COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Commercial Division
2021/CLE/gen/01128

BETWEEN:
(1) ALPHA AVIATION LIMITED
(2) ADVANCED AVIATION LIMITED

Plaintiffs

v.

(1) RANDY LARRY BUTLER
(2) SKY BAHAMAS AIRLINES LIMITED
(3) AVIATION OVERSIGHT GROUP LIMITED

Defendants

RULING

Before:	Mr. Justice Loren Klein
Appearances:	Mr. Michael Horton for the Defendants/Appellants
	Mr. Michael Scott, QC for the Plaintiffs/Respondents
Hearing date:	20 July 2021

Appeal to Judge in Chambers—Registrar's decision—Civil Practice and Procedure—Rules of the Supreme Court (R.S.C.) 1978—Pleadings—Order 18, r.12–Request for Further and Better particulars in advance of defence—Principles for consideration—Statement of Claim—Allegations of Fraud and Conspiracy—Need to plead with particularity— Order 19, Judgment in Default of Defence—Application to set aside judgment in default of defence—Principles— Mistaken belief that judgment regularly entered—Affidavit evidence—Affidavit filed after hearing of appeal.

INTRODUCTION

[1] This is an appeal against the decision of Deputy Registrar Misiewicz dated 22 April 2021 ("the Registrar"), wherein she dismissed the defendants' application to set aside a judgment entered in default of defence and refused their application for further and better particulars. It raises two short points of pleading and practice for consideration, namely: (i) the circumstances in which the court will order further and better particulars prior to delivery of a defence ("the pleading point"); and (ii) the principles for setting aside a judgment in default of defence ("the practice point").

[2] The issues arise in the context of extremely serious allegations of dishonesty levelled against the defendants, in which the plaintiffs claim that the defendants and a third party engaged in a conspiracy over a period of nearly a decade to defraud them of over $33 million.

[3] The appeal was commenced by Notice filed 26 April 2021. The primary relief sought by the defendants is an order setting aside the decision of the Registrar and leave to file their defences. They also seek an order that the plaintiffs deliver the further and better particulars requested

by letter and summons, and which they say are necessary to enable them to prepare their defences.

[4] The underlying action was commenced by specially indorsed writ filed 16 November 2020. The plaintiffs are two aviation companies, respectively Alpha Aviation Limited, a Bahamian company, and Advanced Aviation Limited, formerly a Bahamian registered company but now re-domiciled in the Cayman Islands. The first defendant is Randy Larry Butler ("Butler") and the second and third defendants are respectively Sky Bahamas Airlines Limited and Aviation Oversight Group Ltd., which are said to be companies controlled by the first defendant.

[5] In the main, the plaintiffs allege that the defendants and a third party, Peter Kevin Turnquest ("Turnquest"), who is identified in the statement of claim ("SOC") as a conspirator but not made a defendant to the action, have engaged in fraud, conspiracy and breaches of fiduciary duties over the period 2008 to 2017. It is said that these actions have caused the plaintiffs to dishonestly pay over to the defendants the sum of $33,422,925.00. The plaintiffs claim compensation and damages for that loss and seek other relief, including a declaration, an accounting and inquiries, as well as "compensation in equity". I shall return a little later in this Ruling to examine in greater detail the allegations in the statement of claim, as they are important to the pleading point.

Procedural Background

[6] According to the affidavits filed by the plaintiffs, the writ of 16 November 2020 was personally served on the first defendant on 19 November 2020, at which time he also accepted service on behalf of the third defendant. The second defendant was also served on 19 November 2020, at its registered office, which is the law offices of Mr. Michael Horton. In any event, Mr. Horton entered appearances for all three defendants on 3 December 2020.

[7] As the plaintiffs' statement of claim was indorsed on the writ, the defendants had 14 days from 3 December to deliver their defences, which would have given them until 17 December 2020. They failed to do so. Instead, on 11 December 2020, counsel for the defendants wrote to counsel for the plaintiffs requesting an extension of time to the end of January 2021 to file their defences. By letter dated 18 December 2020, the plaintiffs "reluctantly" agreed to extend time, but limited the extension to the 22 January 2021. The letter warned that "*there will be no further extensions agreed*."

[8] On 18 January 2021, the defendants served on the plaintiffs a request for further and better particulars ("particulars") of the allegations contained in the statement of claim. The plaintiffs replied by letter dated 20 January 2021, dismissing the request for particulars out of hand as a "*naked and disingenuous attempt to purchase additional time for your client*". That letter ended by describing the request for the particulars as "*thoroughly disreputable*" and indicated that the defendants would have to approach the court for any further extension.

[9] The defendants therefore filed their summons for further and better particulars on 22 January 2021. On 25 January 2021, the plaintiffs entered a judgment in default of defence for damages together with interest and costs thereon to be assessed.

The proceedings before the Registrar

[10] The defendants immediately applied by summons filed 26 January 2021 to set aside the default judgment. Curiously, the grounds were that "*the judgment is premature and invalid, having been entered without leave of the Court, and contrary to the provisions of Order 14, rule 1(2)(b) of the Rules of the Supreme Court*", and the summons bore the heading "*Summons for dismissal of Summary Judgment entered by Plaintiffs without leave*".

[11] Additionally, the defendants sought an order that the plaintiffs be ordered within 10 days to answer the request for further and better particulars, that the defendants be at liberty to file defences within 14 days of receiving the said particulars, and that all action on the writ be stayed until the plaintiffs delivered the particulars.

[12] In his arguments before the Registrar (and repeated before this court), Mr. Horton conceded that the reference to Order 14 was in error, and that the defendants were in fact attacking the *default* judgment entered under Ord. 19. The defendants clearly accepted that summary judgment was *not* available in cases alleging fraud, as indicated in their written submissions of 17 February 2021 before the Registrar:

> "This is clearly an attempt to gain an unfair advantage without having to prove the claims of fraud and conspiracy raised against the Defendants and one Peter Turnquest, who is named as a conspirator with the Defendants, but notably not as a defendant in this case. Order 14, r. 1(2) (b) clearly precludes the entry of a judgment where the plaintiff's claim in the writ is based on an allegation of fraud, and Order 18, r. 12(1) expressly requires that allegations of fraud and fraudulent intention must contain particulars of the facts on which such pleading relies."

[13] The mistaken intituling of the summons and the invoking of Rule 14 may have created some confusion as to the grounds on which the defendants were relying, but this was obviously a red herring. For her part, the Registrar rightly concluded that the reference to Ord. 14 was irrelevant, as the plaintiffs had clearly not made an application for summary judgment. It was also common ground before the Registrar that the judgment was 'regularly' entered in default of defence pursuant to Ord. 19. Initially, the defendants perceived the judgment to have been entered pursuant to Ord. 19, r. 3, although whether the judgment was regularly entered pursuant to this sub-rule (or any of the other sub-rules) came to be doubted and challenged by the time the appeal was heard.

