COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2019/CLE/gen/00436

BETWEEN

BH RIU HOTELS LTD.

Plaintiff

AND

BARBARA JOHNSON

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Mr. Leif Farquharson and Mr. Gabriel Brown for the Plaintiff**
Ms. Rodger Outten for the Defendant

Ruling Date: **8th March 2022**

RULING

1. By an Amended Summons filed 12th November 2019, the Defendant, Ms. Barbara Johnson **(the "Defendant")** seeks an order setting aside the judgment in default of appearance filed 3rd June 2019 **(the "Default Judgment")** and the subsequent writ of possession filed 17th June 2019 **(the "Writ of Possession")** obtained by the Plaintiff, BH RIU Hotels Ltd. **(the "Plaintiff") (the "Set Aside Application")**.

2. The Set Aside Application is made pursuant to Order 2 Rules 1 and 2 and Order 13 Rules 7 and 8 of the Rules of the Supreme Court **("RSC")** and the inherent jurisdiction of the Court.

3. The Defendant claims that she was not served with the Writ of Summons filed 2nd April 2019 **(the "Original Writ")** but only the Amended Writ of Summons filed 24th May 2019 **(the "Amended Writ")**, after the Default Judgment had been entered. As proof of service of the Original Writ is a requirement and an essential condition prior to the Default Judgment being entered pursuant to Order 13 Rules 7 and 8 of the RSC and accordingly, she is entitled to have the Default Judgment and Writ of Possession set aside *ex debito justitiae* because it was obtained irregularly.

4. The Plaintiff resists the Set Aside Application and has moved the Court to hear its application made by way of an Amended Summons filed 1st November 2019 for an order pursuant to Order 18, rule 19 (1) (b) and/or (d) of the RSC and/or the inherent jurisdiction of the court, to strike out, in part, the Defendant's defence and counterclaim filed 29th July 2019 **(the "Defence and Counterclaim").**

5. More particularly, the Plaintiff seeks to strike paragraphs 2, 3 and 4 of the Defence, paragraphs 2, 4, 6, 13 and 14 of the Counterclaim and paragraphs 1, 2, 3, 4, 5 and 6 of the prayer in the Counterclaim **(the "Strike Out Application")**. Alternatively, the Plaintiff

seeks an order pursuant to Order 14, rules 1 and/or 3 of the RSC that judgment be given in favour of the Plaintiff for the possession of the subject premises.

6. The grounds the Plaintiff rely on are : -

> "(a) The parties were previously in the relationship of landlord and tenant; the lease of which expired on 31st July 2017, leaving the Defendant with no legal entitlement to be replaced or remain in possession of the subject premises. This makes certain paragraphs of the Defence and Counterclaim frivolous and vexatious and/or an abuse of process.
>
> (b) The now expired lease provided that any costs and expenditures associated with construction or remodeling of the subject premises were to be borne by the sole expense and risk of the tenant; again making certain paragraphs of the Defence and Counterclaim frivolous and vexations and/or an abuse of process.
>
> (c) In **Farrington v BH Riu Hotels Ltd Action No. 2017/CLE/gen/00436**, by ruling dated 30th July 2018, it was held with respect to the subject premises that the said lease had expired, no proprietary estoppel or other equitable interest arose in favour of the tenant, there was no entitlement for the tenant to be reimbursed for expenditures made and the tenant was to surrender the said premises to the Plaintiff. Therefore the mentioned paragraphs of the Defence and Counterclaim were to be rendered frivolous, vexatious and/or an abuse of process **(the "Strike Out Application").**

Background Facts

7. By the Amended Writ, the Plaintiff claims delivery up and possession of a souvenir, food and snack shop situate at 6307 Casino Drive, Paradise Island **(the "Demised Premises")** which it leased to the Defendant from 2006 at a rent of seven hundred dollars per month. To honor this arrangement, a written lease agreement dated 1st January 2006 was executed which contained a termination date of 31st December 2006 **(the "First Lease").** There were subsequent lease arrangements entered into between the parties.

8. Throughout the terms of the various leases, the rent increased to one thousand two hundred and fifty seven dollars and five cents per month. The last lease agreement between the parties was entered into on 15th November 2016 and terminated on 31st July 2017 **(the "Final Lease").** A clause contained in the Final Lease stated that the Defendant was to yield and surrender the Demised Premises to the Plaintiff on or about 31st July 2017. The Plaintiff refused to vacate the Demised Premises and also failed to pay the agreed rent.

9. The Plaintiff seeks damages for trespass in the monthly amount of one thousand two hundred and fifty seven dollars and seventy five cents from 31st July 2017 until possession is delivered up of the Demised Premises.

10. After filing the Original Writ and purportedly serving it on the Defendant, the Plaintiff conducted a search on Thursday, 30th May 2019 of both the Supreme Court Registry Cause List and the Court file. The search revealed that no appearance had been entered by the Defendant as confirmed by the Affidavit of Search filed 4th June 2019.

11. Application was then made for an order for judgment in default of appearance and on 3rd June 2019, the Default Judgment was entered and subsequently a Praecipe for Writ of Possession was filed 6th June 2019 followed by the Writ of Possession.

12. By her Defence and Counterclaim, the Defendant claims that because she had been previously permitted to remain in possession of the Demised Premises upon the expiration of other written lease agreements between her and the Plaintiff, she had expected that the Final Lease would be renewed.

13. The Defendant also claims that there was an understanding that she would eventually be able to purchase the Demised Premises for her business which led to her making renovations to her financial detriment worth approximately three thousand dollars.

