrs. Michaela Sumner-Budhi for the Defendant
Hearing Date:	**18 July 2024**

Application to Set Aside Judgment in Default of Defence – Parts 12 and 13 of the Supreme Court Civil Procedure Rules, 2022 – Promptitude of Application - Reasons for Delay – Arguable Defence – Real Prospect of Success

RULING

FRASER SNR. J

[1] This is an application brought on behalf of the Defendant, Osprey Construction Company Limited, to have a Judgment of Default of Defence filed on 02 October 2023 against it set aside.

Background

[1] The Claimants, Linda Elizabeth Lam and Michael Lam ("**the Claimants**") specialize in providing custom manufactured stainless-steel products and services.

[2] The Defendant, Osprey Construction Company Ltd., is a company incorporated under the laws of the Commonwealth of The Bahamas and operates a general contracting and construction management business.

[3] At all material times, the Defendant was the general contractor for a construction project involving renovations to the Lyford Cay Club, a private members-only club located in Western New Providence.

[4] On or about 31 July 2021, the Claimants and Defendant entered into a contract whereby the Defendant agreed to pay the Claimants the sum of $466,301.40 to fabricate and install stainless-steel railings for the Lyford Cay Club Serpentine Wing.

[5] Under the contract terms, the Defendant was required to make a 50% deposit to the Claimants before the project commenced, followed by an additional 25% midway through the project and 25% due upon its completion.

[6] The Defendant paid the 50% deposit and 25% midway through the project, respectively, but allegedly has not paid the 25% outstanding balance to the Claimant after the project was completed.

[7] The Defendant avers that the sum of $350,000.00 in retention value was withheld due to the railings flaking and rusting and that the balance would only be paid once their client accepted the refinished railings.

[8] On 05 September 2023, the Claimants filed a standard claim form alleging breach of contract against the Defendant based on the aforementioned allegations.

[9] The Claimants seek the following relief:

(i) General damages;

(ii) Special damages for $116,575.36;
(iii) Interest pursuant to section 3 of the Civil Procedure (Award of Interest) Act, from the 9th day of June A.D. 2022 until judgement;
(iv) Costs; and
(v) Such further or other relief as the Court deems just.

[10] On 12 September 2023, the Claimant served the Defendant's registered office with the filed Claim Form along with an acknowledgment of service and defence form.

[11] On 02 October 2023, the Claimant entered a Judgment in Default of Defence against the Defendant for failing to acknowledge service or file a defence within the time required by the Supreme Court Civil Procedure Rules ("**the CPR**") 2022.

[12] On 13 February 2024, the Defendant filed a notice of application for leave to set aside the default judgment, averring that it had a real prospect of successfully defending the claim.

Issue

[13] The issue that the Court must determine is whether the default judgment entered against the Defendant ought to be set aside?

Evidence

Claimant's Evidence

[14] The Claimants filed the Affidavit of Elliot Lam ("**the Lam Affidavit**") on 16 July 2024, which provides: (i) On 5 September 2023, the Claimant filed an action against the Defendant for damages for breach of contract; (ii) The standard claim form was served to the Defendant's registered office on 12 September 2023, but the Defendant did not serve an acknowledgement of service or file a defence within the requisite period; (iii) The Claimant was responsible for the fabrication, installation and delivery of stainless steel at the Lyford Cay Club Serpentine for the Defendant totaling $466,301.40; (iv) The Defendant breached the contractual terms when it failed to pay the Claimant the 50%, 25% and 25%, with 50% prior to commencement of the project, 25% midway point of completion and the final 25% due after the work was completed; (v) By the 31 May 2022, the Claimant had completed the work required under the contract and by email from the Claimant's General Manager, Elliot Lam, to one of the Defendant's employees, Daniel Gill, the Claimant sent the Defendant its final invoice reflecting $116, 575.36 as due and owing; (vi) A joint

