

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

COMMERCIAL DIVISION

2020/COM/com/00015

BETWEEN

SYLA LTD

First Claimant

AND

LAURENT DREUX-LEBLANC

Second Claimant

AND

SYLVIE DREUX-LEBLANC

Third Claimant

AND

REAL ESTATE FUNDING LTD.

First Defendant

POWER WINDSUN LTD.

Second Defendant

**Before: Her Ladyship The Honourable Madam Senior Justice
Deborah Fraser**

**Appearances: McFalloughn Bowleg Jr. for the Claimants
Mr. Rhyan Elliott for the First Defendant
Ms. Roberta Quant and Ms. Leslie Brown for the Second
Defendant**

Judgment Date: 11 March 2024

**Extension of Time to Serve Defence – Request for Defence filed out of time to be
deemed valid and effective – Rule 12.5 of the Rules of the Supreme Court, Civil
Procedure Rule, 2022 - Judgment in Default of Defence – Prospect of successfully
defending claim – Delay – Reasons – Rule 26.1(2)(k) of the Supreme Court Civil**

Procedure Rules, 2022 – Rule 26.1(2)(v) of the Supreme Court Civil Procedure Rules – Part 71 of the Supreme Court Civil Procedure Rules - Costs

RULING

1. There are two applications before the Court – namely (i) an application on behalf of the Claimants requesting judgment in default for the First Defendant’s failure to file its Defence in time; and (ii) An application on behalf of the First Defendant requesting an extension of time in which to serve its Defence and a request that the Court make an Order declaring the First Defendant’s filed Defence be deemed valid and effective. Each application will be considered.

Background

2. On 06 March 2020, the Claimants filed a Specially Endorsed Writ of Summons (“**Writ**”) against all of the Defendants.
3. The First Defendant was served with the Writ on 16 March 2020.
4. On 24 March 2020, Mr. Rhyan Elliot (“**Mr. Elliot**”), counsel for the First Defendant, wrote to Mr. Christopher Jenkins (“**Mr. Jenkins**”), counsel for the Claimants, and stated, *inter alia*:

“In light of the promulgation of the Emergency Powers (COVID-19)(No. 1) and (No. 2) Orders, 2020 (“the Emergency Orders”) and the provisions thereof, we anticipate that we will be unable to enter an Appearance to the captioned action on behalf of the First Defendant within the time limited by the Rules of the Supreme Court (1978). Notwithstanding this, we attach an unfiled copy of our Notice of Appearance and Memorandum of Appearance, which we intended to file on Friday 27 March, 2020.

In all the circumstances, we should be grateful if you would accept our undertaking to file and serve the Notice and Memorandum at the Supreme Court Registry once the Emergency Orders expire.”

5. On that same date, Mr. Jenkins confirmed that the Claimants agreed to an extension of time in which the First Defendant may file its Defence.
6. During the period of 24 March 2020 and 11 February 2021 Mr. Jenkins and Mr. Elliot continuously corresponded via email in an effort to agree an extension of time in which the First Defendant could file its Defence. Multiple extensions were granted to the First Defendant by the Claimants.

7. On 26 June 2020, Higgs and Johnson filed a Notice of Appearance and Memorandum of Appearance.
8. On 02 February 2022, the Claimants filed, with leave of the Court, an Amended Specially Indorsed Writ of Summons. On that same day, the First Defendant was served with the Amended Specially Indorsed Writ of Summons.
9. On 11 March 2022, the Claimants filed a Summons pursuant to Order 19 Rule 7 (1) of the Rules of the Supreme Court, 1978 (“**RSC**”) and/or the inherent jurisdiction of the Court that no Defence having been served by the First Defendant herein, judgment be entered for the Claimants against the First Defendant.
10. The First Defendant then filed a Summons on 25 March 2022 seeking an Order pursuant to Order 3, Rule 4 of the RSC that the time limited by the RSC Order 18, Rule 2 for the First Defendant to serve its Defence to the Amended Writ of Summons, filed herein on 02 February, 2022, be extended to 25 April, 2022 or such other time frame that the Court shall deem just and expedient.
11. On 26 October 2022, the First Defendant then filed a Defence out of time and without leave of the Court.
12. There was also a Summons filed by the First Defendant on 07 November 2022 requesting the aforementioned extension of time to serve its Defence and/or alternatively, an Order pursuant to Order 31A, Rule 26 and/or the inherent jurisdiction of the Court that the Defence, filed herein on 26 October, 2022 be confirmed as valid and effective.
13. I shall address each application in turn.