[14] The Registrar's decision is predicated on three main findings: (i) firstly, she rejected the request for further and better particulars, on the basis that the request was not in compliance with the provisions of Ord. 18, r. 12; (ii) secondly, she held that the defendants had not satisfied the test for setting aside a judgment in default of defence regularly entered (i.e., the '*Saudi Eagle*' test, from the case *Alpine Bulk Transport Company Inc. v. Saudi Eagle Shipping Company Ltd.*

[1986] 2 Lloyd's Report 221 at 223); and third (iii) she rejected the explanation given by the defendants for the delay and failure to enter a defence. I will deal with the issues in the order in which they were considered before the learned Registrar.

DISCUSSION AND ANALYSIS

I. The pleading point: the request for further and better particulars

[15] The Registrar rejected Mr. Horton's arguments that the defendants were entitled to the further and better particulars which had been sought on the ground that they were necessary and desirable for them to prepare their defence. She reasoned in part as follows:

> "12. The Defendants run into two difficulties with this argument. Applications for further and better particulars are governed by Order 18, Rule 12 of the RSC. Under that Rule there are at least two prerequisites to be satisfied before the Defendants can rely upon their demand for further and better particulars to be provided. First, the defendant would have to make a request in writing (Rule 12(6)), and second, if such request was refused the defendants would have to seek an order of the Court that the particulars be provided (Rule 12(3)). There is also a third condition, which is that the application for such an order shall not be made before service of the defence (Rule 12(5)).
>
> 13. This is the general principle. None of the exceptions to this general principle apply here. The language of the Rule is plain and simple. The Defendants have not complied with the provisions of Order 18 Rule 12 in seeking further and better particulars, therefore their pending application by Summons filed on 22nd January 2021 does not avail them."

[16] It is clear that the defendants had complied with the first two pre-requisites (they had made a letter request and had issued a summons for that purpose). So the apparent non-compliance seems to be a reference to Rule 5, and the principle that an application for particulars should normally not be made before delivery of the defence. This is borne out by the conclusion at para. 25 of the ruling:

> "Bearing in mind that the Rules require a defendant to serve a defence *before* being entitled to seek particulars, the argument that the Plaintiffs 'ought to have' provided particulars first, is in the circumstances, without weight or merit."

[17] However, this is not a complete statement of the Rule. Rule 5 in its entirety provides as follows:

> "An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason."

[18] In *Selangor United Rubber Estates Ltd. v. Craddock and Others* [1964] 3 ALL ER 709, which was cited in argument before the Registrar by the defendants (and before this court), Pennycuick J., considering the remit of Order 12, r. 5, made the following observations [pg. 711, H-I]:

> "It will be seen that the court has jurisdiction to make an order under the rule before defence only if in its opinion the order is necessary or desirable to enable the defendant to plead or for some other special reason.
> Counsel who appeared for B.N.S. pointed out that the court is entirely untrammelled in the formation of its opinion and he referred to *Mon v. Redwing Aircraft Co. Ltd.* and in particular to some words of Lord Greene, M.R., at the end of the judgment. That is so. The fact remains that only if the court does judicially form the opinion that the order is necessary or desirable to enable the defendant to plead or for some other special reason, it is open to the court to make the order before defence. Without attempting a definition, an order is no doubt desirable where the defendant would be otherwise prejudiced or embarrassed in his pleading."

[19] *Selangor* was a case in which the court made an order for particulars before delivery of the defence. There, the plaintiff alleged that the defendant bank was in breach of a duty arising from a relationship between them but failed to specify the precise relationship under which the duty arose. Explaining the rationale for granting the order, Pennycuick J said [712, G-H]:

> "I do not see why the defendant bank, B.N.S. should be expected to plead to an allegation that it has been negligent in the performance of the duty which as banker they owed to the plaintiff as their customer, without being told precisely what relation of banker and customer is indicated by those words. Is it the ordinary, common-or-garden relation of banker and customer, or is it some special relation of the kind set up in para.26, or some other special relation? The point could have been easily cleared up, but it has not been, and I think that an order for particulars under this head is desirable in order to enable B.N.S. to plead to it."

[20] Before the Registrar, the plaintiffs contended that any necessary particulars were to be obtained only after pleadings were exchanged, and that there was no ambiguity in the pleadings to justify invoking the principle in *Selangor*. In their written submissions, they lodged a mock-up of their answers to the particulars. The stock answer to most of the claim for particulars was that the requests were for evidence, or were either unnecessary or irrelevant for the purposes of pleading their case.

[21] As stated, the plaintiffs clearly complied with the rules regulating the manner of applying for particulars. The Registrar seems to have rejected the application for particulars mainly (if not solely) on the basis that the request was made *before* delivery of the defences. If this is so, then she was clearly in error, as she ought to have properly considered whether the particulars were necessary or desirable to enable the defendants to plead, or if for some other special reason it would have been proper to order them prior to the delivery of the defences. Alternatively, if the request for particulars was refused on the grounds that the Registrar formed the opinion that they were not necessary or desirable, then this court must examine whether that discretion was properly exercised based on the facts and circumstances of this case, and whether it would exercise its discretion differently. It need only be remarked in passing that an appeal to a judge in chambers is by way of rehearing, and the court is not bound by the exercise of the Registrar's discretion (Ord. 55, RSC; *Evans v Bartlam* [1937] A.C. 473, para. 19, per Lord Wright).

The statement of claim

[22] It is important to have regard to the factual context in which the defendants were seeking further and better particulars. The statement of claim in this matter runs to just over two letter size pages, and it is useful to set out the claim in its entirety.

"STATEMENT OF CLAIM

"1. The First Plaintiff ("*Alpha*") is a company incorporated in The Commonwealth of The Bahamas. The Second Plaintiff (*Advanced*) is a company incorporated in the Commonwealth of the Bahamas aforesaid, but subsequently redomiciled to Cayman Islands. At all material times, one Kevin Peter Turnquest was a director and manager of the First and Second Plaintiffs.

2. The Second and Third Defendants respectively ("*Sky Bahamas*" and "*Aviation Oversight*") were, at all material times, companies owned and/or controlled and/or managed by the First Defendant (*Butler*) and also by the said Kevin Peter Turnquest (*Turnquest*).

3. Between 2008 and 2017, the First, Second and Third Defendants, together with *Turnquest*, or any two or more together (the "*conspirators*"), wrongfully and with intent to injure each Plaintiff and/or to cause loss to them by unlawful means and/or to enrich themselves, unlawfully conspired and combined together to defraud each Plaintiff and to conceal such fraud and the proceeds of such fraud from the Plaintiffs and thereby unjustly to enrich themselves.

PARTICULARS OF INJURY AND UNLAWFUL ACTS

[1] As at 31st December 2017, the *conspirators* had dishonestly caused *Alpha* to pay away a total of $20,680,337.33 to *Sky Bahamas* as, in each case, some kind of bogus loan.

[2] As at 31st December 2017, the *conspirators* had dishonestly caused *Advanced* to pay away via wire transfers a total of $5,916,587.67 to *Sky Bahamas*, also as some kind of bogus loan(s).

[3] As at 31st December 2017, the *conspirators* had dishonestly caused *Alpha* to pay away a total of $3,026,000.00 to themselves via a company then controlled and/or managed by them, namely *AOG Maintenance Limited*.