14. By her Counterclaim, the Defendant claims that the renovations were carried out at the encouragement of the Plaintiff as she was going to be allowed to rent it for a very long period of time and eventually purchase it. Additionally, the Plaintiff had failed to carry out any structural repairs or repairs to the electrical wiring and air condition systems over the course of the twelve year relationship in breach of the lease agreements to do so.

15. Accordingly, the Defendant seeks an order estopping the Plaintiff from denying the Defendant's right to reimbursement or continued possession, an order that the Defendant be allowed to continue renting the premises at the original rent and that the Demised Premises be transferred to her, a determination of the Defendant's right to recovery of her investments in the Demised Premises, damages, an order that the Defendant has a proprietary interest in the Demised Premises and not less than fifty thousand dollars in respect of the improvement of the Demised Premises.

AFFIDAVIT EVIDENCE

Defendant's Evidence

16. By the Defendant's Affidavit of Delvin Hanna filed 19th September 2019 and Karen Davis filed 19th September 2019, the Defendant set out the events which led to a Barbara Miller instead of the Plaintiff being served with the Original Writ. Both Mr. Hanna and Ms. Davis aver that they witnessed officer Stanley Knowles serve the Original Writ on Barbara Miller despite her and other beach vendors' insistence that she was not the Plaintiff.

17. The Plaintiff concedes that the Original Writ was not served on the Defendant.

Affidavit of Barbara Johnson filed 26th September 2019

18. The Defendant avers that she co-owns Demised Premises with Naomi Farrington. On or about 1988 she began working poolside with the Plaintiff and after several years she was allowed to stay and sell her goods poolside and in its lobby to their visitors.

19. In late spring of 2004, she approached the Plaintiff's general manager at the time about the requirements to rent one of the stalls opposite the Hotel from which she could sell her goods and on or about 1st June 2005 she received approval to rent the Demised Premises. They eventually executed the First Lease with a rental value of seven hundred dollars a month and subsequently executed numerous lease agreements, ending with the Final Lease.

20. The general manager informed them that they would be able to make improvements, provided that she obtained the Plaintiff's approval to do so. This led to the Defendant spending several thousands of dollars renovating the Demised Premises. As they had

paid their rent on time, she and her business partner expected the Plaintiff to honor its obligations to maintain the Demised Premises.

21. A key term of every lease executed over the years was for the Plaintiff to maintain and repair the building however, year after year the Plaintiff took their money but never made the required repairs. She began to notice some obvious challenges to the space. One such challenge was that there was no access to power outlets, which led them to spend seven hundred dollars of their own money to install an electricity power line and an electrical power box.

22. The Defendant had informed the Plaintiff's new general manager of their lack of access to power outlets. In turn they were told that they had to obtain utilities and pay for the power connection at their own expense. After a large portion of the Demised Premises was damaged by Hurricane Irene, she also thought that the Plaintiff would replace the roof in conformity with a clause for repair of the Demised Premises if the damage sustained was through no fault of the Defendant. The Plaintiff never fixed the roof despite their repeated requests and they were still, required to pay their rent on time and in full.

23. Another general manager of the Plaintiff called the engineering manager in her presence to find out why the roof was not fixed but this did not yield any solution to the issue. They lost thousands of dollars in merchandise from water damage. They felt as if they had been taken advantage of because months turned into years and there were no results. The roof was low with huge rusty nails and it embarrassed them when tourists visited the Demised Premises.

24. The Demised Premises was hot and their request for an air conditioner was denied. They then purchased and paid for the installation of their own air conditioner which was ruined six months later after it caught afire due to the Plaintiff's engineering department unknowingly sharing their electrical power to the parking lot booth.

25. For over twelve years the Plaintiff never maintained the outside of the Demised Premises. Sometimes when the generator stopped working they would lose food, inventory and perishables. They sought compensation but this request was also denied. Their request to place a table on the pool deck with some souvenirs was also denied.

26. On or about January 2017, a representative from the Plaintiff's accounting department along with two other managers approached them about executing the Final Lease. It was always their practice to have someone review the terms of a lease agreement prior to executing it however, they were not afforded the opportunity nor were they given a copy of the Final Lease.

27. Sometime in July 2017, her business partner Ms. Farrington commenced a law suit against the Plaintiff due to its persistent breach of contract which caused her financial ruin but she personally did not follow the matter. Over the course of their twelve year tenancy, there were periods during which they operated without a lease agreement. Therefore, she did not find it strange that she was not immediately provided with another lease agreement or that the rent paid was returned to her.

28. Her security deposit was not returned to her nor was she informed in writing to vacate the Demised Premises. She continued to focus on her business and worked from the Demised Premises well into January 2019. On or about 25th March 2019, she received written correspondence from the Plaintiff's attorneys, purporting to address the settlement of matters arising from the Final Lease.

29. The Defendant was shocked at the Plaintiff's request that she vacate the Demised Premises as she had spent so much money over the almost thirteen years there. She was additionally shocked at the seven day time limit imposed to confirm her agreement to the proposed terms. Her contract allowed the Plaintiff to serve or give her notice but that was the first time she had received any correspondence regarding the same.

30. She was served with the Amended Writ on 25th June 2019 which was the first time she became aware of an action against her for unpaid rent despite her attempts to do so and they had been returned to her. Upon receipt of the Amended Writ, her attorney entered an appearance on her behalf.

