

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Side  
2015/CLE/gen/FP/00043**

**BETWEEN**

**PATRICK ASTWOOD**  
**Personal Representative of the Estate of Patricia Astwood**  
**Claimant**

**AND**

**DIONY CELICOURT**  
**Defendant**

BEFORE: Assistant Registrar Rosanne Sweeting

APPEARANCES: Ms. Sherita Forbes for the Claimant  
Mr. Dawson Malone and Ms. Miquel Cleare for the Defendant

HEARING DATE: November 11<sup>th</sup>, 2025

**RULING**

This is an application by the Defendant to strike out the Claimant's claim as set out in the Writ of Summons or alternatively set aside the Judgment in Default of Defence

**Introduction**

1. The Defendant filed his Notice of Application and Affidavit of Ebonese Bain in Support of the application on November 26<sup>th</sup>, 2024. The Defendant seeks (i) an Order pursuant to Part 26.3 of the Supreme Court Procedure Rules, 2022 ("CPR") and/or the inherent jurisdiction of the Court that the claim as set out in the Writ of Summons filed on February 12<sup>th</sup>, 2015 be struck out and the action be dismissed; alternatively; (ii) an Order pursuant to Part 13.2 of the CPR to set aside

the Judgment in Default of Defence against the Defendant filed in 2016; and (iii) costs.

## **Background**

2. The chronology/background of this matter is from a review of the Court's file only.
3. The genesis of this action as found in the Writ of Summons filed on February 12<sup>th</sup>, 2015 is from what the Claimant alleges was the result of the Defendant's negligence during a road traffic accident on March 3<sup>rd</sup>, 2012. The Claimant claims damages (special and general) interest on special damages, future medical expenses, interest and costs for personal injuries and loss she suffered. A Statement of Claim was filed on August 4<sup>th</sup>, 2015 setting out the "Particulars of Negligence", "Particulars of Injury" and "Particulars of Special Damage" although the Claimant indicated in that paragraph that her losses and expenses are continuing and will produce a completed schedule of expenses and losses at a later date.
4. The Defendant entered an appearance by way of a Notice of Appearance and Memorandum of Appearance November 3<sup>rd</sup>, 2015.
5. The Claimant filed a Judgment in Default of Defence on August 22<sup>nd</sup>, 2016 which was served on the Defendant on August 29<sup>th</sup>, 2016 as stated in the Affidavit of Service of Reserve 332 John Wayne Johnson filed on September 19<sup>th</sup>, 2016. The Claimant subsequently filed a Notice of Assessment of Damages on September 20<sup>th</sup>, 2016. The Claimant also filed an Affidavit of Search on September 19<sup>th</sup>, 2016 whereby Reserve 332 John Wayne Johnson stated that he conducted a cause list search on August 29<sup>th</sup>, 2016 at the Supreme Court Registry in Grand Bahama and found no Defence was filed in the action.
6. Unfortunately, the Plaintiff in this action Mrs. Patricia Astwood died on October 2<sup>nd</sup>, 2016. A Summons and Ex-Parte Affidavit were filed on January 5<sup>th</sup>, 2018 for an Order that the estate of Mrs. Patricia Astwood be substituted in place of the named Plaintiff and by subsequent Order then Acting Deputy Registrar Ntshona Tynes

granted the Order on February 28<sup>th</sup>, 2018 that the widower, Mr. Patrick Astwood continue the proceedings as the personal representative of the estate of Patricia Astwood.

7. The Plaintiff filed a Notice of Assessment of Damages on March 23<sup>rd</sup>, 2018 and a Notice of Intention to Proceed on June 17<sup>th</sup>, 2022.
8. On November 26<sup>th</sup>, 2024 the Defendant filed a Notice of Change of Attorney, a Notice of Application and Affidavit of Ebonesse A. Bain, the application to which the parties are now before the Court. The Claimant ("Plaintiff") subsequently filed a Notice of Intention to Proceed on December 12<sup>th</sup>, 2024.
9. The Defendant in support of his application to strike out the Writ of Summons or in the alternative set the Judgment in Default aside relies on the Affidavit of Ebonesse Bain and the Written Submissions and Reply Submissions filed on August 21<sup>st</sup>, 2025 and October 30<sup>th</sup>, 2025 respectively.
10. The Claimant objects in part to the Defendant's application to strike out the Writ of Summons and relies on his Affidavit and Supplemental Affidavit filed on August 28<sup>th</sup> and 29<sup>th</sup>, 2025 respectively and his Skeleton Arguments filed on October 10<sup>th</sup>, 2025.