Judgment in Default of Defence

Evidence

First Defendant’s Evidence

14. I have not seen any affidavit filed on behalf of the First Defendant in this matter.

Claimants’ Evidence

15. The Claimants filed the Affidavit of Tonesa Munnings on 29 March 2023 (“**Munnings Affidavit**”) which provides evidence in relation to the First Defendant’s late filing of its Defence. The Munnings Affidavit provides: (i) On 06 March 2020, the Claimants filed their Writ; (ii) on 24 March 2024, Mr. Elliot (on behalf of the First Defendant) emailed Mr. Jenkins regarding the promulgation of the COVID-19 protocols and his inability to file and serve a Notice and Memorandum of Appearance at the time due to the said protocols. He sent Mr. Jenkins an unfiled copy of the Notice of Appearance and Memorandum of Appearance; (iii) on 24 June 2020 Mr. Jenkins wrote to Mr. Elliot stating, inter

alia, that the COVID-19 protocols had been extended to the end of June and would likely be extended further. He also stated that the Courts returned to operationality and he no longer saw a justification for delaying. He requested Mr. Elliot to do the requisite filings on behalf of the Defendant within 21 days; and (iv) On 01 July 2020, Mr. Elliot wrote to Mr. Jenkins stating, inter alia, that COVID-19 (No. 2) Rules, 2020 remain in effect (which extended the time limited for the filing of a Defence during the COVID-19 pandemic to 10 August 2020) and therefore, the time limited for filing a Defence did not expire.

16. The Munnings Affidavit further provides: (i) that the COVID-19 (No. 3) Rules, 2020 extended the time for filing a Defence to 07 September 2020 and that, as of that date, no further extensions were permitted. (ii) On 04 February 2021, Mr. Elliot wrote to Mr. Jenkins stating, inter alia, that he did not have proper instructions and was, therefore unable to file the Defence. He requested a further extension of time in which to file the First Defendant's Defence and informed Mr. Jenkins that he formally made application for extension of time to serve the Defence on 05 March 2021; and (iii) Mr. Jenkins wrote back to Mr. Elliot on 11 February 2021 stating that he was concerned that Mr. Elliot did not receive instructions given the lapse of time and that a formal application for an extension of time has been made without instructions. He told Mr. Elliot that he was instructed to apply for Default Judgment.

Issue

17. The issue that the Court must decide is whether I ought to grant judgment in default of defence?

Discussion and Analysis

18. I have considered the submissions of counsel and the evidence. I will now apply same to the instant case.

Application of the Supreme Court Civil Procedure Rules, 2022 ("CPR")

19. For completeness, I wish to expressly state that these proceedings (and all other proceedings in this matter moving forward) are governed by the CPR by virtue of **Practice Direction No. 9 of 2023, paragraph 2.1**. That paragraph provides that, where no trial date has been fixed, the CPR applies. As no trial date has been fixed for this matter, the CPR, therefore applies to these proceedings.

20. In relation to an application for judgment in default of defence, **Rule 12.5 of the CPR** provides:

"12.5 Conditions to be satisfied – judgment for failure to defend.

The claimant may enter judgment for failure to defend if —

(a) the claimant proves service of the claim form and statement of claim or an acknowledgement of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the Court has expired;

(c) the defendant has not —

(i) filed a defence to the claim or any part of it, or the defence has been struck out or is deemed to have been struck out under rule 22.1(6);

(ii) if 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) where necessary, the claimant has the permission of the Court to enter judgment (emphasis added)”

21. The **Supreme Court Civil Procedure Rules, 2022 Practice Guide, January 2024 (“Practice Guide”)** gives helpful guidance on the applicability of this rule and how the Court ought to proceed. On page 126 of the Practice Guide, the following notes were provided:

“Notes:

*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.”*

22. It is also important to note the cases provided in the **Practice Guide at page 127:**

“Glenford Rolle v Stephen Lander DOMHCVAP2013/0025A (In relation to rule 12.5, the critical question is whether at the time the request for judgment in default was made, a defence had been filed. Similarly, under rule 12.4, the critical question would be whether at the time when the request for default judgment was made, an acknowledgment of service had been filed.)