inspection of the Claimant's project was conducted with the Defendant on 29 July 2022 and the Defendant did not complain about the work quality; (vii) After the inspection, the Defendant informed the Claimant that it intended to pay 95% of the balance and hold 5% on retention. The Claimant informed the Defendant that it was not the contractual agreement that they had initially entered but acquiesced to receive 95% with the 5% being paid later; and (viii) On 5 June 2023, the Claimant spoke with the project owner's representative, Robert Scoon who informed the Claimant about some minor work (peeling paint and rust) that needed to be done to a few parts of the installed railings. The Claimant informed the Defendant that the peeled paint and rust would be addressed once the Claimant received the outstanding payment due. Mr. Scoon also advised the Claimant that the Defendant was paid the sums due in connection with the railings' fabrication and installation and that they no longer held any sum in retention for the Defendant.

[15] The Claimants filed the Affidavit of Samovia Miller ("**the Miller Affidavit**") on 18 July 2024, supplementing the Lam Affidavit, which provides that (i) The Claimant had conducted a research at the Registry General's Department of the most recent annual statement filed of the Defendant company; and (ii) The Defendant company sent a letter dated 10 August 2023 to the Claimant informing the Claimant that "Performance Ltd" had already removed the railings and were in the process of stripping and refinishing them.

Defendant's Evidence

[16] The Defendant filed the Affidavit of Phillip Whitehead ("Whitehead Affidavit") on 13 February 2024, which provides: (i) The Claimant had duly served the Defendant with an Acknowledgment of Service and Defence forms ("Documents") on 12 September 2023, which was emailed to the shareholders; (ii) The Documents were not forwarded to the President of the Defendant Company, Mr. Philip Whitehead and therefore, he had no knowledge of the action the Claimant had against the Defendant; (iii) On or about 2 October 2023, the Defendant's President was informed about a default judgment being entered against the Defendant; (iv) The Defendant's President immediately advised the Defendant's attorney to make an application to set aside the default judgment because the Defendant has a real prospect of successfully defending the claim; (v) The Defendant admitted that it owed the Claimant $116,575.36, but asserted that the Claimant's work was defective, resulting in the Defendant remediating its work; (vi) The Defendant is entitled to set off against the balance it owes the Claimant; and (vii) The delay in filing the application to set aside the default judgment was due to the Defendant being instructed by its attorneys to ascertain if the Claimant was amenable to settling the

matter on fair terms. The Claimant and Defendant could not agree to fair terms because the remediation costs will likely exceed the balance owed to the Claimant.

Law, Discussion and Analysis

Issue: Whether the default judgment entered against the Defendant ought to be set aside?

[17] **Part 12 of the CPR** governs the procedure for a Default Judgment. Rule 12.4 of the CPR outlines the conditions that must be satisfied before a Claimant may enter default judgment against a Defendant for failure to file an acknowledge of 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;*
>
> *(c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;*
>
> *(d) where the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*
>
> *(e) the period for filing an acknowledgement of service under rule 9.3 has expired; and where necessary the claimant has the permission of the Court to enter judgment.".*

[18] **Rule 12.5 of the CPR** states that the Claimant must satisfy the following conditions before entering default judgment against the Defendant for failing to file a defence by stating:

> *"The claimant may enter default 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) necessary, the claimant has the permission of the Court to enter judgment.".

[19] In the notes of the **CPR Practice Guide, January 2024 ("Practice Guide")** page 126 outlines how the Court should be guided in satisfying the conditions of rule 12.4 and 12.5 by stating the following:

> *"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."*

[20] Where a regular default judgment has been entered against the Defendant, the Court has the discretionary power to set it aside or vary it under **Part 13 of the CPR**, provided that the Defendant satisfies the conditions outlined under Part 13 of the rule. **Rule 13.2 of the CPR** outlines cases where the Court must set aside a default judgment as follows:

> *"(1) The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because, in the case of —*

(a) a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied; or

(b) judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied.

(2) The Court may set aside a judgment under this rule on or without an application.

