IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2022/CLE/gen/1518

GODFREY BETHELL

AND

SHANELLE BETHELL

Plaintiffs

AND

CAY CAPITAL SOLUTIONS LTD.

First Defendant

AND

S & L CONSTRUCTION LTD.

Second Defendant

Before:	Assistant Registrar Jonathan Deal
Appearances:	Dawson Malone with Miquel Cleare for the Plaintiffs
	Kevin Moree with Andrew Smith for the First Defendant
	No appearance for the Second Defendant
Hearing dates:	11 September 2024 and 2 October 2024

RULING

ASSISTANT REGISTRAR DEAL

[1.] This is a ruling upon an application made by the First Defendant ("Cay Capital") by Summons filed on 6 February 2023 ("the Set Aside Summons") seeking to set aside a default judgment entered against it on 3 January 2023 (the "Default Judgment"). The grounds of the application are that the Default Judgment is irregular or, alternatively, that Cay Capital has a good and arguable defence on the merits.

[2.] The application is supported by three affidavits filed on the 6 February 2023 (the "First Watson Affidavit"), 31 July 2023 ("the Bellot Affidavit") and 24 June 2024 ("the Second Watson Affidavit") respectively. The evidence in response consists of affidavits filed by the Plaintiffs ("the Bethells") on 28 July 2023 (the "First Affidavit of Godfrey Bethell") and 26 June 2024 (the "Second Affidavit of Godfrey Bethell").

Background

[3.] In November 2020, the Bethells, Cay Capital and the Second Defendant, S&L Construction Ltd. ("S&L Construction"), entered into a Bahamas-law governed Construction Agreement dated 11 November 2020 ("the Construction Agreement") for the construction of a residence, the renovation of a pool house and storage shed, and related works at a property owned by the Bethells. The date for substantial completion of the contractual work ("the Work") was agreed to be 16 months from 5 October 2020.

[4.] In the Construction Agreement, the Bethells are defined as "the Owner" and Cay Capital and S&L Construction are defined as "the Contractor". Article 10.6 of the Construction Agreement explains that "the Contractor" is "an independent contractor formed via a joint venture between S&L Construction Ltd & Cay Capital Ltd" and goes on to provide that S&L Construction "will be responsible for all direct construction related activities" and "shall bear responsibility for all obligations and any liability in respect of the Work" and that Cay Capital "will be responsible for all administrative activities".

[5.] The parties agreed to refer questions or differences concerning the Construction Agreement, or its subject matter, or arising out of the Construction Agreement to arbitration under Article 10.11 of the Construction Agreement. Article 10.11 provides for arbitration before a single arbitrator or three arbitrators (depending upon whether the parties are able to agree a single arbitrator or not) appointed in accordance with the provisions of the **Arbitration Act**. It is not in dispute that the arbitration agreement was once binding on the parties. Whether it remains so is disputed.

[6.] On 1 November, 2022, a generally indorsed Writ of Summons was filed by the Bethells (the "Bethells Writ") containing the following indorsement:

> "The Plaintiffs retained the services of the First and Second Defendant to construct their home situate on Lot 5, High Street, Skyline Heights Subdivision, New Providence, The Bahamas. On the 11th day of November, 2020, they entered a construction agreement setting out the terms of the

construction of the said home. The Defendants have breached the terms of the said agreement causing loss and damage to the Plaintiffs.

AND the Plaintiffs claim:

1. The Sum of $400,000.00;
2. Damages;
3. Special Damages;
4. Interest pursuant to the Civil Procedure (Award of Interest) Act; and
5. Costs."

[7.] In a letter dated 3 November 2022 (the "PlanIt Bahamas Letter"), PlanIt Bahamas, the "Owner's Representative" appointed under Article 6 of the Construction Agreement, asserted a claim by the Bethells against Cay Capital and S&L Construction for the sum of $358,523.09. PlanIt Bahamas demanded payment of the stipulated sum within 7 days of receipt of the letter, failing which the Bethells would seek to send the matter to arbitration.

