COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Side

2016/CLE/gen/FP/00081

BETWEEN

KAYDEE LIMITED

First Plaintiff

AND

DAVID EDWARD JENNETTE SR.

Second Plaintiff

AND

MERCANTILE LAND RESOURCES LIMITED

Third Plaintiff

AND

SEAPORT CONSTRUCTION COMPANY LIMITED

Fourth Plaintiff

AND

MERIDIAN RESEARCH CORPORATION LIMITED

Fifth Plaintiff

AND

DOMINION SWAN INDUSTRIES LIMITED

Sixth Plaintiff

AND

BANK OF THE BAHAMAS LIMITED

Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Harvey Tynes, QC. and Mrs. Tanisha Tynes-Cambridge for the Plaintiffs/Appellants

Mr. Dawson Malone along with Ms. Candice Maycock for the Defendant/Respondent

Mr. Kirk Antoni as a Member of the Defendant Board of Directors

HEARING DATE: September 4 and 29 , 2020

DECISION

Hanna-Adderley, J

Appeal of Registrar's Decision to Set Aside Judgment in Default of Defence

Introduction

1. The parties are before the Court on an appeal from a decision made by the Deputy Registrar Stephana Saunders on October 21, 2019 whereby she set aside the Judgment in Default of Defence filed on October 23, 2017.
2. The Appellants filed their Notice of Appeal on October 22, 2019 for an Order that the said Order of the Deputy Registrar be rescinded and that in place it be ordered that the application to set aside the Judgment in Default of Defence filed on October 23, 2017 be dismissed. In support of their appeal the Appellants rely on the Plaintiffs' Submissions on Appeal filed February 20, 2020 and September 1, 2020. The Respondent relies on it Submissions filed August 31, 2020 and Further Submissions on Reply September 21, 2020. The Court heard voluminous submissions from both sides over a period of two days.

Chronology of Events

3. A brief chronology of events in this matter are:
    a. On March 11, 2016 the Plaintiffs filed a generally indorsed Writ of Summons which was served on the Defendant Bank on March 14, 2016;
    b. The Defendant failed to enter an Appearance to the Writ pursuant to the Rules of the Supreme Court and on March 31, 2016 the Plaintiffs entered Judgment in Default of Appearance against the Defendant;

c. On June 1, 2016 Chancellors Chambers entered an Appearance on behalf of the Defendant and filed a Summons seeking an Order to set aside the Judgment in Default of Appearance;

d. Then Acting Deputy Registrar Coccia on May 5, 2017 ordered that the Judgment in Default of Appearance be set aside. Subsequent to that Order the Plaintiffs appealed to a Judge in Chambers on May 9, 2017 against the decision of the then Acting Deputy Registrar Coccia and on September 22, 2017 Acting Justice Andrew Forbes set aside the decision of the then Acting Deputy Registrar and ordered the Plaintiffs to file and serve their Statement of Claim within 14 days of the Ruling and the Defendant to file and serve its Defence within 14 days of the receipt of the Statement of Claim.

e. The Plaintiffs filed and served their Statement of Claim on October 6, 2017. However, the Defendant did not file and serve its Defence and as a result the Plaintiffs entered a Judgment in Default of Defence on October 23, 2017. Following the entering of the said Judgment, the Plaintiffs filed a Certificate of Assessment of Damages and a final Judgment for Damages against the Defendant on March 7, 2019 following the Assessment of Damages before Deputy Registrar Saunders on March 6, 2019.

f. A Notice of Change of Attorney on behalf of the Defendant was filed on May 9, 2019 by Callenders & Co. In addition to the Notice, Counsel for the Defendant filed a Summons seeking an Order to set aside the Judgment in Default of Defence entered on October 23, 2017. On October 21, 2019 Deputy Registrar Saunders set aside the Judgment in Default of Defence entered on October 23, 2017 and granted the Defendant leave to file and serve a Defence on the Plaintiffs within 7 days of the date of her Order to which they complied.

Appellant's Notice of Appeal

4. The Appellants in their Notice of Appeal states that they intend to appeal the decision of the Deputy Registrar given on October 21, 2019 whereby she set aside the Judgment in Default of Defence filed on October 23, 2017 and granted leave to the Defendant to defend the action by filing a Defence within seven days of that Order; and that the said Order of the Deputy Registrar be rescinded and in place it be ordered that the application

to set aside the Judgment in Default of Defence filed October 23, 2017 be dismissed; costs of the appeal and the application before the Deputy Registrar.

Statement of Facts

5. The Plaintiffs in their Statement of Claim state inter alia:-

"1. The Defendant is a Company incorporated under the Companies Act, Cap 308. The Defendant is also a licensee pursuant to the Bank and Trust Companies Regulations Act, Cap 316, carrying on banking business at its main branch and Registered Office situate in Nassau, New Providence, The Bahamas and at its branch in Freeport, Grand Bahama, The Bahamas and elsewhere throughout The Bahamas.

2. The following persons were at all material times employees of the Defendant authorised to extend credit facilities on behalf of the Defendant to its customers, such as the First and Third through Sixth Plaintiffs: John H. Sands, Jr., Armamae Burrows, George Thompson and Terrence Carey.

3. The First Plaintiff is a Company duly incorporated under the laws of the Commonwealth of The Bahamas and carrying on business therein as a management, service and support entity. The First Plaintiff is and was at all material times a customer of the Defendant at its Freeport Branch.