[21] Under **Rule 13.3 of the CPR**, a default judgment can be set aside or varied if it meets the following criteria:

(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."

[22] In considering whether a regular default judgment entered should be set aside, the Court must determine if three preconditions set out in rule 13.2(a), (b) and (c) of the CPR are satisfied. In the Vincentian and Grenadian decision of **Kenrick Thomas v RBTT Bank** - Civil Appeal No 3 of 2005, Justice Deny Barrow at paragraph 7 outlines that the rules specify three conjunctive preconditions for setting aside a default judgment. His Lordship further notes at paragraph 10:

"…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."

[23] In determining whether to grant a default judgment against a Defendant, 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** 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 [supra] 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.".*

[24] Not only must the Defendant satisfy the three preconditions outlined under rule 13.3(1) and have a real prospect of success in defending the claim that carries some degree of conviction, but 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.".*

[25] Whether a Defendant was prompt in applying to set aside a default judgment depends on the circumstances of the case, as a reasonable explanation for failing to file a defence promptly under the CPR rule is satisfactory. The case of **BAF Financial & Insurance (Bahamas) Ltd v Kendal Williams Construction and et al [2022] SCCiv App 136** is instructive on the significance of promptitude of filing a defence and the need for a good explanation for any delay in doing so. Here, the Defendants were served with the Writ of Summons on 1 June 2017 and an Affidavit of Search filed on 6 July 2017 revealed that the fourth Defendant did not enter an appearance or file a defence. Consequently, BAF filed a judgment in Default of Appearance on 6 July 2017, which was served on the Defendants on 19 July 2017. On 2 February 2021, the fourth Defendant filed a summons supported by an affidavit seeking an order to set aside the judgment in default. The Court of Appeal had to determine if the learned judge erred in addressing the issue of delay by setting aside a regular judgment entered in default of appearance and neglecting to consider whether justice could have been served by setting aside the judgment in default of appearance on specific terms. At paragraph 28, Justice Evans pronounced the following:

> *"In my view, the same principle can apply to the consideration of delay where it is significant as in the present case. It can easily be seen why the Court would give consideration to a delay of over 3 years when considering how to do justice between the parties. It would obviously be an error however, if the learned judge were to find that the applicant had a good defence but had not satisfactorily explained the delay and she erroneously considered the need for that explanation as a precondition for the grant of the order.".*

[26] Moreover, his Lordship postulated that the learned judge considered additional factors, including delay and the Defendant's conduct, when deciding not to set aside the default judgment. At paragraphs 34 and 35, his Lordship pronounced the following:

> *"[34] In my view once it is accepted that the issue of delay was a factor which it was open to the learned judge to consider it formed a reasonable part of the exercise of her discretion. It is clear that she considered 'the dilatory conduct and the length of the delay' on the part of the applicant to be additional factors which militated against the Court exercising its discretion to set aside the default judgment.*

[35] The evidence clearly shows that the default judgment was entered in July, 2017. The applicant was fully aware of that fact but took no steps in February, 2020 when the respondent sought to enforce the judgment and it was not until February, 2021 when the respondent made a second attempt to enforce the judgment that she applied to set it aside. In ***Nolan v Devonport*** *(supra) where a debtor similarly did nothing until the creditor sought to enforce the judgment who then applied to set aside the judgment. His application was refused with the Court holding that the debtor's conduct amounted to an abuse of process."*

[27] In Jamaican Supreme Court case of **RBC Royal Bank of Jamaica Ltd et al v Delroy Howell** [2013] JMCC Comm. 4 Mangatal J made the following pronouncements:

"…the law is clear that the Defendant must demonstrate that he has a real prospect of successfully defending the case, as opposed to a fanciful one, this test is designed to eliminate cases which are not fit for trial at all. It is not meant to eliminate trial where there are issues that should be investigated at trial. The judgment is not meant to be conducting a mini-trial on a hearing of the application to set aside a default judgment."