[8.] The Bethells issued a Notice of Arbitration (the "Notice of Arbitration") pursuant to Article 10.12 of the Construction Agreement against Cay Capital, S&L Construction, Mr. Warren Davis, and Mr. Sean Lynes (collectively, the "Arbitration Respondents") on 18 November 2022. In doing so, the Bethells claimed damages for breach of contract and nominated Justice Ruby Nottage (Ret.) ("Justice Nottage") as sole arbitrator.

[9.] The Notice of Arbitration detailed a litany of alleged breaches of the Construction Agreement by Cay Capital and S&L Construction and other misconduct by the Arbitration Respondents. With respect to the damages sought by the Bethells, the Notice of Arbitration stated in Part VII thereof that Bethells' damages were:

> "currently estimated at $358,523.09 which is inclusive of liquidated damages in the sum of BSD $56,000.00 as at 11th November 2022 to which the Claimants are entitled pursuant to Article 18 of the Contract; and the balance thereof in the sum of $302,523.09 comprising additional costs incurred over and above the agreed Fixed Contract Price to properly complete the Residence to the specifications contained in the Contract and to remediate defective, sub-standard and incomplete work thereto".

[10.] The Bethells' efforts to have Justice Nottage act as sole arbitrator of the parties' dispute were unsuccessful. On 21 November 2022, Justice Nottage proposed a preliminary meeting with all parties in the event that the parties agreed to her appointment as sole arbitrator. On 23 November 2022, Mr. Davis responded to Justice Nottage on behalf of the Arbitration Respondents raising procedural issues connected with the intended arbitration and requesting a copy of Justice Nottage's terms and conditions and details of her experience sitting as a sole arbitrator on complex construction arbitrations (the "1st Nomination Response"). After receiving the 1st Nomination Response, Justice Nottage withdrew her name as a potential arbitrator.

[11.] The Bethells' subsequent efforts to have the late Kelphene Cunningham KC act as sole arbitrator of the parties' dispute were also unsuccessful. The Bethells issued a "Notice of 2nd

Nomination of Sole Arbitrator" on 24 November 2022 nominating Ms. Cunningham as sole arbitrator and asserting that, pursuant to **Section 27(3)** of the **Arbitration Act**, the parties had to jointly agree and appoint a sole arbitrator within 28 days. On 25 November 2024, Mr. Davis wrote to Ms. Cunningham in terms similar to the 1st Nomination Response (the "2nd Nomination Response"). After receiving the 2nd Nomination Response, Ms. Cunningham "recused" herself (effectively withdrawing her name as a potential arbitrator).

[12.] On 15 December 2022, Mr. Davis sent an email to the Bethells on behalf of the Arbitration Respondents to propose that the parties adopt mediation before a skilled construction mediator instead of arbitration, while at the same time confirming the Arbitration Respondents' continued willingness to "arbitrate crystalized disputes". Mr. Davis also canvassed at a high level several points of defence which it is unnecessary to rehearse as they have not been relied upon in support of the Set Aside Summons.

[13.] On 19 December 2022, the Bethells' Writ was served on Cay Capital's registered office, MB&H Corporate Services Limited. Once it was served, it was brought to the attention of Janelle Watson, the Secretary of Cay Capital. Cay Capital says in its evidence, and there is no reason to doubt, that Cay Capital's legal counsel at the firm of McKinney, Bancroft & Hughes was not in office at the time and that MB&H Corporate Services Limited closed for the holidays from 22 December 2022 to 3 January 2023.

[14.] On Tuesday, 3 January 2023, the Bethells entered judgment in default of appearance (the Default Judgment) against Cay Capital under **Order 13** of the **Rules of the Supreme Court** ("**RSC**"). The Default Judgment was in the following terms:

> "The 3rd day of January, A.D., 2023.
>
> No Appearances having been entered by or on behalf of the First Defendant herein,
>
> IT IS THIS DAY ADJUGED:
>
> 1. That the First Defendant do pay to the Plaintiff the sum of Four Hundred Thousand Dollars with interest to accrue at the statutory rate from the date of Judgment until paid in full as endorsed in the Writ of Summons filed on the 1st November 2022; and
>
> 2. That the Defendants do pay the Plaintiff's costs of this action to be taxed if not agreed."