### **Strike Out Application**

11. The Defendant in his Notice of Application seeks an Order pursuant to Part 26.3 of the CPR and/or the inherent jurisdiction of the Court to strike out the Claimant's Writ of Summons filed on February 12<sup>th</sup>, 2015 and dismiss the action on the basis that there has been inordinate delay on the part of the Claimant to pursue this action amounting to want of prosecution. Further, that such action for failing to pursue the action can also be considered an abuse of the Court process if the inaction is intentional or contumelious.
12. Part 26.3 of the CPR provides:-
  - (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that

—

- (a) There has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
  - (b) The statement of case of the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;
  - (c) **The statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;** or
  - (d) The statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10 [**emphasis mine**].
13. While the Notice of Application does not specify which part of the provision the Defendant seeks his relief, based on the submissions by Counsel for the Defendant and the Affidavit evidence in support, the instant application falls within Part 26.3(1)(c) of the CPR.
14. On an application to strike out a claim for want of prosecution the Court is to consider whether the default has been intentional and contumelious or where there has been inordinate and excusable delay by the Claimant or their lawyers and that delay gives rise to a substantial risk that a fair trial is not possible or is likely to cause serious prejudice to the Defendant.

## **Submissions**

15. Counsel for the Defendant, Mr. Malone submits in summary that the actions and inactions of the Claimant since the commencement of this action until the filing of this application amounts to inordinate delay. Further, that such inordinate delay has resulted in a substantial risk to a fair trial. Mr. Malone relies on the cases of **Birkett v James [1977] 2 All ER 801; Major Consulting Limited v CIBC Trust Company (Bahamas) [2014] 2 BHS J No. 19; Jergens v The Grand Bahama Development Company Limited, Bahamas Supreme Court Civil Side No. 1369 of 1987 [unreported]** in support of his submissions.
16. Additionally, the Affidavit evidence of Ms. Ebonesse Bain, in support of the Defendant's application sets out a timeline from when the road traffic accident

occurred on March 3, 2012 to the filing of the application before the Court. Her evidence in part is that:-

- a. The Claimant on the brink of the expiration of the three year statutory limitation period filed her Writ of Summons seeking general and special damages and consequential loss arising from a road traffic accident that occurred on March 3, 2012;
- b. That the Claimant filed her Statement of Claim on August 4<sup>th</sup>, 2015 and served the same along with the Writ of Summons on the Defendant on October 20<sup>th</sup>, 2015;
- c. That the Defendant entered an appearance by filing his Notice of Appearance and Memorandum of Appearance on November 3<sup>rd</sup>, 2015 and serving the same;
- d. That the Defendant on December 7<sup>th</sup>, 2015 filed his Defence in the Nassau Supreme Court Registry and served the Defence on Counsel for the Claimant by way of the exhibited letter however an Affidavit of Service exhibiting service of the Defence on Counsel for the Claimant was not filed;
- e. That on August 22<sup>nd</sup>, 2016 Judgment in Default of Defence was irregularly entered against the Defendant;
- f. That after the filing and serving of the said Judgment in Default nothing else transpired in the action however after conducting a search of the Court's file at the Supreme Court Registry in Freeport, Grand Bahama there was an application filed January 5<sup>th</sup>, 2018 by the widower of the late Claimant for substitution of the estate in place of the deceased and that an Order was made on February 28<sup>th</sup>, 2018 granting the widower's application for substitution;
- g. That the Defendant was never served copies of the substitution application or the Order granted and that this only came into the Defendant's possession after obtaining copies from the Registry;
- h. That the cause list search also showed that a Notice of Assessment of Damages was filed on March 23<sup>rd</sup>, 2018 and that the same was not served

on the Defendant and to date the Assessment of the irregular Judgment has not taken place;

- i. That the Claimant filed a Notice of Intention to Proceed on June 17<sup>th</sup>, 2022, the Defendant was not served with the same and that since the filing of the said Notice the Claimant has not taken any additional steps to progress the action;
- j. That there has been a prolonged and inordinate delay in proceeding with the action by the Claimant;
- k. That it has been six years since the substitution of the Claimant's estate;
- l. That the delay on the part of the Claimant has been inexcusable as there has been no legitimate or reasonable explanation as to why the Claimant failed to move the matter;
- m. That the cause of action arose on March 3<sup>rd</sup>, 2012, 12 years ago and since the filing of the Writ the Claimant who alleged to have suffered personal injuries as a result of the accident died therefore, a fair trial may not be possible;
- n. That the Judgment in Default of Defence was irregularly entered as a Defence was filed and served on the Claimant almost eight months prior to the filing of the Judgment in Default.