Plaintiff's Evidence

Affidavit of Samuel Brown filed 25th October 2019

31. Mr. Brown avers that by the Final Lease, the Defendant and Naomi Farrington **("Ms. Farrington")** jointly leased a souvenir, food and snack shop on the Demised Premises. The rent was agreed at one thousand two hundred and fifty seven dollars and seventy five cents per month.

32. The Final Lease provided, amongst other things, as follows:

> **"2. TERM. The Lease will begin on January 1, 2017 and will terminate on July 31, 2017 (hereinafter called the "Term"). There shall be no implicit or automatic renewal or extension of this term, and therefore this term can only be renewed or extended only by prior explicit written agreement signed by both parties."**
> **3. USE OF PREMISES. .....Tenant further covenants with the Landlord that:**
> **(a).....**
> **.....**
> **(h) Tenant shall not without the prior written consent of Landlord, which consent shall not be unreasonably withheld, make any alteration or addition to the Premises or cut, puncture or injure any walls, ceilings or timbers thereof;**
> **.....**
> **(n) At the termination of this Lease, Tenant shall yield and surrender the Premises (maintained in accordance with this Lease) to Landlord in accordance with the terms contained herein."**
> **5. HOLDOVER. If Tenant maintains possession of the Premises for any period after the termination of this Lease without objection by the Landlord ("Holdover Period"), Tenant shall pay to Landlord a lease payment for the Holdover Period equal to the Lease amount set forth in Clause 4 plus twenty percent (20%). Such holdover shall constitute a month to month extension of this Lease, but this provision shall not authorize the Tenant to so hold over where the Landlord has objected to such holding over or has required the Tenant to vacate the Premises."**
> **9. REMODELING OR STRUCTURAL IMPROVEMENTS. Tenant shall have the obligation to conduct any construction or remodeling (at Tenant's sole expense and risk) that may be required to use the Premises as specified above. Tenant may also construct such fixtures on the Premises (at Tenant's sole expense and risk) that appropriately facilitates its use for such purposes. Such construction shall be undertaken and such fixtures may be erected only with the prior written consent of the Landlord which will not unreasonably be withheld. At the end of the lease Term, Tenant shall be entitled to remove (or at the request of Landlord shall remove) such fixtures, and shall restore the Premises to substantially the same condition of the Premises at the commencement of this Lease."**
>
> **16. ENTIRE AGREEMENT/AMENDMENT. This Lease contains the entire agreement of the parties and there are no other promises, representations or conditions in**

relation to the Premises, whether oral or written. This Lease may be modified or amended in writing signed by both parties."

33. The Final Lease was not the first lease executed by the parties in respect of the Demised Premises. Successive lease agreements were executed spanning the period 2006 to 2017. Many of the leases contained identical or similar terms to those set out above. The Plaintiff and the Defendant have only ever been in the relationship of landlord and tenant.

34. The Plaintiff never made any promises or assurances to the Defendant that she or Ms. Farrington would be given any proprietary interest in the Demised Premises nor that it would be conveyed to them. There is no basis for the Defendant to be put back into or remain in possession of the Demised Premises and no basis for her to be given relief to rent the Demised Premises at the original rent of seven hundred dollars for as long as she wishes or for the land be transferred to her or for her to be given a proprietary interest.

Supplemental Affidavit of Samuel Brown filed 1st November 2019

35. After the expiration of the Final Lease, the Plaintiff did not accept any rental payments from the Defendant. A clause of the said lease was that the Plaintiff was to yield and surrender the Demised Premises to the landlord at its expiration. In the Farrington Ruling, it was found that the lease expired on 31st July 2017 and that no proprietary estoppel or other equitable interest arose in favour of the tenant which was precluded under the terms of the lease. It addressed many of the very same issues raised in the Defence and Counterclaim.

36. There was no belief that there could be a claim for possession of the Demised Premises based on the Defence and Counterclaim. In paragraph 1 of the Defence and Counterclaim, the Defendant seemingly admits that the Plaintiff is the freehold owner of the Demised Premises which was rented to her pursuant to the Final Lease and which she was to surrender after its termination.

SUBMISSIONS

PLAINTIFF'S SUBMISSIONS

37. The Plaintiff submits that a successful application to set aside a regular judgment was incumbent upon a defendant showing that there was a meritorious defence. If the defendant failed to prove that its defence was meritorious, there was no point in setting aside the judgment. In **Alpine Bulk Transport Co. Inc. v. the Saudi Eagle Shopping Co. Inc. [1986] 2 Lloyd's Rep. 221 at p. 223**,

> **".... A defendant who is asking the court to exercise its discretion in his favor should show that he has a defence which has a real prospect of success. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the outcome if the judgment were to be set aside and the defence developed. The "arguable defence" must carry some degree of conviction."**

38. The modern approach to setting aside a default judgment on grounds of irregularity was set out in **Faircharm Investments Ltd v. Citibank International plc. (1998) the Times, February 20, CA**. The Court of Appeal dismissed the appellants appeal and declined to set aside an irregular judgment which was entered in the court below and concluded as follows:

> **"However that may be, I am impressed by what both the deputy master and the judge said, that if Citibank are bound to lose on a subsequent application for summary judgment, it would be pointless to set aside the existing judgment. Lex non cogit ad inutilia. I would not go so far as to say that no irregularity could be so fundamental that the judgment in such a case would have to be set aside, whatever the other circumstances. But if indeed Citibank would be bound to lose I do not, in the circumstances of this case, consider that there is such a degree of fundamental error to require that the judgment be set aside. After all the tortured misunderstanding on both sides in this case and the regrettable imprecision in the pleading and court documents, it is time that justice is done once and for all.....As we said over 100 years ago, "We are not here to punish people for their mistakes in procedure but to do justice."**