[4] Between around February 2008 and July 2016, the *conspirators* dishonesty caused *Alpha*, by means of some 39 fraudulent invoices and /or book entries and for no adequate consideration, to pay away to *Aviation Oversight* (37 cheques) and to *Sky Bahamas* (2 cheques) the sum of US$3,800.000.00.

[5] In breach of their duties of honesty and fidelity as directors and/or managers of both the Plaintiffs and of the Second and Third Defendants and their duties to act in the best interest of the companies, *Turnquest* and *Butler* failed to keep or to ensure that the companies kept any, or any adequate, financial books of account or financial records recording and/or documenting the companies' financial transactions, failed to maintain or keep any or any proper management accounts or bank or cheque or wire transfer reconciliations and failed to put in place any adequate financial controls or systems.

[6] None of the payments to *Sky Bahamas* or to *Aviation Oversight* from either *Alpha* or *Advanced* were documented properly, or at all, or were due and owing by the Plaintiffs, or either of them, in any amounts, or at all.

[7] At all material times, Butler knew or must be taken to have known that the receipt by *Sky Bahamas* and *Aviation Oversight* from *Alpha* and *Advances* were paid away by Turnquest in breach of his fiduciary duties and dishonestly and were received by *Sky Bahamas* and *Aviation Oversight* as money had and received by those companies on behalf of *Alpha* and *Advanced* and held by them on resulting trust for the Plaintiffs.

[8] By reason of the above particularized torts and/or breaches of duty, the conspirators, and each of them, wrongfully caused loss and damage to the Plaintiffs, and to each of them, in the amounts particularized above.

AND the First and Second Plaintiffs claim:

(1) Against the First, Second and Third Defendants:

(i) An order that each Defendant compensate the Plaintiffs in equity;
(ii) An account of all sums misappropriated by the Defendants from the Plaintiffs and an order for payment of all sums found due upon the taking of such an account;
(iii) A declaration that these Defendants hold all sums taken from the Plaintiffs and/or all assets representing such sums, on constructive or resulting trust for the Plaintiffs.
(iv) Damages;
(v) Interest pursuant to the Civil Procedure (Award of Interest) Act, Ch. 80, or in equity;
(vi) All necessary or further accounts, directions and enquiries;
(vii) Further or other reliefs;
(viii) Costs.

Dated the 16th day of November, A.D., 2020."

General Principles relating to Pleadings

[23] Order 18, r. 6(1) requires a plaintiff to plead the material facts relied on for his claim, although not the evidence required to prove the alleged facts. It provides in material part as follows:

> "[E]very pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits."

As to what facts are material, in *Bruce v Odhams Press Ltd.*, [1936] 1 KB 697 [at pg. 712], Scott LJ said:

> "The cardinal provision in r. 4 is that the statement of claim must state the material facts. The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under Order

> XXV., r. 4; see *Phillips v Phillips*; or "a further and better statement of claim" maybe ordered under Order XIX., r. 7."

[24] This rule imposes a general obligation on a claimant to plead to his case with sufficient clarity and particularity so that his opponent is not taken by surprise and knows exactly the case he has to meet at trial (see, e.g., *Spedding v. Fitzpatrick* (1888) 38 Ch. D. 410, CA; *Bruce v Odhams Press Ltd.* (*supra*). But it does not require him to overload his statement with exhaustive particulars or minor details. The SOC should contain a concise statement of the facts on which the claimant relies to frame his cause of action, but other details are left to be supplied at later stages in the case, such as by the submission of witness statements and through the use of the processes of discovery and disclosure.

Pleading fraud and conspiracy

[25] A corollary to the general rule is that in pleading matters such as fraud and conspiracy, a higher standard of particularity is required. Order 18, r. 12(1) provides in part as follows:

> "…every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words—
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of the mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies."

[26] In the leading case of *Three Rivers District Council v Bank of England* [2001] UKHL 16, Lord Millet set out the functions of pleadings, particularly when allegations of dishonesty or fraud are being made (paras. 184-186):

> "[184] It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: Kerr on Fraud and Mistake, 7th ed (1951), p. 644; *Davy v Garrett* (1989) 7 Ch. D 473, 489; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch. 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> [185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the opposite party sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulent", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. […]
>
> [186] The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularized, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is

> also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonestly is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied on at trial to justify the inference. At trial, the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonestly from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

[27] Addressing the degree of particularity required to plead fraud, Warren J, in *Sunico* [2012] EWHC 4156, stated the following [7-8]:

> "[8] But simply to allege fraud or knowledge is not enough. The second requirement in a fraud case is that a defendant is entitled to know from the pleadings the fraud which he is alleged to have perpetrated and the allegations as to the facts which are made against him in order to establish the fraud alleged. Since knowledge is the essence of fraud, he is entitled to particulars of knowledge. It is, however, a rare case where direct evidence of knowledge of fraud can be adduced. It would be a stroke of the most extreme luck for a claimant to find, for instance, a latter passing between conspirators setting out the detail of their plot. Usually, the knowledge of a defendant is to be inferred from all the facts. Accordingly, a plea of fraud is not to be struck out on a pleading point if, first of all, fraud or dishonesty and, secondly, the primary facts relied on at the time of the inference and, thirdly, the extent of the knowledge of the fraud could be said to be inferred or alleged."

[28] Similar rigour is required in pleading conspiracy. In this regard, the learned editors of "*Bullen & Leake on Pleadings*" (19th Edition, Sweet & Maxwell) set out the following guiding principles (quoted elliptically):

> "**59-02. Necessary elements of an action in conspiracy**. The claimant must plead and prove the following necessary elements:
>
> (i) a combination or agreement between two or more individuals (required for both types of conspiracy);
> (ii) an intent to injure (required for both types of conspiracy but must be shown as the sole or predominant purpose for type (2) above);
> (iii) pursuant to which combination or agreement and with that intention certain acts were carried out;
> (iv) resulting loss and damage to the claimant.
>
> "**59-03. Combination or agreement.**
> […]
>
> Should the names of all conspirators not be known it is acceptable to plead a conspiracy between "A, B and [other] persons whose names are presently unknown to the claimant. An allegation of conspiracy must be properly particularized. It is essential that the facts on which reliance is to be placed in support of the existence of a conspiracy are clearly identified and that the logical connection between those facts and the substantive allegations in the pleadings are made clear. This means the claimant must plead both the primary facts on which he relies and set out clearly how they give rise to the inference that the defendants were parties to a conspiracy."

[29] One of the cases footnoted in that passage from *Bullen & Leake* is *Paragon Finance Plc v. Hare*, 1999 WL 477561. In that case, Mr. Justice Moore-Brick granted an application by the second and fourth defendants to have the claim in conspiracy struck out for being insufficiently particularized and therefore embarrassing, vexatious and an abuse of the process of the court. He made the following observations in respect of the pleadings:

> "[…] Mr. Parker submitted that the plaintiffs' case concerning Ranga's [one of the alleged conspirators] knowledge is fully set out in the pleading, but in a case of this kind it is not sufficient for the plaintiff simply to include all the necessary allegations without pleading the inferences which he says are to be drawn from them. It is incumbent on him both to plead the primary facts on which he relies and to set out clearly how they give rise to the inference that the defendants were parties to the conspiracy. That, it seems to me, is what Carnwarth J. had in mind when he said that the plaintiffs had to make clear the logical connection between the facts pleaded and the substantive allegations. If that is not done the defendant is placed in a difficulty because he is unable to identify clearly the nature of the case to which he must plead and which he must meet at trial."