[15.] On 4 January 2023, Mr. Davis wrote to the Bethells on behalf of the Arbitration Respondents stating *inter alia*:

> "...The service of the Writ will now require an application to stay the proceedings pending the arbitration, which we will be forced to seek costs for. We wanted to avoid this. Can you confirm if you are willing to engage in mediation or if not, will you agree to stay the proceedings pending the arbitration? If not, we will instruct our attorneys to file an Appearance and make the necessary application to stay these proceedings, including seeking costs."

[16.] The Default Judgment was served on Cay Capital at its registered office on 5 January 2023. The Bethells entered Judgment in Default of Appearance against S&L Construction the same day.

Preliminary issues

[17.] It was common ground between the parties that the **RSC** should be applied to the Set Aside Summons. The Bethells made two preliminary objections and the merits of Cay Capital's application were argued *de bene esse*. The preliminary objections are considered below.

Is Cay Capital properly before the Court?

[18.] Cay Capital has never entered an appearance, whether conditional or otherwise, in the action. The Bethells objected to Cay Capital's application being proceeded with at all for the reason that Cay Capital failed to enter an appearance before filing the Set Aside Summons. The Bethells invited the Court to dismiss the Set Aside Summons for want of proper appearance.

[19.] Counsel for the Bethells contended that, in order for a company to act in proceedings, it must do so by way of an attorney and that, in order for an attorney to act in proceedings and to be placed on the record, the attorney must enter an appearance, whether that appearance be conditional or unconditional (though a company that wishes to apply to set aside a default judgment to challenge the jurisdiction of the Court must first enter a conditional appearance). Counsel submitted that the requirement that companies are obliged to act by attorney and an appearance must be filed exists to ensure that corporate entities are "properly represented". Counsel submitted that the absence of a conditional appearance in this case was a "significant legal violation" which made the steps purportedly taken on behalf of Cay Capital void *ab initio*.

[20.] In support of the first preliminary objection, the Court was referred to **Order 12, Rule 1(2)**, **Order 12, Rule 6**, **Order 12, Rule 7**, **note 5/6/2** in the **Supreme Court Practice 1982**, **note 12/1/2d** in the **Supreme Court Practice 1982**, the decision of Stewart J in **Wincrest Capital Limited v Rebecca Fernie** 2019/CLE/gen/00452 (10 May 2021) (as authority for the proposition that an application can be dismissed for want of appearance) and the decision of Deputy Registrar Toote (as he then was) in **Cherelle Cartwright v Sapodilla of West Bay Ltd 2019/CLE/gen/00260** (18 September 2024).

[21.] Cay Capital contended, relying on **note 13/9/2** in the **Supreme Court Practice 1979**, that an appearance was not required before it filed the Set Aside Summons.

[22.] Counsel for Cay Capital advanced **note 13/9/2** in the **Supreme Court Practice 1979** as authority for the submission that, while a defendant generally cannot enter an appearance after judgment is entered without the leave of the Court, in instances where an application is being made to set aside a judgment entered in default of appearance, there is no need for an appearance to first be entered whether the defendant is a company or not. Counsel submitted that this is in recognition of the fact that the effect of default judgments are severe. Counsel also referred to the "narrow residual jurisdiction" that exists after final judgment has been entered in default.

[23.] Counsel for Cay Capital submitted that it was telling that no relevant authorities were provided by the Bethells to make good their objection based on the lack of a formal appearance by Cay Capital. Counsel submitted that **Wincrest Capital Limited v Rebecca Fernie** is of no relevance, as the case concerned an application for summary judgment made under **Order 14**. Counsel submitted that **Cherelle Cartwright v Sapodilla of West Bay Ltd** is supportive of its position but that, if it is not, it is distinguishable because it concerned an application to set aside an Order extending the validity of a Writ of Summons and not an application to set aside a judgment entered in default of appearance.

[24.] Counsel for Cay Capital submitted that **Order 12, Rule 1(2)** was not breached by Cay Capital having regard to the nature of its application and its intentions if the Default Judgment is set aside. Counsel further submitted that the specific rule governing applications to set aside judgments entered in default of appearance overrides the general rule that a defendant company must act through an attorney. Counsel submitted that **note 5/6/2** in the **Supreme Court Practice 1982** was not breached by Cay Capital as the Set Aside Summons was issued by Moxey Law Chambers on its behalf. Counsel also invited the Court to remedy any irregularity pursuant to **Order 2, Rule 1** because the Bethells suffered no prejudice.