*Lux Locations Ltd v Yida Zhang [2023] UKPC 3 (**If a defendant contests an application for default judgment and there is material before the Court showing that the conditions for setting aside default judgment under CPR 13.3 would be satisfied, it is a waste of resources, and wrong in principle, for the Court to enter a judgment where proper grounds have already been shown for setting aside. The just and expedient course in such a case is to exercise the court’s discretion to decline to enter judgment in the first place. If there is no such material, the court should proceed to determine what remedy (if any) the claimant is entitled to on the statement of claim.** For this purpose, the court will treat the allegations made in the statement of claim as true and legally valid unless (and to the extent that) it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the court. An appeal lies to the Court of Appeal from the court’s decision on the application in the ordinary way.)*(emphasis added)”

23. Rule 13.3 of the CPR provides as follows:

“13.3 Cases where Court may set aside or vary default judgment.

(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 (emphasis added)”

24. Having reviewed the Defence and bearing in mind the aforementioned principles, I am minded to permit the Defence to be entered and not grant judgment in default of Defence. It cannot be refuted that there was effective service of both the Writ and the Claimants’ Amended Writ of Summons and Statement of Claim and the period for filing a Defence had expired but a Defence has already been

filed, though irregularly. I also agree with and rely on the **Chapman v Chapman [1985] 1 All ER 757** where Megarry VC stated:

“During the argument, I took the view that a failure to comply with the rules, including a failure to serve a notice to proceed, did not by itself invalidate the proceedings or any step taken in them, despite the irregularity. Until anything has been set aside, it remains valid, despite being irregular. Indeed, unless it remains valid, it is difficult to see what there would be for the court to ‘set aside’; and Ord 2, r 1(2) is drafted in terms of setting aside the valid rather than validating the invalid. I do not think that this view is affected by the general words at the end of the paragraph which gives the court power to ‘make such order (if any) dealing with the proceedings generally as it thinks fit (emphasis added).”

25. No application has been filed to set aside the Defence. Also, from a review of the 16 page Defence (and relying on Rule 13.3(1)(c) of the CPR), it appears that there is a real prospect of success defending the claim. There is undoubtedly information contained in the Defence which conflicts with what is contained in the Claimants’ Writ.
26. Moreover, though it may appear that the First Defendant rested on its laurels for an inordinate period of time, the evidence before me provides that the delay was due to the COVID-19 pandemic and the promulgation of COVID-19 rules and regulations and because Mr. Elliot was not able to be instructed in the matter at that time. This was communicated to the Claimant’s counsel.
27. I am of the view that a trial ought to take place, prior to any judgment being made in this matter. Whereas, I acknowledge that a judge may make a default judgment, even when declaratory relief is sought, it should only be done where I am satisfied there is a legal basis for the declaration, and such basis is present on the facts and the law, and, I should then determine whether in all the circumstances it is appropriate to grant the declaratory relief sought (**Coral Beach Management Company Limited v Barefoot Postman Limited and others [2012] 1 BHS J No. 78**). The facts are heavily in dispute in this case and I do not wish to grant any declaratory relief prematurely without ventilating all of the facts, fully considering the issues and evidence and applying the law.
28. In the premises, I do not accede to the judgment in default of defence application.

Extension of Time Application

Issue

29. I now turn to the Extension of Time Application. The issues which this Court must decide are: (i) Whether the Court should extend the time in which the Defendant may serve its Defence? (ii) Whether the Defence filed out of time and without leave of the Court ought to be deemed valid and effective.

Discussion and Analysis

30. The Court is imbued with a wide scope of powers relating to the management of cases. In relation to extension of time, Rule **26.1 (2) (k) of the CPR** provides:

“26.1 Court's general powers of management.

(2) Except where these rules provide otherwise, the Court may —

(k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed...”

31. In **Widenhoffer v Commonwealth 1970 HCA 54 122 CLR 172**, Gibbs J opined:

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

32. I have reviewed the Defence filed out of time and without leave of the Court. Bearing in mind the aforementioned principles, this Defence does provide extensive allegations of which conflict with that of the Claimants' Writ. From a cursory review of the Defence, it appears that the First Defendant may have a strong Defence to the claim. I am not prepared to disallow service of the Defence, despite the extended delay.