The principles applied to the statement of claim

[30] I begin with the observation that the statement of claim in the action is remarkably succinct. While brevity and conciseness of language are the hallmarks of good pleadings, there is only so much that can be sacrificed to attain economy. Considering the seriousness of the allegations and scale of the fraud alleged, the long span of time over which it is alleged to have occurred, and the individual and corporate defendants alleged to be involved, the pleadings may be thought rather threadbare.

[31] It does not require a painstaking analysis to discern that the pleadings as they stand fall far short of the mark in setting out a case of fraud and/or conspiracy. In the main, the allegations are simply that the conspirators "*dishonestly caused*" various payments to be made to them over a period of time as "*some form of bogus loan*". There are no facts, matters or circumstances pleaded to support the allegation that the defendants were dishonest (as opposed to, for example, merely negligent), or that the "bogus loan" (whatever that may mean) was procured or orchestrated by the defendants for the purpose of fraud, or that the defendants entering into such a transaction necessarily had a dishonest state of mind. Neither do the pleadings make clear what the nature and object of the conspiracy is, or particularize any overt act or acts relied on to found the conspiracy, or said to be done in pursuance or furtherance of the conspiracy, and in which the defendants are alleged to have participated. It would be difficult to discern from these very general allegations the details of the fraud and conspiracy which are being alleged against the defendants, or for that matter the third-party conspirator. In fact, faced with the generality of the allegations and lack of particulars, the defendants may be thought less than vigilant in not having applied to have them struck out.

[32] Moreover, in addition to the lack of sufficient particulars (which I examine in more detail below), it seems to me that there are other matters of substance that arise from the state of the pleadings. I mention these only in passing, considering that the action is still at an early stage,

and with deference to the principle of party autonomy in the presentation of their cases. But there are three matters that are deserving of mention.

[33] Firstly, two of the defendants are corporate defendants, and while it is clearly the case that a company may itself unlawfully conspire with any other legal or natural person (see *Belmont Finance Corp. Ltd. v. Williams Furniture Ltd.* [1979] 1 Ch. 250), corporate conspiracy is more usually to be deduced from the acts of its human controllers or agents. But in either case, there is the necessity to plead the specific acts relied on for the existence or furtherance of the conspiracy which the company is said to be a party to, either resulting from the actions of agents, which are imputed to the company, or acts which have been taken in the company's name and authorized by its officers.

[34] Secondly, it is also a point of note that both individual conspirators are alleged to have been directors and/or managers of the plaintiff companies. Again, as illustrated by *Belmont Finance*, a plaintiff company which has been the victim of conspiracy is not debarred from making a claim simply because its agents are also implicated in the conspiracy (see 261F—262A, 263H—264C, per Buckley, LJ). But again, the material facts and circumstances necessary to establish the dishonest acts of the agents and the lack of imputation of any guilty knowledge to the company must be pleaded. Thirdly, it is striking that the named third party conspirator is not made a defendant to the action. Obviously, this raises issues as to whether all the proper parties are before the Court to enable it to properly determine the issues.

The summons for further and better particulars

[35] To avoid having to repeatedly parse references to the request for particulars made by the defendant, and as the list of particulars sought is not unduly long, it is convenient to set it out in full.

> "[…]
>
> Under paragraphs 1 and 2:
>
> (1) As to the statement: "At all material times" state what day, month, year or years constitute such times.
>
> (2) As to the allegation in paragraph 2 that the Second and Third Defendants were "owned and/or controlled and/or managed by the First Defendant and also by the said Peter Turnquest", state the date or dates when the First Defendant owned and/or controlled and/or managed the Second and Third Defendants, stating also whether such ownership or control or management was separate or joint.
>
> Under paragraph 3
>
> As to the particulars of Injury and Unlawful Acts:
>
> (1) (a) whether the sum of $20,680,337.33 was lent by 'Alpha' to 'SkyBahamas' in a single sum, and if so, in what form, and on what date or, if not in a single

sum, the date or dates before 31st December 2017, when the alleged loan was made;
(b) whether 'Alpha' required the alleged loan to be documented and/or collateralized, and if so, by what documents or documents, identifying the document or documents and the collateral required by 'Alpha' to support such alleged loan;
(c) whether the alleged loan was paid by 'Alpha' into a bank account in The Bahamas owned, controlled or managed by 'SkyBahamas' or any of the other Defendants, and if so, identifying the bank and the account so receiving the alleged loan proceeds;
(d) whether such alleged loan was locally sourced or was derived from a foreign source, and if from a foreign source, state whether exchange control was obtained from The Central Bank of The Bahamas or other authority of the Government of The Bahamas for such loan, identifying the document or documents by which such approval was obtained;

(2)(a) the date or dates of the wire transfers to 'SkyBahamas' of the sum of $5,916,587.67, stating the origin of the wire transfers, and identifying the document or documents by which it is alleged that the alleged wire transfers were made;
(b) state what is mean by the allegation of "some kind of bogus loan(s)";

3(a) whether the sum of $3,026,000.00 allegedly paid by Alpha to "the conspirators" was paid in a single sum, and in what form, stating whether the sum was from a local or foreign source, and identifying the dates or dates when such sum or sums were paid.
(b) whether the sum of $3,026,000.00 was documented at the time or times of the alleged payment by 'Alpha' to the alleged "conspirators", identifying the document or documents by which the alleged payment or payments were made, and the name of the payee;
(4) particulars of the alleged 39 fraudulent invoices totaling $3,800,000.00, stating the date or dates on which they were made, the place of origin of the invoices, stating which defendant made them, the amount of each such invoice, what the alleged invoices were expressed to cover, whether the cheques allegedly paid to 'SkyBahamas' and 'Aviation Oversight' were foreign or local cheques, and the name of any bank at which they were negotiated, local or foreign;

(5)(a) as to the alleged "breach of their duties of honesty and fidelity as directors and/or managers of both the Plaintiffs and of the Second and Third Defendants", sate the dates or time during which the First Defendant was such a director and/or manager of the Plaintiff companies and the Second and Third Defendants, stating whether the First Defendant and Turnquest were at the same or separate times such director and/or manager of the Plaintiff companies and the Second and Third Defendants, the date or dates when such directorships or such offices were held and when they ceased, who was or were other directors or shareholders of the Plaintiffs at the time that the First Defendant was allegedly a director of the Plaintiffs;
(b) particulars as to the alleged failure of the First Defendant "to ensure that the companies kept…financial books of account or financial records….or any financial controls or systems", stating when or on what date or dates the First Defendant was fixed with such responsibility in respect of the Plaintiffs, whether the Plaintiffs conducted an audit of the Second and Third Defendants and/or of

> the Plaintiffs to determine the absence of such alleged "…adequate financial controls of systems", or that the First Defendant "failed to keep or to ensure that the companies kept any or any proper management accounts….", stating the date or dates of any such audit of the defendant companies or the plaintiffs, identify the auditor, and the document or documents being the result of any such audit;
> (6) as to the payments by the Plaintiffs to 'SkyBahamas' and 'Aviation Oversight' not being documented properly, particulars as to what documentation, if any, the Plaintiffs would have kept of any such payments allegedly made improperly to 'SkyBahamas' or to 'Aviation Oversight', stating the nature of such documents, the date or dates thereof, identifying the name of the person or persons who were responsible for creating and keeping or maintaining the same."