[25.] Having considered the submissions of the parties, the Court accepts Cay Capital's submission that it was not required to enter an appearance under **Order 12** before filing the Set Aside Summons. **Note 13/9/2** in the **Supreme Court Practice 1979** states that leave to enter an appearance is not required before applying or in order to apply to set aside a judgment entered in default of appearance. **Note 13/9/2** does not distinguish between applications to set aside regular judgments and applications to set aside irregular judgments, nor does it distinguish between individual litigants and bodies corporate. The Court holds that Cay Capital is properly before the Court for the purposes of the Set Aside Summons.

[26.] **Order 12, Rule 1(2)**, the main peg upon which the Bethells rested their argument, does not clearly have the effect of requiring a corporate defendant to first take the step of obtaining leave to enter an appearance before applying to set aside a judgment entered in default of appearance. Were the Bethells' preliminary objection correct, one would expect the position asserted to be well-attested by authority. However, the authorities relied upon by the Bethells were not, on review, directly on point. Neither **Wincrest Capital Limited v Rebecca Fernie** nor **Cherelle Cartwright v Sapodilla of West Bay Ltd** concerned an application to set aside a judgment entered in default of appearance at all, let alone one made by a company, and neither **note 5/6/2** nor **note 12/1/2d** actually confirms the correctness of the Bethells' preliminary objection.

[27.] The Court is fortified in its conclusion that Cay Capital is properly before the Court by **Ten OC Estates Limited v Becker Landscaping & Irrigation Inc.** [2011] 3 BHS J. No. 105, a decision by Heburn J relied on by Cay Capital for other reasons. In that case, the defendant, a company (see [41]), successfully made an application to have a judgment entered in default of appearance for the sum of $855,526 plus interest and costs set aside in order to proceed with a summons for leave to enter a conditional appearance and a summons to set aside the writ. The

reverse of what the Bethells posit should have taken place here happened there without any adverse comment as to the *locus standi* of the defendant.

[28.] Whether this would be an appropriate case for the exercise by the Court of its curative powers under **Order 2, Rule 1** strictly does not arise but, if, as has been suggested, Cay Capital ought to have entered an appearance before filing the Set Aside Summons, Cay Capital's failure to do so is a mere irregularity which is capable of being cured under **Order 2, Rule 1**. In the Court's view, any such irregularity ought to be waived because Cay Capital has at all material times been represented by attorneys, the mischief to which **Order 12, Rule 1(2)** is directed, and no discernable prejudice has been caused to the Bethells.

*Is the Set Aside Summons irregular for non-compliance with **Order 2, Rule 2(2)**?*

[29.] The Bethells objected to Cay Capital attempting to set aside the Default Judgment on the basis that it is irregular because Cay Capital failed to state its grounds of objection in the Set Aside Summons in compliance with **Order 2, Rule 2(2)**. This objection was raised in the Bethells' written submissions dated 28 July 2023 lodged in anticipation of the first hearing of the Set Aside Summons. Cay Capital argued that the objection was raised untimely or that the Bethells delayed but that submission is not meritorious.

[30.] The Bethells argued that the Set Aside Summons failed to specifically set out the grounds of irregularity relied upon by Cay Capital as is mandatorily required by **Order 2, Rule 2(2)** and, therefore, Cay Capital ought not to be permitted to rely upon any purported grounds of irregularity to challenge the Default Judgment. The Bethells asserted that the Set Aside Summons' failure to state the grounds of objection relied upon by Cay Capital was not cured by the First Watson Affidavit, which offered little indication of the grounds intended to be relied upon. The Bethells invited the Court to confine Cay Capital to contesting the Default Judgment on the basis that it was a regularly entered judgment.

[31.] Counsel for the Bethells submitted that any attempt by a litigant to set aside a step in proceedings for irregularity must be "grounded in strict procedural compliance". Counsel submitted that some of the very cases relied upon by Cay Capital, namely, **Scotiabank (Bahamas) Limited v Stuart t/a The Junkanoo Lounge** [2013] 3 BHS J. No. 67 and **Ten OC Estates Limited v Becker Landscaping & Irrigation Inc.**, demonstrated how Cay Capital should have stated its grounds in the Set Aside Summons and how Cay Capital ought to have gone about rectifying its failure to comply with **Order 2, Rule 2(2)** by making a formal application to amend.