39. In **Cusack v. De Angelis [2017] QCA 313** the Queensland Supreme Court endorsed Faircharm and considered the modern approach originated therefrom:

> **"More recently, the English Court of Appeal has held that it may be inappropriate to set aside an irregularly entered judgment if a subsequent application for summary judgment is bound to succeed. That decision is consistent with the contemporary approach of applying rules of practice and procedure, whether statutory or developed under the common law, not rigidity and with undue technicality, but with regard to considerations of cost, expedition, utility and justice."**

40. The Plaintiff submits that there is no basis to set aside the Default Judgment. They observe that the Set Aside Application is defective as it fails to specify any grounds of irregularity the Defendant relies on and instead recites various provisions of the RSC and the inherent jurisdiction on which they rely. The evidence provided by both parties make it abundantly clear that the Defendant has no entitlement to possession of the Demised Premises.

41. Moreover, all of the issues raised by the Defendant were already considered and determined by Winder J in **Naomi Farrington v BH RIU Hotel Ltd Action No. CLE/gen/00859** therefore the fact that the Defendant seeks to raise them again is an abuse of process or operates to create an issue estoppel. In **Naomi Farrington** the Plaintiff was granted summary judgment and ordered delivery up of possession and damages to be assessed for mesne profits.

42. Winder J held that the Final Lease had expired on 31st July 2017, no proprietary estoppel or other equitable interest arose in Ms. Farrington's favour, she was not entitled to be reimbursed for expenditures made in developing or improving the Demised Premises as precluded under the terms of the final lease and upon its expiration, Ms. Farrington had agreed to surrender the Demised Premises to the Plaintiff. A writ of possession was subsequently issued against Ms. Farrington.

43. In **House of Spring Gardens Ltd. v. Waite and Others [1990] 2 ALL ER 990, CA** a joint tortfeasor was held to be bound by a decision dismissing his fellow tortfeasors' claim to set aside an earlier judgment on the basis of fraud, although not a party to that claim. He was precluded from bringing a separate action seeking the same relief as his fellow tortfeasors. The English Court of Appeal emphasized that the appellant was aware of the other proceedings, he could have applied to be joined to oppose the application but chose not to.

44. The Plaintiff prays that the Set Aside Application be dismissed with costs or alternatively for the Court to accede to its Summary Judgment Application and award summary judgment in its favor for possession of the Demised Premises and damages to be assessed for mesne profits as was done by Winder J in **Naomi Farrington v BH RIU Hotel Ltd**. Further or alternatively, the Plaintiff prays for the Court to strike out the specified paragraphs of the Defence and Counterclaim insofar as they seek to challenge the Plaintiff's right to possession.

DEFENDANT'S SUBMISSIONS

45. The Defendant contends that before a judgment in default of appearance can be entered a plaintiff must first prove due service upon a defendant. This is an essential condition for the jurisdiction. Failure to comply with this condition would render any such judgment obtained and all subsequent proceedings based thereon wholly irregular.

46. The Plaintiff's failure to comply with the rules of service is wholly irregular pursuant to **Orders 2 Rules 1 and 2 and Order 13 Rule 7 (1) of the RSC** which state as follows:

> **"Order 2, Rule 1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein.**
> **(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.**
> **(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.**
>
> **Order 2 Rule 2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.**
> **(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."**
>
> **"Order 13 Rule 7. (1) Judgment shall not be entered against a defendant under this Order unless —**
> **(a) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ or notice of the writ on the defendant; or**
> **(b) the plaintiff produces the writ indorsed by the defendant's attorney with a statement that he accepts service of the writ on the defendant's behalf.**
> **(2) Where, in an action begun by writ, an application is made to the Court for an order affecting a party who has failed to enter an appearance, the Court hearing the application may require to be satisfied in such manner as it thinks fit that the party is in default of appearance."**

47. She submits that the Plaintiff failed to personally serve her with the Original Writ and that such failure became incurably bad after the Default Judgment was obtained. The fundamental defect in service meant that the proceedings had not begun until effective service of the Amended Writ, which occurred some three weeks after the Default Judgment was entered.

48. In **Re Pritchard (deceased) [1963] 1 ALL ER 873**, Upjohn LJ considered **MacFoy v United Africa Co Ltd [1961] 3 ALL ER** where Lord Denning held that where a defendant had not been duly served, the failure to comply with the rules were so defective that the proceedings must be set aside. At p. 880, Upjohn LJ stated,

> **"In that case the defendant had never been served with any proceedings at all. It was not a case of some failure to comply with the rules relating to service, but the defendant was in the position where he could say that he had no knowledge of any proceedings against him at all, until he learnt of them, and that he then made application to have the order set aside. Lord Greene MR with whom Goddard LJ agreed, held that the order obtained without any service on the defendant was a nullity and must be set aside....there are some proceedings so defective that they may properly be described as a nullity....with the distinction between a nullity, which was wholly void, and something which, although improper, was voidable and capable of being cured. He pointed out that if a proceeding is a nullity, it is incurable and cannot be validated by any subsequent act of the parties by waiver or taking some step in the action. It is unnecessary to have an order setting aside a nullity although it may be convenient to do so..."**
>
> .....
>
> **"The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. (i) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: see eg, Finnegan v Cementation Co Ltd."**

49. The Defendant also submits that a defendant's right to a defence is not an abuse of process. In **Wandsworth London Borough Council Appellants and Winder [1985] AC 461** the House of Lords considered whether it was an abuse for an individual, who claims that his existing rights under a contract have been infringed by a decision of a public authority and whether or not it was appropriate to strike out the Defendant's Defence and Counterclaim as submitted in his defence.