Conclusions on the request for particulars

[36] In my view, the pleadings are glaringly deficient and I conclude that the defendants would be embarrassed and prejudiced in attempting to plead to them without the assistance of further and better particulars. I would therefore grant the order for particulars in substance as requested (although I do consider several of the requests to be unreasonable), and I dispose of the request for particulars as follows.

Request under paragraphs 1 and 2

[37] Under these paragraphs, the defendants seek particulars of the dates when the third-party conspirator (Turnquest) was said to have been a director/manager of the plaintiff companies and when the first defendant and Turnquest are said to have either owned, controlled, or managed the second and third defendants, respectively. In so far as it is the plaintiffs' case that the dishonest acts relied on to constitute fraud and conspiracy are alleged to have been done by the first defendant and Turnquest in their capacities as directors and officers of the respective companies (as seems to be the case), the dates they functioned in those capacities would clearly be material facts to be pleaded. I therefore find that the defendants are entitled to these details and grant the request.

Request under paragraph 3(1)(a-d)

[38] At paragraph 3(1), the SOC simply alleges that as at a certain date (31 December 2017) the conspirators had dishonestly caused Alpha (first plaintiff) to pay $20,680,337.33 to Sky Bahamas, "*as in each case, some kind of bogus loan*". Under 3(1)(a) the defendants seek details of whether that sum was advanced to SkyBahamas as a single sum or in tranches, what dates before the 31 December 2017 the payments were made, and what form the payment or payments took.

[39] It requires very little elaboration to make the point that the allegation at 3(1) is deficient. The defendants are clearly entitled to know with specificity when and in what form the alleged payments which they are alleged to have dishonestly procured and received were made. These are material facts necessary to support the allegations of fraud and/or conspiracy. It may be inferred from the use of the phrase "*as in each case*, some kind of bogus loan" that there were

a series of payments, as opposed to a single payment, and therefore these payments ought to be set out. (The issues arising from the phrase "…*some kind of bogus loan*" will be dealt with below, as the defendants have sought clarification on that expression under another paragraph.)

[40] As to the request under 3(1)(b) for details as to whether Alpha (first plaintiff) required the loan to be documented and or collateralized and seeking details as the documentation and/or collateralization process, I do not think these are material or primary facts necessary to the allegations. These are matters that can be dealt with either on the exchange of witness statements or on discovery or disclosure. This request is refused.

[41] Under 3(1)(c) the defendants seek information as to whether the alleged loan was paid into a bank account in the Bahamas owned, controlled or managed by SkyBahamas, or any of the other defendants and identifying information on the bank and account that received the alleged loan proceeds. The plaintiffs in their mock-up of answers to the request for particulars dismiss this as a request for evidence and as unnecessary. I disagree. While I do not think it is necessary to provide account numbers at this stage (and I would refuse that part of the request), in my view the identification of the ownership of any accounts into which funds were allegedly dishonesty or unlawfully paid is material, and for reasons similar to those at 3(1)(a) above, I would grant this request.

[42] Under paragraph 3(1)(d) the defendants seek details on whether the said loan was locally sourced or derived from foreign sources and, if the latter, request the plaintiffs to state whether exchange control was obtained and to provide details of the documents evidencing such approval if granted. Similar to the request at 3(1)(b), I find that this strays into secondary facts that do not need to be pleaded as part of the summary of the claim. These are matters that can be illuminated by way of witness statements, discovery or disclosure. I dismiss this request.

<u>Request under paragraph 3(2)(a)</u>

[43] Here, and similar to the form used in the request under 3(1)(a), the defendants seek information on the dates of the alleged dishonest wire transfers to SkyBahamas from Advanced Aviation Limited, in the sum of $5,916,587.67, stating their origin and identifying the specific transaction or document by which it is alleged the wire transfer were made. For reasons similar to those given in the explanation under that request, I would grant this request and order the particulars sought.

[44] The defendants request at 3(2)(b) that the plaintiffs "state what is meant by the allegation of '*some kind of bogus loan*' " (a phrase which as indicated also appears at paragraphs 3(1) and 3(2) of the SOC). The plaintiff countered in his mock answers, somewhat cavalierly, that the "*inference is obvious that this means a fraudulent transaction or event or events disguised as a loan*." If so, it would have been an easy matter to plead the main details of the fraudulent transaction or events in the statement of claim. Such a pleading clearly violates the rules for pleading fraud, which cannot be pleaded using equivocal or ambiguous language. While the plaintiffs are right to say that bogus is never used to connote transactions that are legitimate,

the obvious questions raised and unanswered are 'bogus' by whose account, and in whose knowledge? I therefore would grant the request for the particulars sought in this regard.

Request under paragraph 4

[45] As to paragraph 4, the defendants seek details of the some 39 invoices which are alleged to have been fraudulently paid by the plaintiffs to Sky Bahamas and Aviation Oversight between February 2008 and July 2016, including the date or dates on which the payments are alleged to have been made, the place and origin of the invoices, which defendant issued the invoices and their amounts, as well as the dates and amounts of the cheques paid, and the banks at which they were negotiated. Again, as each transaction is said to constitute a specific allegation of fraud and/or conspiracy, then the defendants ought to be confronted with the particulars of the allegations made against them. As the money was allegedly paid by cheques, then the date of negotiation is also a material fact. I would grant the order for these particulars, subject to the caveat below.

[46] To the extent that the defendants also seek particulars of what the invoices covered, I would disallow this part of the request, as being a matter of evidence that can be dealt with at the evidential phase of the proceedings.

Request under 5(a)(b)

[47] Under this paragraph, the defendants seek particulars of the dates when the first defendant was a director of the plaintiff companies, and the dates when such directorship or such offices were held and when they ceased. In their submission, the plaintiffs contended that there is "no allegation that the first defendant was the Director of the Plaintiffs companies". In point of fact, paragraph 3(5) of the SOC does plead, without specific or respective attribution to any of them, that Turnquest and Butler "*In failure of their duties of honesty and fidelity as directors and or/managers of both the Plaintiffs and of the Second and Third Defendants and their duties to act in the best interest of the companies*" failed to ensure, *inter alia*, that financial records were kept. As already indicated in the commentary under the particulars sought under paragraphs 1 and 2, these dates of directorship, etc., are material facts in respect of allegations relating to fraud and conspiracy, where the actions of individual conspirators are being imputed to the corporate victim and/or conspirator. The plaintiffs should be compelled to provide the details sought and I grant this request.