[32.] Counsel for the Bethells made painstaking efforts to distinguish the cases relied upon by Cay Capital as demonstrating the "modern" approach to procedural irregularity and to confine the broad statements of principle relied upon by Cay Capital as *obiter dicta*. Counsel submitted that none of the cases relied upon by Cay Capital made good Cay Capital's opposition to the preliminary objection. Counsel admonished the Court to take Cay Capital's alleged breach of **Order 2, Rule 2(2)** seriously because it reflected a "disregard for proper procedure", Cay Capital

had acted unjustly in the lead up to this litigation and Cay Capital had made other procedural errors, including the appearance point.

[33.] Counsel for the Bethells submitted that, insofar as Cay Capital had not applied to amend its Set Aside Summons, Cay Capital had to rely on the Court's benevolence to overlook its irregularities in order to point at the Bethells' alleged irregularities. Counsel submitted that "what is good for the goose is good for the gander" and that it could not be that the rules of court only applied to the Bethells. Counsel argued that Cay Capital's procedural missteps were more fundamental than the Bethells', to the extent that there were any, and, in any event, those missteps are fatal to Cay Capital relying on any irregularities, as a party's right to set aside for irregularity is not absolute but subject to the requirements of **Order 2, Rule 2**.

[34.] In support of the second preliminary objection, the Court was referred to **O'Sullivan v Holmes and Hills LLP** [2023] EWHC 508 (KB), **Anthony Egbert Hanna v Neil Lausten** SCCivApp No. 3 of 2014 (18 October 2018), **Section 3(3)** of the **Interpretation and General Clauses Act** and **Caribbean Mining Group Limited v J. O'Brien** et al, 2012/CLE/gen/FP/0020 (31 May 2013). **Anthony Egbert Hanna v Neil Lausten** and **Section 3(3)** of the **Interpretation and General Clauses Act** were referred to for the mandatory nature of the requirements of **Order 2, Rule 2. Caribbean Mining Group Limited v J. O'Brien** was referred to for the proposition that, if a party fails to amend after being forewarned, consequences may follow.

[35.] Cay Capital contended that it had complied with **Order 2, Rule 2(2)** by stating the grounds of irregularity in the Set Aside Summons, the First Watson Affidavit and/or its written submissions dated 28 July 2023. In the alternative, Cay Capital contended that the Set Aside Summons is not a nullity and any irregularity ought to be cured pursuant to the Court's powers under **Order 2, Rule 1**. Counsel for Cay Capital referred the Court to a collection of cases in which courts have given effect to the well-known maxim that "...in the pursuit of justice, procedure is a servant and not a master". [1] Counsel submitted that the modern approach is to "get on" with matters and that the Bethells were "clutching at straws" with their objections and were seeking to exploit technicalities which caused no prejudice.

[36.] Having considered the submissions of the parties, the Court finds that Cay Capital failed to comply with **Order 2, Rule 2(2)**. The Set Aside Summons failed to specify the grounds of objection and the specific irregularities relied on. The Set Aside Summons baldly raised irregularity in a fashion very similar to the summons in **Ten OC Estates Limited v Becker Landscaping & Irrigation Inc**, which Hepburn J found was irregular. Having regard to its contents, the First Watson Affidavit did not cure the Set Aside Summons' deficiencies. With respect to Cay Capital's written submissions, no authority was provided for the proposition that

[1] The cases the Court was referred to included **Petrona Russell v Anthony Thompson 2018**/CLE/gen/01500, **Ann Maxine Patton v Alvarez, Jimenez, De Pass, S.A. a/k/a Alvarez Aguilar Abogados Asociados, S.A** 2017/CLE/gen/00777, **Higgs Construction Company v Patrick Devon Roberts** 2017/CLE/gen/00801, **Finance Corporation of Bahamas Limited v Philip Arlington Mitchell** 2009/CLE/gen/1398, **John Pinder v Peter Outten** 2019/CLE/gen/00655 and **Dramiston Ltd v Financial Intelligence Unit** 2017/CLE/gen/1266.