[28] The Court has read the submissions and affidavits of the Claimants and Defendant as well as the Defendant's draft defence. For the Court to determine whether it ought to set aside or enforce the default judgment entered against the Defendant, it must consider if the Defendant has a good explanation for the delay and a realistic prospect of success.

[29] The Defendant was personally served on 12 September 2023 at its registered office with a Standard Claim and Acknowledgment of Service forms. Pursuant to the CPR, the Defendant had until 26 September 2023 to file an Acknowledgement of Service and/or 10 October 2023 to file a defence. The Affidavit of Ganito Saunders filed on the Claimant's behalf regarding the Notice of Discontinuance and Judgment in Default of Acknowledgement of Service was personally served on the Defendant's registered office on 2 October 2023 at approximately 3:26 p.m. There is no doubt that time had lapsed, and the Defendant did not acknowledge service as stipulated under the CPR, which resulted in a regular default judgment being entered.

[30] Counsel for the Claimant submitted that the test to be applied to determine if the regular default judgment entered against the Defendant should be set aside is outlined under rule 13.3(1) of the CPR, and the Defendant must satisfy the three preconditions conjunctively. The Claimant's counsel further submitted that the Defendant's application to set aside the default judgment was made four (4) months after the default judgment was entered, and such period could not be considered "as soon as reasonably practicable." Even during negotiations with the Claimant, the Defendant could have filed its application to set aside the default judgment. The Claimant's counsel further submitted that the Defendant did not provide a good explanation for not acknowledging service or filing a defence because the Defendant was served at its registered office, proving that the Claimant had effected good service. The Defendant's shareholders are also involved in the daily operation of the business as it is family owned and operated, so the Defendant's President, not being advised of the Claimant's action against the Defendant, "is of no moment.".

[31] The Court rules that the Defendant has provided a good explanation for the four (4) months delay in filing to set aside the default judgment, notwithstanding that the period for acknowledgment of service had passed. Four (4) months delay was not inordinate, and the Defendant had filed the application as soon as reasonably practicable when the Defendant negotiations with the Claimant failed to materialize. Therefore, the Defendant has satisfied the test for a good explanation for the delay in applying to set aside the default judgment.

[32] The Claimant relied on the Lam Affidavit filed on 16 July 2024 that evidence at paragraph 9 that on or about 31 July 2021, Mr. Elliot Lam ("Mr. Lam"), the Claimant's General Manager, entered an agreement with the Defendant, whereby the Claimant was responsible for fabricating and installing stainless steel railings at the Lyford Cay club Serpentine Wing. At paragraph 10 of the Affidavit, the Claimant outlined the contract terms as follows:

> *"Under the terms of the contract, the Claimant was required to fabricate, deliver, and install various stainless-steel railings for the Lyford Cay Club Serpentine Wing at a total cost of $466,301.40, inclusive of Value Added Tax…"*

[33] The Lam Affidavit further evidence at paragraph 11 the Defendant's contractual payments as follows:

"It was a further term of the contract that the total contract cost to be paid in instalments of 50%, 25% and 25%, with 50% due prior to the commencement of the project, 25% due at the midway point of completion and the final 25% due after the work was completed."

[34] As evidenced in paragraphs 12 and 13 of the Lam Affidavit, the Defendant paid the 50% deposit on 5 August 2021 and, at midway through the project, paid the 25% on 15 January 2022, leaving the Defendant to pay the balance of $116,575.36 after completing the project. By 31 May 2022, the Claimant had completed the project and emailed one of the Defendant's employees, Daniel Gill, the invoice with a $116,575.36 balance. Mr. Lam evidenced at paragraph 17 that the Defendant does not have a real prospect of defending the claim because after the project's completion, he and the Defendant's Construction Director, Luke Plummer ("Mr. Plummer"), inspected the Claimant's completed project on 29 July 2022. The Defendant did not complain about the Claimant's work quality.