17. Ms. Sherita Forbes, Counsel for the Claimant in response to the Defendant's application submits in summary that the power to dismiss an action for want of prosecution is discretionary. Further, that the court will only dismiss an action when it considers two issues, whether there has been a prolonged and inexcusable delay and whether such delay will do a grave injustice to one side or the other or both. Ms. Forbes relies on the cases of **Clough and Others v Clough and Others [1986] 1 All ER 1179; Ferguson v Commissioner of Police [1997] BHS J. 12; Icebird Ltd. v. Winegardener [2009] UKPC 24** in support of her submissions.

18. Additionally, the evidence of Mr. Patrick Astwood, the Claimant in both his Affidavit and Supplemental Affidavit sets out the reasons for the delay and the ways in which the Defendant would not be prejudiced should the matter proceed.

19. His evidence in part is that:-

- a. The Claimant died intestate on October 2, 2016 and an application was made to the Court to substitute him as Claimant to carry on the matter and the Court made an Order on February 28, 2018;
- b. That immediately after the Claimant's death, Freeport suffered the devastating effects of Hurricane Matthew whereby the roof of their home was destroyed;
- c. That in 2017 Freeport was struck again by two hurricanes which also caused damage to their home;
- d. That in 2018 he contacted his attorney in hopes to having the matter resolved;
- e. That while his attorney was trying to negotiate a settlement in the matter Hurricane Dorian hit Freeport in September 2019 whereby their home was demolished and his place of employment did not have sufficient work resulting in no pay;
- f. That in March 2020 COVID 19 impacted the Bahamas and life came to halt until sometime 2022;
- g. That the facts and evidence would not be hard to recall because of the time that has passed because he was a passenger in the vehicle driven by the deceased but was not injured and he can fully testify to what took place;
- h. That he was with his wife during all of her medical treatments in The Bahamas and the United States and that all of her medical records are preserved and available;
- i. That the police report was presented to the insurance company and he still has the report in his possession;
- j. That he has all of the receipts scanned and saved except one in the amount of \$600.00 to fix the car;

- k. That all of the deceased's special damages can be quantified by the receipts presented to the court and the only issue in the matter is the assessment of damages which would include discussing his wife's injury which can be done by a doctor;
  - l. That the Defendant was found at fault for the accident as stated in the police report exhibited.
20. Mr. Malone, in reply to the submissions of Ms. Forbes, submits in part that while natural disasters were unprecedented events that posed challenges they do not constitute a sufficient or lawful justification for the prolonged and inordinate delay in the Claimant prosecuting the matter. Further, that the Court adapted to these unprecedented events by implementing remote hearings, electronic filing systems and procedural directives to ensure the continuation of the administration of justice. It is also his submission that the Claimant's bare assertion of financial hardship without more does not constitute a sufficient or acceptable explanation for the prolonged failure to take any meaningful steps to progress the litigation.
21. It is also his submission that former Counsel for the Defendant and the Claimant's attempt to resolve the matter does not negate the Claimant's procedural responsibility to actively advance the matter through proper court channels where settlement seems unlikely or protracted and judicial intervention becomes necessary to ensure timely resolution.

## **Discussion/Analysis**

22. Mr. Malone has referred the Court to **Birkett v James (supra)** a House of Lords case that provides guidance on the test to be applied by the Court for an application to strike out an action for want of prosecution.
23. In **Birkett v James (supra)** the Plaintiff, Mr. Birkett brought an action against the Defendant, Mr. James for monies he alleged was due under oral agreements made between the parties. The Plaintiff delayed in commencing proceedings for over two years, however once the proceedings commenced the matter progressed.



Unfortunately, the matter stalled due to financial hardships and procedural difficulties. As a result the Defendant made application and was successful to have the matter dismissed for want of prosecution before the expiration of the limitation period. The Plaintiff in anticipation of the same issues a fresh writ within the limitation period.