Order 2, Rule 2(2) can be treated as having been complied with if the grounds of objection and the specific irregularities are set out in written submissions in support of the application.

[37.] Cay Capital's failure to comply with **Order 2, Rule 2(2)** is an irregularity which brings the Set Aside Summons within the ambit of **Order 2, Rule 1**. **Order 2, Rule 2(2)** is mandatory, but a failure to comply with it is not necessarily fatal. **Anthony Egbert Hanna v Neil Lausten** did not address the issue. Case law shows that there is more than one possible response to a breach. The Court can decline to permit the applicant to rely on the alleged irregularities, as in **Dean v Package Delivery Service Ltd.** [1985] BHS J. No. 9. However, the Court can also take steps to cure the irregularity, as in **Ten OC Estates Limited v Becker Landscaping & Irrigation Inc**. If the application based on irregularity proceeds despite the deficiency, there may be costs consequences.

[38.] It was a point of significant controversy whether the Court could (or should) cure Cay Capital's non-compliance with **Order 2, Rule 2(2)** without a formal application by Cay Capital. The Court is satisfied that the lack of a formal application is not preclusive. The Court can order of its own motion that any irregular document in the proceedings be amended to correct a defect or error. In **Ten OC Estates Limited v Becker Landscaping & Irrigation Inc.**, a case closer to the present facts than **Caribbean Mining Group Limited v J. O'Brien**, Hepburn J granted the defendant "leave to cure the defect complained of" pursuant to **Order 2, Rule 1** without any discernable formal application as part of the Court's disposition of the appeal.

[39.] The purpose of the requirement imposed by **Order 2, Rule 2(2)** is to identify the specific points of irregularity relied upon by the applicant in order to prevent their opponent from being taken by surprise. Cay Capital's case based on irregularity was developed in its written submissions dated 28 July 2023 and the grounds of irregularity were specifically set out in the Second Watson Affidavit. When the Set Aside Summons came on for hearing on 11 September 2024 no prior determinations had been made in the matter and the Set Aside Summons was effectively heard *de novo*. The Bethells were not materially prejudiced by Cay Capital's non-compliance with **Order 2, Rule 2(2).** Cay Capital's case on irregularity had been articulated and the Bethells had ample time to prepare for and to meet it.

[40.] Notwithstanding the attractiveness of Counsel for the Bethells' submission that "what is good for the goose is good for the gander", the Court accepts Cay Capital's submission that the Bethells' comparison between Cay Capital's failure to comply with **Order 2, Rule 2(2)** and the irregularities alleged by Cay Capital to exist in the Default Judgment is one of "apples to oranges". On Cay Capital's case, an irregular final judgment for the sum of $400,000 which ought never to have been entered leaves it exposed to the effects of **Section 63** of the **Supreme Court Act** and to execution until such time as the judgment is set aside. That is a far more serious thing than a failure by a litigant to state grounds in a summons when it has been possible for their opponent to meet their case.

[41.] In the premises, the Court is satisfied that Cay Capital's failure to comply with **Order 2, Rule 2(2)** ought not to prevent it from seeking to set aside the Default Judgment on the basis that it is irregular. The Court's curative powers under **Order 2, Rule 1** ought to be exercised to waive

Cay Capital's failure to comply with **Order 2, Rule 2(2)**. To the extent that it is required, the Court orders that the Set Aside Summons be amended to state the grounds of irregularity set out at [3]((i) to (v)) of the Second Watson Affidavit.

Discussion and analysis

[42.] Having decided the Bethells' preliminary objections in favour of Cay Capital, consideration must be given to the merits of the Set Aside Summons. The issue of whether the Default Judgment should be set aside on the basis that it is irregular shall be addressed before the issue of whether it should be set aside if it was regularly entered because if Cay Capital is successful on the former issue that may be dispositive.

Should the Default Judgment be set aside on the basis that it is irregular?