[35] The Lam Affidavit further evidence at paragraphs 18 and 19 that the Defendant acknowledged that it owed the Claimant and promised to pay 95% of the outstanding balance on the basis that their client, the project owner, was holding an unspecified sum as retention for the Defendant. Mr. Lam noted that the original contract made no provision for any sum to be held on retention and, therefore, denied that it was subject to the same retention provisions that were applied to the Defendant by the client, the project owner. Nonetheless, Mr. Lam agreed to accept the 95% outstanding balance, with the remaining 5% to be paid later. At the Defendant's request, a revised invoice reflecting a 95% payment of $93,260.28 was emailed to the Defendant between 29 and 30 August 2022. The Lam Affidavit also evidence in paragraphs 21, 22, and 23 that on 19 October 2022, Mr. Lam emailed the Defendant to ascertain the status of the $93,260.28 payment, and Mr. Plummer advised him that the invoice was being processed. Despite Mr. Lam's numerous follow-up emails sent to various employees of the Defendant, he received no replies until 14 November 2022. On that date, Cornelius Hickey, Vice President of Construction for the Defendant, copied Kristin Altieri, one of their staff members, in an email asking when the payment would be issued to the Claimant. Despite these communications, the Defendant failed to release the $93,260.28 payment.

[36] Conversely, the Defendant relies on the Whitehead Affidavit, which referred to the Defendant's draft defence and counterclaim ("Draft Defence") filed on 13 February 2023. The Defendant admitted that it owes the Claimant $116,575.36 but denies breaching its agreement with the Claimant when it failed to pay the 95% balance and the 5% later. At paragraph 3 of the Defendant's Draft Defence, the Defendant averred that it did not satisfy the debt because the Claimant had breached

an implied term of the contract, whereby the railings would be free from any defect rendering them or their quality unsatisfactory upon examination. Also, that the railings would be reasonably fit for purpose, but within eleven (11) months post-installation, issues such as rust at the weld points and flaking paint became evident. In addition the handrail caps edges installed at the private member property were sharp, posing serious user risks.

[37] Without descending into the Draft Defence, the Court notes that there seems to be a strong defence that may very well answer the allegations made in the Claimants' pleadings. There appears to be a viable defence.

[38] Considering the evidence provided by the Claimant and Defendant, the Court believes that the Defendant has a real prospect of defending the claim. The Claimant admitted that after a year, normal wear and tear resulted in minor flaking and rusting of the railings. Still, the Defendant averred that the defects were noticeable approximately seven (7) months of railings' fabrication and installation. There are serious issues between the Claimant and Defendant that must be ventilated at a trial, and enforcing the regular default judgment against the Defendant would hinder these issues from being adjudged. The Claimant's and Defendant's conflicting evidence regarding the remediation of the defective railings can only be tested at a trial where their version of the facts is scrutinized. The Defendant's claim is more than arguable and carries a degree of conviction. The Claimant failed to discharge the burden of proving that the default judgment entered against the Defendant should not be set aside. Therefore, the Court finds that the Defendant has satisfied the test and that it has a realistic prospect of defending the claim.

Conclusion

[39] The Court is committed to fulfilling the overriding objective outlined in Part 1 of the CPR in ensuring cases are dealt with justly and proportionately while avoiding any unnecessary expenditure of judicial resources. The Defendant has satisfied and complied with the three (3) criteria outlined under rule 13.3(1) of the CPR conjunctively and it would be prejudicial to enforce the judgment against the Defendant, particularly where some of the evidence of the Claimant and Defendant are controverted. In exercising its discretion, the Court hereby sets aside the regular default judgment entered against the Defendant. I therefore make the following order:

(i) The Judgment in Default of Defence filed on 02 October 2023 is hereby set aside.

(ii) Leave is granted for the Defendant to file and serve its Draft Defence and counterclaim within fourteen (14) days of this ruling, failing which the Claimants may enter Judgment in Default of Defence, with costs to be assessed if not agreed; and

(iii) Costs for this application shall be costs in the cause.

Dated this 18th day of October 2024

Deborah E. Fraser

Senior Justice