24. The House of Lords in the above case provided that such drastic remedy to strike out an action for want of prosecution is justified only in two circumstances. Firstly, where the Claimant's delay is intentional and contumelious; and secondly, where there has been inordinate and inexcusable delay by the Claimant or his/her/their lawyers and that delay gives rise to a substantial risk that a fair trial is no longer possible or is likely to cause serious prejudice to the Defendant. Further, that such remedy to strike is an exceptional measure particularly where the limitation period for bringing a fresh action has not expired. As the Court understands the guidance provided both circumstances must be satisfied, i.e. that the delay was intentional and contumelious AND such delay will give rise to a substantial risk that a fair trial is no longer possible or likely to cause serious prejudice to the Defendant.

### **Length of Delay**

25. Mr. Malone and Ms. Forbes have both provided in their respective written submissions the instant matter's chronology from the commencement of this action to the application now before the Court. Additionally, the evidence of the delay has been established in both the Claimant and Ms. Bain's Affidavit, in particular at paragraph 24 of Ms. Bain's Affidavit. The cause of action in this matter arose on March 3, 2012, some 12 years ago from the filing of the Defendant's application. The Writ of Summons was filed on February 12, 2015, just under a month shy of the expiry of the limitation period provided in Section 9 of the Limitation Act. There appeared to be some progress with advancing the matter with the Defendant entering an appearance and filing a Defence. The Claimant subsequently filed Judgement against the Defendant for what is alleged as the Defendant's failure to enter a Defence in August 2016. The then Plaintiff, Mrs.

Astwood unfortunately passed away in October 2016. It is at this point where a period of inactivity on this matter occurred. The Claimant in his Affidavit sought to explain the reasons for the inactivity citing the loss of his wife and the passage of three devastating hurricanes between 2016 and 2017. The Claimant subsequently made an application to be substituted as the Plaintiff in the action and the Order granted in February 2018. A Notice of Assessment of Damages was filed on March 23, 2018 however, there is no evidence before the Court that any hearing relating to the notice was set before any Judicial Officer. The matter laid dormant until June 2022 whereby the Claimant filed a Notice of Intention to Proceed. The Claimant in his Affidavit again sought to explain the reasons for the inactivity during this period (2018-2022) citing the passage of Hurricane Dorian, the COVID-19 Pandemic and the resulting effects of both events on the economy in Grand Bahama. Additionally, he states that there was on-going negotiations between his attorney and the Defendant's former Counsel to reach a settlement for the claim. Once again, after the filing of the Notice of Intention to Proceed the matter did not advance any further until Counsel now on record filed his Notice of Change of Attorney and the instant application in November 2024.

26. The Claimant in his Affidavit has cited the many challenges he experienced which contributed to the slow progression of this action.
27. The Court sympathizes with the Claimant for the numerous hardships experienced during the now almost 14 years from when the action arose. The reality of the instant action is that there have been more periods of inactivity than actual progression of the matter before the Court. Based on the documents filed the matter was live from 2015-2016 then revived in 2018 and revived once more in 2022 with a total of 4 years of activity. Therefore, there was at least 5 years of inactivity on the Claimant's behalf.
28. Based on the Claimant's submissions made by Ms. Forbes, the Claimant accepts that there has been delay and sets out that even in the face of such delay the Claimant remains desirous of prosecuting the claim. It should also be noted that the same Counsel has acted on behalf of the Claimant from the commencement

of the action to the hearing of the Defendant's application. While Ms. Forbes has submitted that there was many attempts to negotiate a settlement against the backdrop of the continuing claim which lent to some of the inactivity throughout the years, the Court wishes to implore to Counsel that there still remains a duty to advance the case of the client even in the face of settlement negotiations.

29. Given that the Claimant accepts that there has been delay and in reviewing the evidence before the Court and the submissions of Counsel, it is evident that there has indeed been inordinate and inexcusable delay on the part of the Claimant with prosecuting the claim. However, a finding of such delay does not automatically give rise to dismissal but the Court has to now consider whether such delay would give rise to a substantial risk that a fair trial can no longer happen OR such delay is likely to cause serious prejudice to the Defendant.