[43.] The grounds of irregularity enumerated in the Second Watson Affidavit are:

(i) the Default Judgment is irregular because the amount of the Default Judgment is not a debt or liquidated demand and, in any event, exceeds the amount, if any, owed by Cay Capital at the time the Default Judgment was entered;

(ii) the Bethells waived their right to pursue their claims in the Supreme Court and were estopped from entering the Default Judgment due to the Notice of Arbitration;

(iii) the Bethells' commencing this action was an abuse of process in light of the arbitration clause in Article 10.11 of the Construction Agreement;

(iv) the Supreme Court does not have jurisdiction to adjudicate the disputes between the parties as a result of the arbitration clause in Article 10.11 of the Construction Agreement; and

(v) the arbitration clause is a complete defence to the claims made by the Bethells in this action and the substantive defence to the claims made by the Bethells should be raised in the arbitration.

[44.] It is only ground (i) of the above-enumerated grounds that is suitable for determination. To venture into a detailed consideration of grounds (ii) to (iv) would anticipate Cay Capital's applications foreshadowed at [10] of the Second Watson Affidavit (those being applications to strike out the action as an abuse of process or to stay the action in favour of arbitration). Ground (v) substantially relates to Cay Capital's alternative ground.

[45.] Cay Capital contended that the sum of $400,000 in respect of which the Default Judgment was entered did not qualify as a debt or liquidated demand entitling the Bethells to enter final judgment under **Order 13, Rule 1** and, therefore, the Default Judgment is irregular and Cay Capital is entitled to have the Default Judgment set aside *ex debito justitiae*. Cay Capital further contended that the sum of $400,000 for which the Default Judgment was entered exceeds the amount, if any,

owed by Cay Capital to the Bethells when the Default Judgment was entered and, therefore, the Default Judgment is irregular on that basis as well.

[46.] Relying on **note 6/2/4A** in the **Supreme Court Practice 1979**, Counsel for Cay Capital submitted that a claim is not for a debt or liquidated demand simply because a specified figure is stated on the face of the pleading. Counsel submitted that the real question is whether the figure claimed is already ascertained or capable of being easily ascertained as a matter of arithmetic on the one hand or whether the figure requires "investigation beyond mere calculation". Counsel contended that there is nothing in the Bethells' Writ or the Construction Agreement which would allow the amount of $400,000 to be ascertainable or capable of being ascertained as a matter of arithmetic and, therefore, it is not a debt or liquidated demand.

[47.] Counsel for Cay Capital highlighted that the PlanIt Bahamas Letter and the Notice of Arbitration only contained "estimates" of damages, which were put at $358,523.09, some $40,000 lower than the sum of $400,000 claimed in the Bethells' Writ. Counsel submitted that the Bethells' own documents therefore recognized that (i) the damages being claimed are only estimated (and, as such, cannot amount to liquidated damages or a liquidated demand) and (ii) insofar as the sum of $358,523.09 is alleged to comprise both liquidated damages and some other amount, which was not something that Cay Capital accepted, the sum of $400,000 exceeded any amount that could be considered a liquidated demand.

[48.] Counsel for Cay Capital further submitted that the PlanIt Bahamas Letter and the Notice of Arbitration suggest that the figure of $400,000 was derived from a list of damages prepared by the Bethells. Counsel submitted that the Bethells were not entitled to have entered judgment based on their own figures which had not been properly assessed by the Court. The Court was referred to **Hall v The Bridge Authority** [2019] 1 BHS J. No. 24 and **Jon Gary Snell and Valentina Snell (nee Dezelebova) v Hugh Gordon Cash (Trading as North Eleuthera Builders)** 2023/CLE/gen/00045 (10 September 2024) as Bahamian authority for the proposition that a plaintiff cannot unilaterally assess the damages to which they are entitled when their claim is unliquidated in nature.

[49.] As regards Cay Capital's argument that the Default Judgment is irregular because it was entered for an amount greater than that which is due from Cay Capital, Counsel for Cay Capital submitted that there is a "separation of liability" under Article 10.6 of the Construction Agreement whereby the only damages that Cay Capital can be liable for are damages alleged to relate to "administrative activities". The indorsement on the Bethells' Writ fails to differentiate between "administrative activities" and "direct construction related activities". However, the PlanIt Letter suggests that at least the vast majority of what the Bethells complain about is construction-related. The result is that the Default Judgment was entered for an amount greater than that which could be claimed from Cay Capital.