50. Lord Fraser of Tullybelton held,

> **"It wouldn't my opinion be a very strange use of language to describe the respondents' behavior in relation to the syndication as an abuse of process by him of the process of the court. He did not select a procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of an individual to defend an action against him on the ground that he is not liable for the whole some claimed by the plaintiff. Moreover, he puts forth his defence as a matter of right whereas in an application for judicial review success would require an exercise of Court's.....he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid."**

51. The Defendant submits that the matter raises numerous questions of fact to be determined at trial and was not a case where the entire claim nor any part thereof should be struck out. The Defence and Counterclaim was submitted in time and in accordance with her procedural right to defend herself against the claims in the Amended Writ.

52. It was not a plain and obvious case to which Order 18 Rule 19 applies and an order to strike out pertinent parts of the Defendant's Defence on the purported basis of an abuse of process would deprive her of any legal redress and render a grave injustice to the Defendant.

DECISION

53. By **Order 13 of the RSC** a Plaintiff may make application for judgment in default of appearance for various claims, including claims for liquidations and unliquidated damages, claims in detinue and claims for possession of land. In the instant case, the Plaintiff's claim was for, *inter alia*, possession of land. It therefore made a successful application pursuant to **Order 13 rule 4 of the RSC** to obtain a judgment in default of appearance against the Defendant. **Order 13 rule 4 of the RSC** provides,

> **"4. (1) Where a writ is indorsed with a claim against a defendant for possession of land only, then, subject to paragraph (2), if that defendant fails to enter an appearance the plaintiff may, after the time limited for appearing, and on producing a certificate by his attorney, or (if he sues in person) an affidavit, stating that he is not claiming any relief in the action of the nature specified in Order 77, rule 1, enter judgment for possession of the land as against that defendant and costs, and proceed with the action against the other defendants, if any."**

54. A condition precedent to obtaining a judgment in default of appearance is proof of service of the writ on the defendant as provided by **Order 13 rule 7 of the RSC**,

> **"7. (1) Judgment shall not be entered against a defendant under this Order unless — (a) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ or notice of the writ on the defendant; or**
> **(b) the plaintiff produces the writ indorsed by the defendant's attorney with a statement that he accepts service of the writ on the defendant's behalf. (2) Where, in an action begun by writ, an application is made to the Court for an order affecting a party who has failed to enter an appearance, the Court hearing the application may require to be satisfied in such manner as it thinks fit that the party is in default of appearance."**

55. The Plaintiff claims that she was never served with the Original Writ, therefore the Default Judgment and Writ of Possession should be set aside. The Defendant on the other hand submits that because the action would inherently fail in any event they should not be set aside or alternatively seeks summary judgment.

56. The Court is given the jurisdiction to set aside a judgment in default of appearance by **Order 13 rule 8 of the RSC** which states,

> **"8. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."**

57. The **Supreme Court Practice 1976**, starting at paras. 13/7/1 discusses the effect of **Order 13, rules 7 and 8 of the RSC**,

"13/7/1 Effect of this Rule – This Rule is taken from R.S.C. (Rev.), 1962, which had been partly taken from the former O. 13, r. 2 and partly embodied the previous practice, but the provision that proof of service may be effected by proving acceptance of service by the defendant's solicitor was new.

Before proceeding to enter judgment in default of appearance, the plaintiff must first prove due service of the writ or notice of the writ upon the defendant. This is an essential condition, for the jurisdiction to enter judgment in default of appearance is dependent upon this condition being properly satisfied (see Crane & Sons, Ltd. v. Wallis, [1915] 2 Ir. R. 411, C. A.). Failure to comply with this condition would render the judgment entered in default and all subsequent proceedings based thereon wholly irregular (see O. 2, r. 1, supra).

Affidavit of Service – The affidavit of service must be a proper affidavit proving due service of the writ or notice of the writ on the defendant. By 0.B65, r. 8, infra, the affidavit of service must state by whom the writ or notice of the writ was served, the day of the week and the date on which it was served and where and how it was served. Where such an affidavit did not state where the affidavit was served, it was held insufficient, for it might have been served out of the jurisdiction (Davis v. Hole, (1842), 1 Y & C, Ch. CAS. 440). The affidavit should also state that the writ and copy of writ were properly indorsed and except in the case of service out of the jurisdiction that the indorsement of service on the writ was duly completed under 0. 10, r. 1 (4), supra....."

13/7/3 Proof of Default of Appearance – A search for appearance must first be made, and a certificate of non-appearance may be obtained from the proper officer.

13/9/2 Application to Set Aside Judgment in Default – If the Defendant desires to defend the action notwithstanding the judgment, he may apply under this Rule to set aside the judgment. It is not necessary to obtain leave under 0. 12, r. 6, to enter an appearance before applying or in order to apply to set aside the judgment.

Irregular Judgment – .....Where a judgment is obtained irregularly the defendant is entitled ex debito Justitia to have it set aside (Analby v. Praetorious, 20 Q. B. D. 764). But if the irregularity is due to an error arising from an accidental slip or omission, it may be corrected (Armitage v. Parsons, [1908] 2 K. B. 410, C.A.). When setting aside an irregular judgment, the Court should impose no terms whatever on the defendant, not even contingent terms, such as that the costs should be costs in cause (see White v. Weston [1968] 2 Q. B. 647: [1968] 2 W.L.R. 1459 C.A.)"