[48] Under 5(b), the defendants seek particulars as to the alleged failure of the first defendant to ensure that "the companies" kept financial books of accounts or records of the plaintiffs, stating in particular when the first defendant was fixed with such responsibility in respect of the plaintiffs. The plaintiffs' response to this was that this duty arises as a matter of law resulting from the first defendant's status as a director of the second defendant as well as shareholder. Firstly, this response does not cover any duties said to be imposed on the first defendant in respect of the plaintiffs and the 3rd defendant. In any event, if alleging a breach of any duty, a pleader must set out the circumstances in which the duty came to be imposed on the person

alleged to be in breach and the specific nature of the duty breached. Thus, similar to the position at paragraph 47 above, the plaintiffs are directed to provide the information.

[49] As to the request at the tail end of paragraph 5(b), that the plaintiffs indicate the dates of any audits of the plaintiffs or first and second defendants and provide the dates of such audits and the auditor, I do not find these are necessary primary facts to enable the defendants to plead. Again, these are matters for evidence and or discovery/disclosure, and not required at the pleading stage.

Request under paragraph 6

[50] At paragraphs 6, the plaintiffs simply allege that none of the payments to Sky Bahamas or to Aviation Oversight were documented properly, or at all, or were due and owing by the plaintiffs in any amounts or at all. The defendants seek in relation to this pleading particulars of the documentation, if any, kept by the plaintiffs of the payments allegedly improperly made to Sky Bahamas and Aviation Oversight, including the nature of such documents, the dates, and identifying the persons who were responsible for creating and maintaining such documents.

[51] The plaintiffs dismiss this as being a request for evidence, or unnecessary or irrelevant for the purposes of pleading. I agree that it is not necessary at the stage of pleadings that the defendants should know what documents the plaintiffs would have kept of the transactions. This is a matter for discovery or disclosure. I therefore do not think it necessary to grant the orders for particulars sought under this paragraph.

[52] In conclusion, based on the facts and circumstances of this case, I am of the view that the Registrar erred in principle in refusing the request for particulars. I would exercise my discretion to grant the particulars sought (subject to the limitations set out above) as being necessary and desirable to enable the defendants to plead their defences. This finding alone is sufficient to set aside the Ruling, but I go on to consider whether the Registrar was also wrong to refuse to set aside the default judgment.

II. The Practice Point: Principles applicable to setting aside judgment in default of defence and exercise of the Registrar's discretion.

[53] It is important to point out at the outset that the jurisdiction to enter judgment in default of service of defence is conferred by rules of court (e.g., Ord.19) and in the majority of cases does not require the *imprimatur* of the court. The right arises after the expiration of the time fixed by the rules, or any extensions granted by consent. The plaintiff, after certifying that the time has expired and that no defence has been filed (normally after a search at the Registry), may simply 'enter' or 'sign' judgment by filing the appropriate form for that purpose in the Registry. This is essentially an administrative act, so to refer to it as a 'judgment' is oxymoronic, for it is one on which there has been no adjudication. Not surprisingly then, Ord. 19, r. 9 gives the court a wide discretion to set aside or vary any judgment entered in pursuance of that Order "*on such terms as it thinks just*".

[54] This is not to suggest in the least that a default judgment is without legal value. As was said by the Privy Council in *Strachan v The Gleaner Co. Ltd. and another* [2005] UKPC 33, per Lord Millet:

> "In their Lordships' opinion these questions are easily answered if three points are borne in mind. The first is that, once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 citing *Lunnun v Singh* (unreported) 1 July 1999, EWCA. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata*."

[55] An application to set aside a judgment in default of defence may be based on the ground that it was obtained irregularly, that is, that there was a failure to comply with the rules in entering the judgment. This is so, notwithstanding the provision of Order 2, r.1, which states that any failure to comply with the requirement of the Rules shall be treated as an irregularity and shall not nullify the proceedings, any step taken or any document or *judgment* therein. It all depends on whether the irregularity is such as to require setting aside, or whether the matter might be cured by amendment. The older authorities stated the position that when the judgment was entered irregularly, such as when it was entered prematurely or in breach of the rules, the defendant was entitled to have the judge set aside as of right (*ex debito justitiae*): see, for the leading example, *Anlaby v. Praetorious* (1888) 20 Q.B.D. 764, CA.

[56] Importantly, as was held in *Anlaby v. Praetorious*, in cases where the judgment is irregularly entered, the court had little (if any discretion) in setting it aside, and little turned on whether the defendant had asserted a meritorious defence or on his failure to properly explain his failure to file a defence in time. The reasoning in *Anlaby v Praetorious* has been adopted and applied in more modern authorities (see the UK Court of Appeal in *Charlesworth v Focusmulti Limited*, 17 February 1993, CA (1993 WL 13725813).

[57] By contrast, there is very little doubt that the principles applicable to the setting aside of a judgment regularly entered are those summarized by Sir Roger Ormrod in the *Saudi Eagle* (*supra*), and which are distilled from the speeches of their Lordships in *Evans v Bartlam* (*supra*). These were correctly identified and adverted to by the Registrar in her ruling, and by reference to the local cases which had applied these principles. I set out the principles as they appear in the *Saudi Eagle*:

> "(i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;
> (ii) the Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms "unconditional" and the Court should not "lay down rigid rules which deprive it of jurisdiction" (per Lord Atkin at p. 486);
> (iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;
> (iv) the primary consideration is whether the defendant "has merits to which the Court should pay heed" (Per Lord Wright at p 489), not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence

> and if he has shown "merits" the "Court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication"[ibid p. 489 and per Lord Russell of Killowen at p. 482].
> (v) Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant "found himself bound by a judgment regularly obtained to which he could have set up some serious defence" [per Lord Russell of Killowen at p. 482].

[58] As made clear, the primary consideration, as a matter of legal principle and common sense, is whether the defendant has a meritorious defence. If the defendant cannot establish that he could mount a defence with merits, it would be fruitless to set aside a default judgment; but if there were a serious defence, the court would not countenance a judgment on which there had been no adjudication. Naturally, the court would also take into consideration any explanations from the defendant as to the reasons for his failure to file a defence.

[59] The Registrar very clearly placed great emphasis on her finding that the defendants had not demonstrated that they had any meritorious defence, as illustrated by the following passages:

> [21] Therefore, in this case the Defendants must show not merely that there is a 'triable issue' but they must meet the higher standard that they have a defence, which, if developed would carry some degree of conviction.
> …
> [23] Furthermore, it is notable that nowhere in the Butler Affidavit is there set out the barest outline of a defence or any grounds of a defence. I was concerned by the serious allegations in the Statement of Claim. However, the Butler affidavit does not even condescend to contradict or challenge the allegations of fraud, conspiracy or breach of fiduciary duty.
>
> 24. In point of fact, the submissions by Mr. Horton do not address or assert any form or shade of character of a possible defence. He says that the lack of particulars "unfairly prejudices the Defendants, but does not show how they are prejudiced."
>
> 30. Bearing in mind the higher bar for setting aside a regular judgment as set out in *Evans v Bartlam* [1937) and *Hanna and another v Lausten* (2018) (above), I cannot find any support in the evidence or as made out in argument, for a defence with a reasonable degree of conviction on which I could rest the exercise of the Court's discretion in favour of the Defendants."