### **Substantial Risk or Prejudice to Defendant**

30. Mr. Malone in his submissions refers the Court to the decision of Allen, J in **Wolfgang Jergens v The Grand Bahama Development Company Limited (supra)**. In that case Allen, J dismissed the Plaintiff's action as she found that the inordinate and inexcusable delay in prosecuting the action was a substantial risk to the fair trial of the action and caused serious prejudice to the Defendant. She sets out her reasons for the dismissal at paragraph 5 of the Ruling noting that the issues in the action did not appear to be as straight forward as submitted by the Plaintiff as the trial of the issues would rely to a large extent on the oral evidence of witnesses who will be subjected to substantial cross-examination. Moreover, that it had been 15 years since the cause of action arose and it would very likely be that the witnesses (who will also be coming to give evidence for the first time since the alleged transaction) will not be as clear about the alleged details as they would have been closer to when the transaction occurred. Further, that the witnesses would not be able to recollect sufficient details of the transaction to ensure a fair trial.

31. The evidence of Ms. Bain as it relates to potential prejudice in summary is that the former Claimant who alleged to have suffered personal injury owing to the accident died thus a fair trial may not be possible in spite of the provisions of the Survival of Actions Act.
32. The Claimant in his Affidavits while accepting that there has been delay states in part that he is in a position to produce and give evidence in support of his wife's personal injuries. It is his evidence that he was a passenger of the vehicle during the accident but was not injured; that he can testify as to what took place; that he accompanied his wife during each medical treatment locally and abroad; that all of the special damages can be quantified by receipts saved and scanned save for a \$600.00 receipt to fix the car; that a doctor can speak to his wife's injuries at an Assessment of Damages hearing and that the Defendant was at fault for the accident as shown in the Royal Bahama Police Force accident report.
33. Ms. Forbes, Counsel for the Claimant submits that the Defendant would not be prejudiced by the evidence given before the Courts and as such a fair trial is still possible. She refers the Court to **Ferguson v Commissioner of Police [1997] BHS J. 127** in support of the above submission. It is also her submission that the decision in **Icebird Ltd. v Winegardner [2009] UKPC 24 P.C.** shows that even if there has been an inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, once there is no evidence of prejudice to the Defendant caused by the delay the matter should not be struck out.
34. Mr. Malone, Counsel for the Defendant has submitted in part that as Mrs. Astwood is now deceased, the Defendant is deprived of the opportunity to cross-examine her; that the Claimant's evidence (i.e. the suggestion that he can speak to the accident because he was a passenger in the vehicle, attending medical appointments, etc.) is inherently secondhand and subjective at best and such evidence cannot be replaced by the Claimant's evidence. Further, he submits that the Defendant is unable to request independent medical evaluations of the Mrs. Astwood's condition at the time and on-going periods thereafter. It is his submission that the Court would be required to assess damages based solely on

evidence that is not contested or capable of being tested. It is this he submits undermines the principles of a fair trial.

35. Mr. Malone, Counsel for the Defendant submits that the rationale in **Icebird (supra)** does not assist the Claimant in the present circumstances as the facts in **Icebird (supra)** are materially distinguishable for the instant case. It is his submission that the length of the delay held to inordinate and excusable in **Icebird (supra)** was two years whereas in the instant case there has been a total of seven years of inactivity on the part of the Claimant. He submits that the cumulative effect of the prolonged inactivity is both inordinate and inexcusable. It is also his submission however, that it was the Court finding that the two years delay was held to be inordinate and inexcusable coupled with the lack of demonstrated prejudice against the defendant was the determining factor for allowing the matter to proceed.

36. In the case of **Icebird (Ltd) (supra)** the factual dispute between the parties centered on alleged obstructions by the Respondent to the Appellant's right of way. The issue to be determined by the Privy Council was whether the Appellant's claim should have been struck out for want of prosecution due to inordinate and inexcusable delay. The writ was filed in July 2000, an appearance was entered and a Defence in late 2000, the Appellant obtained leave to amend the Writ and Statement of Claim but the Order was not perfected until January 2002. There was a period of inactivity for two years and then in February 2004 the Respondent applied to strike out the action. The application to strike out was not heard until February 2006 where the action was struck which was subsequently upheld by the Court of Appeal. The Appellant appealed to the Privy Council whereby it was found that the delay was inordinate and inexcusable however there was no evidence of serious prejudice or risk to a fair trial nor evidence of intended or contumelious default or abuse of process. The appeal was allowed and the Rulings in the courts below were set aside and directed the Appellant to promptly take steps to advance the action. The Court held that the response to delay should have been to make

an unless order requiring the Appellant to proceed rather than striking out the claim.