58. In **Hanna and another v. Lausten [2018] 1 BHS J. No. 172**, the Court of Appeal had to determine whether it would allow the appeal of a judge's refusal to set aside a default judgment based on the irregularity of the default judgment. The Court held that the general rule that a litigant is entitled *ex debito justitiae* to have an irregular judgment set aside was not absolute.

59. The Respondent had commenced an action in the Supreme Court for breach of contract seeking, inter alia, possession of property and damages. The Appellants failed to file a defence and the respondent applied for leave to enter judgment against the appellants for possession of the property. Default judgment was entered entitling him to recover possession of the property and a writ of possession was subsequently obtained. The default judgment was however irregular as it included additional relief which was outside the scope of the court's jurisdiction.

60. For eight years, the appellants failed to take any steps to set aside the default judgment and writ of possession and to be given leave to defend. The appellants eventually filed to have the default judgment set aside and for leave to file and serve a Defence and Counterclaim. The judge dismissed the application.

61. The application to set aside the default of defence was made pursuant to Order 19 rule 9 of the RSC however the appellate court noted that it was identically worded to Order 13 rules 8 of the RSC. The court held that the starting point in relation to the power of a judge to set aside a default judgment whether entered under Order 13 or Order 19 began with considering whether there was a prima facie defence.

62. The court held that the appellants had several hurdles to surmount. In addition to convincing the judge that the default judgment should be set aside ex debitio justiciae for irregularity, they also had to convince the judge that they had a meritorious defence. They agreed with the trial judge's decision not to set aside the default judgment despite there being some irregularity to how it was obtained as the right to set it aside was not absolute.

63. Furthermore, a party's right to apply to set aside any proceeding, judgment or order for irregularity is pre-conditioned on his duty to apply under Order 2 rule 2 (1) of the RSC to set it aside within a reasonable time and before he has taken any "fresh step" after becoming aware of the irregularity.

64. In **Hanna and another v Lausten** Crane-Scott JA comprehensively set out, the law with regard to setting aside a judgment in default, even where the judgment was irregularly entered. I respectfully set the same out here: - ,

> ***"Ground 1 --Refusal to set aside the irregular judgment ex debito justitiae; the waiver point.....***
>
> **49 *The judgment was irregular and should have been set aside ex debito justitiae*: Next, Mr. Smith contended that the learned judge was plainly wrong in refusing to set aside the default judgment *ex debito justitiae* inasmuch as at paragraph 22 of her Ruling *(above)* she had clearly accepted the appellants' submission that the default judgment was irregularly entered.**
>
> **50 He took issue in particular, with her conclusion at paragraph 26 of her Ruling *(above)* that the appellants had lost their "right" to have the default Judgment set aside *ex debito justitiae* having regard to the 17 year delay which had occurred since the irregular judgment had been entered. The thrust of the submission was that once the judgment was shown to be irregular, the judge ought to have set it aside.**
>
> **51 Having considered the argument we have no difficulty with the learned judge's refusal to set the judgment aside *ex debito justitiae* notwithstanding that she was satisfied that the judgment was irregular. As is well known, the general rule expressed in Analby v. Praetorious [1888] 20 Q.B.D. 764 that a litigant is entitled *ex debito justitiae* to have an irregular judgment set aside is not absolute.**
>
> **52 The principle has always been subject to the power of the court in an appropriate case to, *inter alia*, vary a default judgment so as to correct an irregularity. It is subject also to the court's power under O.2, r. 2(1) to allow amendments to correct irregularities. [See Practice Note 13/9/8 under the heading "Irregular judgment" located between pages 157-158 of Volume 1 of the 1999 Edition of The English Supreme Court Practice.]**
>
> **53 Furthermore, a party's right to apply to set aside any proceeding, judgment or order for irregularity is pre-conditioned on his duty to apply under O.2 r.2(1) to set it aside *"within a reasonable time"* and before...he has taken any *"fresh step"* after becoming aware of the irregularity.**
>
> **54 In this jurisdiction, the rule is encapsulated in O. 2 r. 2 R.S.C. 1978 which states:**

"*Application to set aside for irregularity*

(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion." [Emphasis added]

55 As required by O.2. r. 2(2) the 2013 Summons clearly set out the grounds of objection and the specific irregularities on which the appellants sought to have the judgment set aside for irregularity.

.....

59 Additionally, the Record clearly establishes that after becoming aware of the default judgment and the existence of the Writ of Possession, the appellants took a *"fresh step'* in the proceedings on or around the 30th July, 1996 when, instead of applying to set aside the default judgment, they instead filed a Summons to stay the Writ of Possession. The Summons in support of the stay was supported by an affidavit of the first-named appellant, filed the same day. At paragraph 3 of his affidavit, Anthony Egbert Hanna clearly deposed that the respondent had entered judgment against the appellants for possession and had subsequently obtained an order for possession of the said premises. [See pages 100 to 99 of the Record.]

60 As we see it, in the light of the foregoing facts, the learned judge was expressly prohibited by O.2 r. 2(1) from granting the appellants" application to set the judgment aside for irregularity due firstly, to the inordinately unreasonable period (17 years) which had elapsed since it was entered; and secondly, due to the appellants having taken several *'fresh steps'* in the proceedings after becoming aware of the irregularity. Both these matters provided more than sufficient justification for the learned judge's refusal to set the judgment aside on the ground of irregularity. There is no merit in Mr. Smith's argument which fails.