[60] Very little criticism can be made of the Registrar's decision to treat the default judgment as a regular judgment and applying the *Saudi Eagle* test. Counsel for both parties were proceeding on the basis that the judgment was regularly entered, and Mr. Horton conceded in his written submissions that the judgment was regular. As indicated, however, he recanted this position in his arguments on appeal.

Was the Judgment in fact regularly entered?

[61] The procedural Rules in respect of entering default judgments are not a one size fits all. Where there is a default by the defendant to serve a defence within the time limit fixed by the rules,

or as may be extended, the plaintiff may enter judgment under Ord. 19, rr. 2 to 6, according to the nature of the plaintiff's claim. Rule 2 allows him to do so where the claim is for a liquidated demand only. Rule 3 applies when the claim is for unliquidated damages only. Rule 4 applies where the claim is for detention of goods only. Rule 5 applies when the claim is for the recovery of land only. Rule 6 applies to mixed claims, that is any combination of two or more of the claims enumerated under rules 2-5.

[62] Ord. 19, r. 7 applies in respect of claims not covered under the preceding rules (2-6), which are conveniently referred to as "other claims". That rule sets out a different process for entering default judgment. In any "other claims" scenario, the plaintiff is required to apply by summons or motion for judgment, and the court may give such judgments as the plaintiff appears entitled to on his statement of claim.

[63] In the proceedings before the Registrar, it seems to have been assumed that the claim was a "mixed claim", and therefore regularly entered pursuant to Ord. 19, r. 6. In fact, Mr. Scott QC asserted in his written submissions that the judgment was regularly entered pursuant to Ord. 19, r. 6, in default of defence for damages to be assessed. In the notice of appeal, no mention was made as to whether the judgment was regularly or irregularly entered. However, on appeal, Mr. Horton indicated that he was resiling from the concession made before the Registrar that the plaintiff's judgment was regular, and submitted as follows:

> "… The judgment filed by the Plaintiffs, it is submitted, is irregular, inasmuch as Order 19, rule 6, does not afford them the right to enter such judgment, given the nature of the claims raised in the Plaintiff's writ.
> […]
>
> The prayer in the Writ claims:
>
> (1) Compensation in equity
> (2) An account of misappropriated funds
> (3) A declaration
> (4) Damages and interest
> (5) Accounts and inquiries
>
> Such claims are not covered by Order 19, Rules (2) to (5) and, it is submitted, no two or more of the claims by the Plaintiffs in their writ can entitle them to enter judgment under Rule 6, or any other rule, without a trial of the claim. On this basis…it is submitted that procedurally the Plaintiff's judgment in default cannot stand, and the Defendants humbly submit that the Decision of the learned Registrar is wrong in law."

[64] Mr. Scott QC did not make any formal concession on the point, but it appears from the line of argument adopted before this court on appeal that he implicitly accepted that the judgment could not have been entered under Ord. 19, r. 6. For example, he contended that "*the plaintiffs have obtained a regular judgment under Order 19, Rule 7*." He relied for this submission primarily on a note to Ord. 19, r.7 in the White Book 1997, and the single case noted there—*Morley London Development Ltd. v Rightside Properties Ltd.* (1973) 117 S.J. 876 AC.

[65] That case, he contended, is authority for the proposition that a plaintiff is entitled to abandon without notice every relief or remedy in his claim which falls outside of the description of claims under rules 2-6 and thereby proceed to enter default judgment for his claims within the ambit of the rules. He relied in particular on the extract from page 3 of the judgment of Edmund LJ, where His Lordship said: "*At any time a plaintiff was free to elect to abandon a particular form of relief….He was under no duty to give prior notice to the other side of the election*." This, however, is only a snippet from the case, and does not quite represent the true rationale. I am of the view that Mr. Scott QC's reliance on this case is misplaced.

[66] *Morley London Development Ltd.* was a claim by writ for specific performance of a contract for sale of a property, or alternatively for damages, and all necessary accounts and inquiries. After the appellants (defendants) entered an appearance, the respondents sought judgment pursuant to Order 86 for damages to be assessed, with an inquiry as to damages and an account of all sums received by the appellants pursuant to the contract. When the matter came up for hearing, the master indicated that he was not inclined to make any order on the summons, save with regards to costs, and adjourned the matter to a judge. As summarized by Edmund Davis LJ in the appeal:

> "Seeing that this would involve them in yet more delay, the respondents withdrew the order 86 summons and, in the words of Templeman J. 'steamed straight round and signed judgment in default of defence on the very same day.' They made it plain that they were going to take this course. The order for judgment, entered pursuant to order 19, r. 3, set out that no defence having been served and "the [respondents] abandoning their claim to the relief sought in the statement of claim, it is this day adjudged that the [appellants] do pay to the [respondents] damages to be assessed."

[67] The appellants took out a summons to set aside the judgment, which Templeman J. granted and gave leave to defend, but which he made conditional on a large payment into court from which they appealed. The Court of Appeal upheld the decision of Templeman J., but the reasons for doing so are more clearly set out in the passage below, from the speech of Edmund Davis, LJ., from which Mr. Scott QC only partially quoted.

> "At any time, a plaintiff was free to elect to abandon a particular form of relief. On a case being called, a petitioner who indicated that he was not seeking one or other of the forms of relief claimed in the action, would be startled if he were told he could not do so without leave. The fact was that a plaintiff was free to choose the relief he wished to pursue, the only requirement being that at the time when the matter came to court he must make it plain what remedy he asked for. He was under no duty to give prior notice to the other side of his election, though in the present case there seemed to be no doubt that the respondent had made clear to the appellants their decision to abandon their claim for specific performance and only to seek unliquidated damages. On November 22, then, the respondents having informed the court and (indeed) the appellant's advisers of their decision to seek only the remedy of damages, nothing more was required of them and they were free to sign judgment.
>
> If that were wrong, and it was necessary for the respondents to show that they had withdrawn their cause of action for specific performance, he (his Lordship) agreed with Templeman J. that they had done so. He also agreed with the Judge in holding that the

> prayer for an account was but ancillary to that for specific performance and had been abandoned with, it, so that the only prayers for relief remaining were those which concerned unliquidated damages. If followed that the appellants' contention that judgment had been irregularly entered could not be supported."

[68] Thus, what very clearly emerges from the ruling is that at the time when judgment in default was signed, the respondents were *only* claiming unliquidated damages, which meant that the claim fell squarely with Ord. 19, r. 3. That is not the position here. Mr. Scott QC asserts that the judgment was a judgment regularly entered under Ord. 19, r. 7, a proposition which is self-negating, as judgment can only be entered under that rule on a claim by summons or motion to the court. When the plaintiffs signed judgment in this matter, they were claiming some five different heads of relief, which, as rightly pointed out by Mr. Horton, did not fit within rules 2-6. Additionally, none of them had been withdrawn, nor had it been indicated to the defendants that they would be. The matter was not even mentioned during arguments before the Registrar.

[69] If what Mr. Scott QC argues were correct, it would mean that a plaintiff could assert against a defendant claims which fall under any "other claim" (Ord. 19, r.7)—which requires an application to the court—and then retrofit it at his convenience within one or other of the rules by simply abandoning *ex post facto* any other claim that did not fit that particular rule. This would run a horse-and-carriage through the scheme set up under Ord. 19 for entering judgment in default of defence.