37. The instant action before the Court is a personal injury claim the result of a road traffic accident whereby it is alleged that the Defendant was at fault.
38. The Court at this juncture has to consider whether there is **evidence** that the delay gives rise to serious prejudice to the Defendant OR the delay gives rise to a substantial risk that a fair trial is not possible.
39. In cases where an application is made for strike out for want of prosecution the Court requires that some evidence that the delay after the commencement of the action has added to the substantial risk that there cannot be a fair trial. The Court may still draw inferences from the affidavits that the delay will cause prejudice however, it must be more than a mere allegation.
40. In the instant case the Defendant's Affidavit while comprehensively setting out the timeline of the action from its commencement to the substantive application has merely alleged that the delay resulted in serious prejudice and a fair trial may not be possible as a result of the delay. It is only in the Defendant's Written Submissions that the Defendant asserts the various ways that the Defendant may be prejudiced.
41. It was also submitted by the Defendant in Written Submissions that the Defendant accepts that liability for the road traffic accident is not in dispute as contained in the police report but a fair trial on the issue of quantum is no longer available due to the death of the original Claimant, the delay in prosecuting the claim, limited evidence now available, unreliability of cross-examination at this stage and the resulting prejudice to the Defendant in properly challenging the nature, extent and cause of the injuries and losses claimed.
42. In response to Ms. Forbes's submission on this point that the Defendant accepts liability for the road traffic accident and that the Defendant had always accepted liability, Mr. Malone submitted that the Claimant has an obligation to prove on a balance of probabilities each and every injury sustained at the liability hearing; that it is not just a question as to who was at fault for the accident; that the

Claimant also has to prove exactly what the injuries were subject to cross-examination and then quantification of the same. However, he submits that the Claimant was still alive within five years of the accident and as such a trial could have been started and completed within those five years.

43. However while Mr. Malone has submitted that the Defendant now accepts liability for the road traffic accident, in the filed Defence, it was the Defendant's case at the time that the then Claimant was wholly at fault for the accident.
44. To the Court's mind, the filed Defence still in some way has crystalized the Defendant's position. Although the Defendant has submitted that the Claimant's assertion that the evidence in support of his wife's claim can be introduced through him is self-serving and deprives the Defendant of properly challenging the nature, extent and cause of the injuries and losses claimed, the Court finds these are issues (i.e. whether to allow the evidence in and the weight to be applied) to be considered by the trial Judge.
45. Nonetheless, striking out a claim has always been viewed as a draconian step as in essence it brings a party's case and in particular the Claimant's case in whole or in part to an end without any adjudication on the merits. Therefore, the Court in deciding whether to exercise the power to strike out, it must have regard to the overriding objective under the CPR which is to deal with cases justly and at proportionate cost. The Court should concentrate on the intrinsic justice of the case in light of the overriding objective taking into account all of the relevant circumstances and make a broad judgment after considering the available possibilities.
46. The Court in the instant case finds that while there has been delay, mere allegations (contained in the Defendant's Affidavit in Support) does not amount to evidence of serious prejudice or a substantial risk that a fair trial is no longer possible.

## Default Judgment

47. The Defendant has submitted in the alternative that if the Court does not strike out the Writ of Summons for want of prosecution that the Judgment in Default of Defence entered be set aside on the ground that it is irregular.

## The Law

48. Part 13.2 of the CPR provides:-

(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.

## Submissions

49. Mr. Malone, Counsel for the Defendant submits that the Default Judgment was entered under the provisions of the former Rules of the Supreme Court, in particular Order 18, Rule 3. He submits that that provision is in respect to unliquidated damages and dictates that only if the Defendant fails to serve a Defence on the Plaintiff, the Plaintiff may after the expiration of the period fixed for service of the same enter judgment against the Defendant for damages to be assessed. It is his submission that under Order 18, Rule 8 of the RSC and Part 13 of the CPR the Court has similar powers to set aside a Default Judgment. Additionally, he refers the Court to **Evans v Bartlam [1937] 2 All ER 646** in support.

50. Ms. Forbes, Counsel for the Claimant has submitted that the Judgment in Default of Defence was entered against the Defendant pursuant to the former Rules of Court; that the Defendant filed a Memorandum of Appearance and Notice of



Appearance however those documents were filed in New Providence and not in Grand Bahama where the action begun and as such no record of the documents were on the Court's file. She also submits that at the time the Judgment in Default was filed no attorney was yet identified and as such the Judgment in Default of Defence was served personally on the Defendant. Further, that the Plaintiff did not have any knowledge of who represented the Defendant at the time the Judgment in Default of Defence was filed and that the former Defendant's attorney only became aware when the Judgment in Default and Notice to Insurers was served on the insurance company.