Grounds 2 and 3 - Erroneous exercise of judicial discretion; failure to consider whether the Appellants have a meritorious defence as a primary consideration or at all; irreparable mischief

63 Ground 2: The thrust of the complaint is that the learned judge wrongly exercised her discretion under O. 19 r. 9 in failing to take into account as a primary consideration, or to even consider, the question of whether the appellants had a meritorious defence.

64 Counsel for the appellants, Mr. Smith submitted that in exercising her discretion the learned judge failed (as required) to consider or make any findings as to the merits of the appellants' intended defence, but had instead relied solely on her finding that the appellants' delay was *"itself prima facie evidence of prejudice".*

65 In support of his submissions, Mr. Smith relied on the following authorities: Evans v. Bartlam [1937] A.C. 473; Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. Inc (The "Saudi Eagle") [1986] 2 Lloyds Law Reports 221; Vann v. Awford [1986] WL 407661; JH Rayner (Mincing Lane) Limited and others v. Federative Republic of Brazil [1999] EWCA Civ 2015.

66 Citing dicta from the English Court of Appeal's decision in "The Saudi Eagle" *(above)* Mr. Smith drew our attention to various paragraphs of the Ruling which, in his view, showed that although the judge was clearly aware that in the light of the relevant authorities, the primary consideration was whether the appellants had a

meritorious defence, she nonetheless fell into error in the exercise of her discretion.

.....

79 We start our review of the judge's decision with the observation that inasmuch as the judgment had been entered in default of defence pursuant to O. 19, the relevant rule which gave the learned judge the discretion to set it aside is O. 19 r. 9 which provides:

> **Setting aside judgment**
>
> **9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order." [Emphasis added]**

80 An identically worded provision is found at O.13 r. 8 R.S.C. 1978 *(setting aside a judgment in default of appearance to writ)* and corresponds in all respects to the former English O. 13 r. 9 *(setting aside a judgment in default of notice of intention to defend).* [See the former English O. 13 r. 9 along with its associated Practice Notes at pages 156- 161 of Volume 1 of the 1999 Edition of the English Supreme Court Practice.]

81 The relevant Practice Note to the corresponding English O.19 r. 9 *(setting aside a judgment in default of defence)* found at page 368 Volume 1 of the 1999 Edition of the English Supreme Court Practice, states that the practice and cases on setting aside a judgment entered in default of notice of intention to defend under O. 13 r. 9 are equally applicable to an application to set aside a judgment in default of defence under O. 19 r. 9.

82 As we see it, the starting point for any discussion on the law and practice relating to the discretionary power of a judge to set aside a default judgment whether entered under O. 13 or O. 19 usually begins with the oft-cited 1937 decision of the House of Lords in Evans v. Bartlam *(above).* Although the judgment in Evans v. Bartlam was one which was regularly entered in default of appearance, the authority applies with equal force to the exercise of the judicial discretion to set aside a regular judgment entered in default of defence conferred under O. 19.

83 In their individual speeches, their Lordships explained that the discretionary power conferred under the rules to set aside a default judgment is unconditional, but that the courts have, however, laid down for themselves rules to guide them in the normal exercise of their discretion.

84 Lord Atkin acknowledged the existence of one rule (referred to in some of the older authorities as an (almost) inflexible rule) which requires an applicant to produce an affidavit of merits, meaning that evidence must be produced to satisfy the court that the applicant has a *prima facie* defence. [See also Farden v. Richter (1889) 23 Q.B.D. 124; Hopton v. Robertson [1884] 23 Q.B.D. 126 Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183 (mentioned at Practice Note 13/9/7 of Volume 1 of the 1999 Annual Practice) in which the necessity for the application to be supported by an affidavit showing a defence on the merits is discussed.]

85 Lord Atkin however doubted the existence of a second rule requiring the applicant to satisfy the court that there is a reasonable explanation why judgment was allowed to go by default. Although accepting that a defendant's explanation as to why he allowed a judgment to go by default and why there may have been delay in applying to set it aside, were matters to which a court may have regard in the exercise of its discretion, Lord Atkin (at page 480) justified his position that there was only one requirement in the following terms:

"If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of their efficacy. 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. [Emphasis added]

86 Lord Atkin even went as far as to suggest that even the rule requiring an affidavit of merits could in rare and appropriate cases be departed from. At page 480 he expressed the following view, with which Lord Thankerton concurred:

"But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist." [Emphasis added]

87 In similar vein, Lord Russell of Killowen (at pages 481-482) explained:

"It was argued by counsel for the respondent that before the Court or a judge could exercise the power conferred by this rule, the applicant was bound to prove *(a)* that he had some serious defence to the action and *(b)* that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence or (what amounts to the same thing) to the exercise of the judicial discretion.

For myself I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in the face of the wording of the rule. It would be adding a limitation which the rule dos not impose.

The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion both *(a)* whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and *(b)* how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance."[Emphasis added]

88 Lord Wright explained the distinction in substance between the setting aside of an irregular judgment *ex debito justitiae*, and the exercise of the court's discretion on an application to set aside a regular judgment. He further identified the 'primary' question which must be considered whenever a court is exercising its discretion whether to set aside a regular judgment. At page 489, he observed:

"A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained. In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must

> **show grounds why the discretion to set it aside should be exercised in his favour. The *primary consideration* is whether he has merits to which the court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication...." [Emphasis added]**

89 In The Saudi Eagle *(above)*, the English Court of Appeal in a judgment delivered by Sir Roger Ormrod, in 1986, clarified what they understood the expression *"primary consideration"* referred to in Evan v. Bartlam to mean.