[70] I therefore find, with great sympathy for the position of the Registrar, who did not have the benefit of arguments as to whether the judgment was in fact regularly entered, and accepted at face value the representations of the parties that it came within Order 19, r. 6, that the judgment was in fact *irregular*, and therefore the reliance on the *Saudi Eagle* test was misplaced. The defendants would therefore be entitled as of right to have the judgment set aside on this ground, and I would order that it be set aside.

[71] This finding, in conjunction with the finding on the request for particulars, effectively disposes of the appeal. But in deference to the submissions on the explanation for the failure to enter a defence and because of a particular development in this matter, I need to say something on this point.

III. The Defendants' explanation for their failure to enter defences

[72] The Registrar was obviously unimpressed with the defendants' attempts to explain their failure to file a defence. In the first defendant's affidavit (filed 26 January 2021), the default was said to be due mainly to a confluence of circumstances: logistical challenges in the first defendant being in North Andros and unable to fly out to properly instruct his counsel, a situation exacerbated by the public health restrictions and various curfews imposed to mitigate the Covid 19 pandemic; and the first defendant himself falling ill to Covid. Moreover, the first defendant stated that further and better particulars of the pleadings were needed in order to draft the defences, as illustrated by the following paragraphs of the affidavit:

> "8. This case is a complex one, and the Plaintiffs' rush to judgment does not allow the scurrilous allegations made against me and my co-defendants to be properly defended without the further and better particulars we have requested.
> 9. I am advised, and verily believe that this is a case where the further and better particulars requested of the Plaintiffs ought fairly to precede the process of discovery, as these particulars are necessary for a proper defence against the allegations made against us.
> 10. I say, with much humility, that justice in this case requires that the Plaintiffs should define the accusations they have levelled against us, and not make broad, unsupported allegations of wrongdoing."

[73] These reasons were augmented in an affidavit filed on 19 July 2021 for use in the appeal. As an additional ground, the first defendant indicated that one reason he was unable to instruct his attorney was because he was not able to access documents and information, as some of these were in his former offices, which for the past two years had been (and remained) under the control of the plaintiffs. Further, he states that he was advised that without the information in the particulars sought, "*it would not be of any use to file a defence simply denying the allegations without more, as this would be no more than a sham defence*". He also alleged that he was unable to fly out of North Andros to meet with his attorney in Nassau, even on a private plane, because there were considerable difficulties in getting clearance.

[74] While the second affidavit still does not condescend to any details of a possible defence, the defendants notably make this averment:

> "15. The allegations against me and my companies are severe, scurrilous, and wicked. The Plaintiffs charge conspiracy and fraud against the Defendants with another, whom they have failed or refused to sue, and would seem to want to make the Defendants scapegoats by their outrageous claims. I humbly ask the Court that this case be allowed to go to trial so that justice may be done."

[75] As indicated, in light of the conclusion to which the court has come, and for the reasons advanced, the cogency or otherwise of these reasons are not material considerations. But even if I had come to the conclusion that the judgment were regularly entered, and the *Saudi Eagle* test applied, I would not have been so dismissive of the attempts to explain the delay, especially in light of the additional factors raised on appeal. Undoubtedly, the defendants could have served themselves better by providing via affidavit some indication of the merits of their defence, or by exhibiting a draft holding defence. But the cases do support the position (as stated in the 19 July 2021 affidavit of the first defendant) that general denials of conspiracy are risky business, and it is advisable to deny every allegation of fact in the particulars of claim if possible (*John Lancaster Radiators Ltd. v. General Motor's Radiators Co. Ltd.* [1946] All ER 685).

[76] The second point, and the "development" to which I referred, is this. Following the hearing of this matter, and after the court had reserved to consider its judgment, the plaintiffs filed the affidavit of Marnique Knowles of Messrs. Scott & Co. (on 3 August 2021) in further opposition to the defendants' appeal. In particular, it was aimed at disputing the first defendant's claim

that he was unable to fly out of North Andros to instruct counsel. That affidavit exhibited an affidavit from one Bruce Green, said to be an aviation expert resident in Florida, the purpose of which was to put before the court flight records from an open aviation site which purports to show that an aircraft owned by the first defendant was flown between San Andros and New Providence on perhaps as many as 9 times during the period 25 November 2020 to 23 January 2021.

[77] Mr. Horton, by letter dated 5 August 2021, registered his objection to this, on the basis that the matter had already been heard and adjourned for consideration of the ruling. Mr. Scott QC, in characteristic panache, dismissed the defendants' objections with a reference to the Shakespearean line spoken by Queen Gertrude in Hamlet—"*me thinks the lady doth protest too much*…".

[78] I do not consider it necessary to have regard to the content of the Knowles affidavit for the resolution of this matter. In any event, if I did, the defendants would have been entitled to file evidence in reply. But for my part, I do not agree that Mr. Horton's objection was overplayed. While it is obviously the case that the court remains seized of a matter until the pronouncement of its ruling, and the parties are under an obligation to keep the court informed of any subsequent developments that may have a material effect on the proceedings, this does not constitute a licence for any party to continue to file affidavit evidence in support of its case, particularly without seeking the leave of the court. There would be no end to litigation if parties, subsequent to the hearing of a particular application or claim, continued to unilaterally submit materials to the court to further buttress their case without regard to the court or the other side. It is a practice to be deprecated and avoided.

Concluding observations

[79] Before concluding this matter, there are a few general observations I would make in respect of the court's discretion to set aside default judgments. The overarching reason for the nearly untrammelled discretion given to the court is to enable it to do justice between the parties. All of the cases state that there should not be a mechanistic approach to the exercise of this discretion, and in the *Saudi Eagle* Sir Roger Omerod stressed that the court should not "*lay down rigid rules which deprive it of jurisdiction*", which was to be exercised according to common sense.

[80] In *Day v Royal Automobile Club Motoring Services Ltd.* [1998] EWCA Civ. J1029-8, which was an appeal against an application to set aside judgment entered in default of defence (which was allowed), a strong UK Court of Appeal considered and somewhat distinguished the test in *Saudi Eagle*. Ward LJ, who delivered the leading judgment, described the court's general discretion as follows:

> "At the heart therefore of this discretionary exercise is the need to do justice. Justice has to be done both to the plaintiff, to the defendant and, of course, and especially in this day and age, to the whole process of the administration of justice in these courts. But it may not be out of place to cite one other passage in the speeches of the well-known case of *Evans v Bartlam* and to remind everybody of the words of Lord Atkin at page 480:

> ‘The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.’ ”

[81] I accept that these continue to be the guiding principles, and the court should be astute to ensure that parties are never denied substantive justice based on the blind and procrustean application of procedural rules.

CONCLUSION AND DISPOSITION

[82] For the reasons given above, I am completely satisfied that this appeal should be allowed and the Registrar’s decision set aside. I therefore grant the orders sought by the Defendants, as limited by my findings with respect to the request for further and better particulars. Costs to the defendants to be taxed if not agreed.

14 December 2021

Loren Klein
Justice