[50.] The Bethells answered Cay Capital's submissions by attempting to distinguish the cases relied upon by Cay Capital, by drawing a parallel between the Bethells' Writ and the Default Judgment, and by disputing Cay Capital's interpretation of Article 10.6. Placing to one side the

Article 10.6 issue, which engages the merits of Cay Capital's defence, the strongest point taken by the Bethells was that in none of the cases Cay Capital relied upon was there a distinct "expressed sum" claimed in the plaintiffs' pleadings. Counsel submitted that the Bethells' Writ was in this respect "fundamentally different" from the pleadings in the cases cited by Cay Capital because the Bethells' Writ expressly claimed the sum of $400,000 and that is the amount for which the Default Judgment was entered. Counsel submitted that there was no quantification of damages here.

[51.] Having considered the submissions of the parties, the Court finds that the Default Judgment is irregular. The Bethells' claim for the sum of $400,000 was not a claim for a liquidated demand as the term "liquidated demand" does not extend to unliquidated damages. While the Bethells' Writ does not particularise how exactly the sum of $400,000 was calculated, the Bethells' claim is for breach of the Construction Agreement and the sum of $400,000 was never agreed to be paid by Cay Capital under the Construction Agreement nor could it have been exclusively composed of liquidated damages under Article 18 of the Construction Agreement. The Bethells were entitled to claim damages for breach of the Construction Agreement, but the total amount of the Bethells' entitlement required "investigation beyond mere calculation" and judicial assessment.

[52.] In the premises, the judgment entered against Cay Capital is irregular and Cay Capital is entitled to have it set aside *ex debito justitiae* provided that it applied to set aside it aside within a reasonable time and before taking any fresh step after becoming aware of the irregularity (i.e., subject to compliance with the requirements of **Order 2, Rule 2(1)**). The Set Aside Summons was filed just over a month after the Default Judgment was served on Cay Capital and before Cay Capital took any other step in the proceedings. The Court finds that the conditions of **Order 2, Rule 2(1)** are satisfied on the facts, notwithstanding the criticisms made by the Bethells of Cay Capital's promptness. The Default Judgment therefore must be set aside.

Should the Default Judgment be set aside on the basis that Cay Capital has a good and arguable defence?

[53.] It is unnecessary for the Court to consider whether the Default Judgment ought to be set aside as a matter of discretion under **Order 13, Rule 8** because Cay Capital has a good and arguable defence on the merits in light of the Court's findings on the issue of irregularity. The existence of an arbitration agreement between the parties is generally not in and of itself a defence on the merits and it does not relieve a defendant of the need to show a good and arguable defence on the merits when challenging a regularly entered default judgment: **Vann v Awford** [1986] Lexis Citation 1365; **Patel v Patel** [2000] QB 551. As it is possible that Cay Capital's substantive defence may one day fall to be considered by an arbitral tribunal, it would be unwise for the Court to discuss the merits of that defence without a pressing need to do so.

Conclusion

[54.] For the foregoing reasons, the Court accedes to the Set Aside Summons. The Default Judgment is set aside. The Court declines to impose the conditions sought by the Bethells. The Default Judgment has been found to be irregular, making the imposition of conditions

inappropriate (cf **note 13/9/4** in the **Supreme Court Practice 1979**). In addition, the proper method of securing a defendant's assets prior to trial if there is a risk of dissipation is a freezing injunction.

[55.] Where a default judgment is set aside on the basis that it is irregular, the usual rule is that the plaintiff must pay the defendant's costs, as **Scotiabank (Bahamas) Limited v Stuart t/a The Junkanoo Lounge** makes clear (at [16]). However, it is not an absolute rule, and the circumstances of the case may warrant some other order. **Hall v The Bridge Authority** serves as an illustration, where no order as to costs was made because the successful defendant had been in breach of an "unless" order (at [5]).

[56.] The Bethells requested an opportunity to be heard on the issue of the costs in light of the Court's ruling in the course of argument. The Court therefore invites brief written submissions from the Bethells on the issue of the appropriate costs order to be made by 5:00 pm on 14 March 2025. Cay Capital may respond in writing, should they wish to do so, by 5:00 pm on 21 March 2025. The issue of the appropriate costs order will then be determined on the papers.

[57.] In concluding this ruling, Counsel are thanked for their helpful submissions and authorities.

Dated this 3rd day of March, 2025

Jonathan Deal
Assistant Registrar