33. Furthermore, the reasons for the delay in the filing and service of the First Defendant's Defence were due to the COVID-19 pandemic and Mr. Elliot's inability to receive instructions in relation to the matter. I believe these were significant and valid reasons for the protracted delay.

34. In the premises, I am prepared to allow the extension of time for service of the already filed Defence. Furthermore, though the Defence was filed without leave of the Court, I am also satisfied that no injustice would come to the Claimants as no judgment was made on the matter, only the filing of an application for leave to enter judgment. Had a judgment been made, I would not permit any Defence to be filed, served nor be deemed valid.

35. As the First Defendant has already filed a Defence, I rely on **Rule 26.1(2)(v)** of the CPR to order that the Defence be deemed effective and valid. The Rule provides:

“26.1 Court's general powers of management.

(2) *Except where these rules provide otherwise, the Court may —*

(v) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation, or directing that such a hearing take place before a Court appointed neutral third party, with the aim of helping the parties settle the case.”

36. The Defence is therefore deemed valid and effective. The Defendant shall serve its Defence on all parties within fourteen (14) days from the date of this ruling.

Costs

37. Rule **71.6 of the CPR** expressly provides general principles in relation to costs:

“(1) Where the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

*(2) The Court may, however, make no order as to costs or, **in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party** (emphasis added).”*

38. Also, **Rule 71.10 of the CPR. Rule 71.10 (1), (2) and (3)** provides factors which the Court ought to consider when making an order as to costs:

“(1) In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including —

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;

(c) any payment into court or admissible offer to settle made by a party which is drawn to the Court’s attention and which is not an offer to which costs consequences under Part 35 and 36 apply.

(2) For the purposes of paragraph (1)(a), the conduct of the parties includes

—

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim; and

(e) unreasonable conduct of any kind by any party in relation to the inclusion or exclusion of documents or authorities in any bundle and whether a joint bundle or otherwise.

(3) The Court may make an order that a party must pay —

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct issue in or part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment (emphasis added)."

39. Additional factors that the Court must consider can be found at **Rule 71.11 of the CPR**, which reads:

"71.11 Factors to be taken into account in deciding the amount of costs.

(1) The Court is to have regard to all the circumstances in deciding whether costs were —

(a) proportionately and reasonably incurred; or

(b) were proportionate and reasonable in amount.

(2) In particular, the Court must give effect to any orders which have already been made.

(3) The Court must also have regard to —

(a) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done..."

40. Though there may be merit in the First Defendant's Defence, it is not faultless. Counsel are to conduct themselves in a fair manner and the Court must ensure all parties are on equal footing (**Rule 1.1 of the CPR**). The Court bears in mind that the First Defendant did delay in filing and serving the Defence, and filed a Defence without first obtaining leave of the Court which necessitated these applications. In ordinary circumstances, such conduct may attract an adverse costs order as against the First Defendant. However, I reiterate that I believe that there were significant and valid reasons for the protracted delay (as mentioned above).
41. Though I granted the relief sought by the First Defendant, I do not wish to encourage such behavior by any party before this Court in the future.
42. The Claimants are granted leave to file and serve any Reply within fourteen (14) days from the date of receipt of the Defence. The First Defendant, however, shall pay the costs of the Claimants for any Reply, to be assessed if not agreed.
43. Based on the unique circumstances of this case, I shall order that costs for both applications be costs in the cause.

CONCLUSION

44. Based on the applicable principles in this matter, I make the following order:
- (i) The Application for Judgment in Default of Defence is dismissed.
 - (ii) The Defence filed by the First Defendant on 26 October 2022, is deemed valid and effective. The Defence shall be served on all parties in this matter within fourteen (14) days from the date of this ruling.
 - (iii) The Claimants are granted leave to file and serve any Reply within fourteen (14) days from the date of receipt of the Defence. The First Defendant shall pay the costs of the Claimants for any Reply, to be assessed if not agreed.
 - (iv) Costs for the applications shall be costs in the cause.
 - (v) Even though the Second Defendant had representation in these applications, their presence was not necessary. I therefore make no order as to costs for the Second Defendant.
45. This is my ruling.

Senior Justice Deborah Fraser

Dated this 11 day of March 2024