51. It is her submission that the Judgment in Default was entered regularly but is of the view that the Judgment in Default of Defence is set aside to allow all of the merits of the matter to be tested before the courts. She refers the Court to *Evans v Bartlam* (supra) in support of this submission.

52. Mr. Malone in response has submitted that the Defendant agrees that the Judgment in Default should be set aside, it is not agreed that the matter is capable of being properly ventilated at trial as a result of the Claimant's inordinate and inexcusable delay in prosecuting the claim. It is also his submission that should the Court not set aside the Judgment in Default that the provisions of the Limitation Act and the decision of Winder, J in the case of **Perfect Luck Investments Limited and another v CFT BM Holdings Ltd. and another [2017] BHS J. No. 122** make enforcement of the same statute barred.

### **Discussion/Analysis**

53. The Court accepts the submissions of both Counsel on this point. The Court does have the discretion to set aside the Judgment in Default of Defence. They also submit that the Judgment in Default of Defence ought to be set aside. However, where they diverge is whether the Judgment in Default of Defence was regularly or irregularly entered.

54. On review of the Court file, the cause list and the documents submitted to the Court on this matter, it is evident that the parties made attempts to ensure that

the relevant documents had been filed. However, there was a series of missteps that occurred that leads the Court to wonder what the outcome would have been had the documents been properly served in accordance with the provisions of the Rules of Court.

55. While Counsel for the Claimant, Ms. Forbes has submitted that the Defence was not filed in the correct jurisdiction the action was started i.e. in Grand Bahama, to the Court's mind, the establishing of a Supreme Court in Grand Bahama at the time was to provide the island that possibly housed the nation's second largest population with access to the Supreme Court. Ultimately, it is one Supreme Court with facilities being made available for persons who do not live in New Providence to commence and continue litigation matters.
56. Unfortunately, while the Court accepts that it is possible to "file" a matter in New Providence for a matter for Grand Bahama and vice versa, the burden still rests on the filing party to ensure that the document is filed and **served [Court's emphasis]**. Additionally, Counsel representing the Defendant at this juncture is not in a position to provide any reason as to why the filed Defence was not served on Counsel for the Claimant in accordance with the provisions of the RSC or produce an Affidavit of Service evidencing that it was service in accordance with the provisions of the RSC.
57. Additionally, it is unclear as to why the Plaintiff filed a Judgment in Default of Defence and not a Judgment in Default of Appearance if Counsel's position was that they were unaware as to who was acting on the Defendant's behalf in this matter. On a review of the provisions of the RSC, in particular Order 13, Rule 2, it provides for a Plaintiff to enter Judgment for a Defendant's failure to enter an appearance.
58. The Affidavit of Search filed on behalf of the Plaintiff only speaks to searching for a filed Defence but did not speak to searching for a filed Notice of Appearance or Memorandum of Appearance. It would appear to the Court that either the Plaintiff was aware of the appearances filed and that is what led to the entering of a Judgment in Default of Defence or the failure to conduct a proper search led to

the filing of the Judgment in Default of Defence. To the Court's mind at that stage the absence of those documents (Memorandum and Notice of Appearance) ought to have prompted the Claimant to enter Judgment pursuant to Order 13, Rule 2 of the RSC.

59. Therefore, the Court finds that the Judgment in Default of Defence was irregularly entered as a result of this procedural misstep and the Judgment in Default of Defence is set aside.

## **Conclusion**

60. For the reasons stated above, the Defendant's application pursuant to Rule 26(3) of the CPR to strike out the Claimant's Writ of Summons and claim is hereby dismissed.

61. Additionally, the Judgment in Default of Defence is hereby set aside.

62. The Court in its duty to further the overriding objective by actively managing cases and control the progress of the case to ensure it proceeds quickly hereby orders that the Claimant has seven days from the date of this Ruling no later than 4:00p.m. to file and serve his Notice of Application for Case Management, any evidence in support upon which the Claimant intends to rely on and a draft order sought failing which the Claimant's claim shall be struck out.

63. On the issue of costs as both parties were partly successful (either defending the application or succeeding on part of the application) and both parties agreeing the Court makes no order as to costs.

Dated the 9<sup>th</sup> day of February, 2026

*Rosanne Sweeting*

**Rosanne O. Sweeting**  
**Assistant Registrar**