90 At page 223 the Court of Appeal interpreted all of the judgments of the House of Lords in Evan v. Bartlam as clearly contemplating that a defendant who is asking the court to exercise its discretion to set aside a default judgment in his favour *"should show that he has a defence which has a real prospect of success".* Their Lordships outlined the nature of the task which is to be undertaken by the court which is exercising the discretion in the following terms:

> **"In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction."[Emphasis added]**

91 In the light of the foregoing principles we have reviewed the learned judge's Ruling, and in particular, the reasons which she gave for dismissing the 2013 summons.

92 As we indicated earlier, the respondent's action against the appellants in the court below was essentially for an order for possession pursuant to clause 8 of the purchase agreement whereby the appellants (as purchasers-in-possession) had agreed, *inter alia*, to vacate the premises at Lot 12, Block 16 Cutwater Lane in the event that they failed to complete the purchase in accordance with the agreement or, alternatively, were in breach of any of the purchasers' obligations set out therein.

93 Counsel for the appellants says that the learned judge's discretion was improperly exercised because she failed either as a primary consideration or at all, to consider whether the appellants had a meritorious defence. With respect, we do not agree."

65. The findings of the Court of Appeal provide that the setting aside of a default judgment obtained irregularly is not absolute. It is incumbent upon no fresh steps being taken by the defendant and there being no meritorious defence.

Is the Default Judgment irregular?

66. The Plaintiff has conceded that the Original Writ was not served on the Defendant prior to the Default Judgment and Writ of Possession being obtained. The wrong 'Barbara' was served with the Original Writ as evidenced by the Defendant. Therefore, the Default Judgment is irregular.

Was any fresh step taken by the Defendant prior to filing the Set Aside Application?

67. After being served with the Amended Writ, the Defendant entered an appearance in the action and proceeded to file her Defence and Counterclaim on the 29th July 2019. Her

claim that she did not become aware of the Default Judgment and Writ of Possession until the 27th August 2019 has not been disputed.

68. Therefore, it cannot be said that prior to her filing the Setting Aside Application she took fresh steps in the proceedings by filing an appearance and the Defence and Counterclaim.

Is there any merit in the Defence and Counterclaim?

69. The Demised Premises and the lease arrangements concerning the same was the subject of the ruling handed down in **Naomi Farrington** by Winder J. Therefore, the same issues which have been adjudicated by Winder J are those that the Defendant wishes this court to consider. Ms. Farrington is the business partner referred to by the Plaintiff in her evidence before this court, although she claims that she was unaware of the outcome of the court proceedings initiated by Farrington.

70. In **Naomi Farrington**, Winder J granted summary judgment to the Defendant on its counterclaim after Ms. Farrington commenced an action seeking, *inter alia*, a proprietary interest and possession of the Demised Premises. Winder J considered the terms of the Final Lease, the Defendant's evidence that the Plaintiff was always a tenant pursuant to that and previous lease agreements in addition to the Plaintiff's admission that she did in fact execute the lease agreements.

71. Winder J made the following findings:

> **"12. The essence of the defence is proprietary estoppel in that there has been acquiescence in that there has been approval given (by someone whose name is presently unknown) to carry on the works of improving the shed.....**
>
> **15. I am satisfied that this is not a case of proprietary estoppel. On the Plaintiff's own case there is no equity established as there is, in my view, no mental element in the Defendant, no common intention that the expenditure by her that would give her any right in the property.**
>
> **16. It is the Plaintiff's case she says that she got permission, albeit oral to engage in the improvements. She does not say that the promise of any right in the property was given or any expectation otherwise conveyed. Notwithstanding the absence of any promise to cede any right in the estate to the Plaintiff, the difficulty which I find here is that this act, of improvement with permission, is the very act which has been provided for, by the lease, at paragraph 9. By the terms of the same lease the Plaintiff promised nonetheless to surrender the premises at the expiry of the term. How can it be said that there is any acting to detriment or unconscionable behavior when there are the terms of the lease which had been agreed by the parties on successive occasions.**
>
> **17. I therefore grant judgment to the Defendant on its Counterclaim. I order that"**
>
> > **(1) The Plaintiff deliver up of possession of the demised premises within 120 days;**
> >
> > **(2) Damages be assessed by the Registrar of the Supreme Court; and**
> >
> > **(3) ....."**

72. In the same vein, this Defendant claims that by an oral agreement, permission was obtained to conduct renovations on the Demised Premises. Her evidence differs slightly however, as she claims that an oral agreement was made to vest an interest in the Demised Premises if she carried out such renovations. This claim however is discredited by the provisions of the lease agreements. Similarly there is no evidence before this

court of any acknowledgment or consent by the Plaintiff to convey any interest in the demised premises of the Defendant.

73. Consequently, I do not consider that the Defence and Counterclaim would stand against the Plaintiff's claim. Specifically, the Defence and Counterclaim holds no merit. Setting aside the Default Judgment and allowing the matter to proceed to trial would not be a satisfactory use of the court's resources and time when the same outcome would be achieved.

74. In light of the foregoing, the Defendant's Set Aside Application is dismissed with costs to be paid to the Plaintiff to be taxed if not agreed.

75. As the Default Judgment has not been set aside, I do not find it necessary to make a finding on the Plaintiff's Summary Judgment Application.

76. The Plaintiff is awarded its cost of the application to be taxed if not agreed.

Dated this 8th day of March 2022

Hon. G. Diane Stewart

ADDENDUM:
Court also order that the Deputy Provost Marshall should return all keys to the demised premises to the Plaintiff forthwith.