4. The Second Plaintiff is an Octogenarian and Permanent Resident of The Commonwealth of The Bahamas. He is and was at all material times a customer of the Defendant at its Freeport Branch.

5. The Third Plaintiff is a Company duly incorporated under the laws of the Commonwealth of the Bahamas and duly licensed by The Grand Bahama Port Authority, Limited to carry on the businesses therein of residential and commercial real estate development, residential and commercial Lessor, property and project management, subdivision development and real estate holdings. The Third Plaintiff is and was at all material times a customer of the Defendant at its Freeport Branch.

6. The Fourth Plaintiff is a Company duly incorporated under the laws of the Commonwealth of the Bahamas and duly licenced by The Grand Bahama Port Authority, Limited to carry on the businesses therein of residential, commercial, industrial and infrastructural construction, general contracting, project management and real estate development and holdings. The Fourth Plaintiff is and was at all material times a customer of the Defendant at its Freeport Branch.

7. The Fifth Plaintiff is a Company duly incorporated under the laws of the Commonwealth of the Bahamas and duly licenced by The Grand Bahama Port Authority, Limited to carry on the businesses therein of investment and development of authorised real property and management of same, to act as agent for the purpose of providing title search services, company search services, Cause List search services and commercial real estate holding services. The Fifth Plaintiff is and was at all material times a customer of the Defendant at its Freeport Branch.

8. The Sixth Plaintiff is a Company duly incorporated under the laws of the Commonwealth of the Bahamas and duly licenced by The Grand Bahama Port Authority, Limited to carry on the businesses therein of commercial real estate development, commercial project management and commercial property management, commercial financing arrangements and commercial leasing operations.

9. The First and Third through Sixth Plaintiffs and each of them are part of a group of related companies commonly known and referred to as the MRC Limited Group whose business activities are centered in The Bahamas generally and in Freeport, Grand Bahama in particular. On or about September 2009, the said Plaintiffs attempted to obtain financial support from non banking sources to fund their various activities and in the course of so doing, entered into financial arrangements that had become onerous to them. In order to ameliorate the said Plaintiffs financial circumstances and to repurchase assets which had been sold on terms enabling the repurchase, the said Plaintiffs approached the Defendant for funding through the Fourth Plaintiff herein.

10. David Edward Jennette, III in his capacities as Trustee and General Counsel to the Fourth Plaintiff, was instructed to arrange and secure certain credit facilities with the Defendant, which at all material times acted through its employee, agent and Senior Branch Manager for the Northern Bahamas, Mr. John H. Sands, Jr. At all material times Mr. John H. Sands, Jr. represented to the Fourth Plaintiff that he was vested with the requisite authority from the Defendant to extend the necessary credit facilities to the Fourth Plaintiff and its related companies including the Third, Fifth and Sixth Plaintiffs and that it was within his capacity as Senior Branch Manager for the Northern Bahamas to commit on behalf of the Defendant to approve, grant and extend the necessary credit facilities to Fourth Plaintiff and its said related companies.

11. On or about the 6th day of October, A.D. 2010, Mr. John Sands, Jr. informed the said

David Edward Jennette, III that the Defendant was ready, willing and able to extend the necessary credit facilities to Fourth Plaintiff and its said related companies contingent upon the Fourth Plaintiff immediately depositing the sum of Sixty Thousand Dollars (B$60,000.00) in the currency of the Commonwealth of The Bahamas with the Defendant. On the continued representations, assurances and undertakings of Mr. John Sands, Jr. acting on behalf of the Defendant, the Fourth Plaintiff arranged and secured payment of the said Sixty Thousand Dollars (B$60,000.00) by way of cheque drawn on First Plaintiffs bank account. It was expressly agreed between Mr. John Sands, Jr. and David Edward Jennette III. on behalf of the Fourth Plaintiff that the said funds were tendered to the Defendant in consideration of the Defendant extending the necessary credit facilities to the Fourth Plaintiff and its said related companies collectively or by any combination thereof. By reason of the Fourth Plaintiffs said deposit of $60,000.00 with the Defendant, a parole contract arose as between the said Plaintiffs and the Defendant.

12. The Defendant breached the said parole contract, more particularly referred to in paragraph 11 hereof, by failing to lend any sums to the said Plaintiffs, more particularly referred to in paragraphs 9 through 11 hereof; by reason of which the said Plaintiffs have suffered loss and damage.

13. Alternatively, the Defendant holds the said sum of $60,000.00 on a resulting trust for the Fourth Plaintiff herein.

14. On or about the 14th day of February, A.D., 2011, the Defendant issued a letter of commitment to the Third and Fourth Plaintiffs herein, whereby it committed to lend the Fourth Plaintiff the sum of $2,600,000.00 subject to certain conditions precedent, which 'conditions were complied with by the Third and Fourth Plaintiffs. By reason of the compliance by the Third and Fourth Plaintiffs of the said conditions precedent, a contract arose as between the Third and Fourth Plaintiffs and the Defendant, by which contract, the Defendant was obliged to lend the Fourth Plaintiff the said sum of $2,600,000.00.

15. In breach of the contract, more particularly described in paragraph 14 hereof, the Defendant failed to lend any money to the Fourth Plaintiff, by reason of such breach of contract, the Fourth Plaintiff suffered loss and damage.

16. Alternatively, the Defendant holds the sums of monies paid in satisfaction of the conditions precedent more particularly described in paragraph 14 hereof, on a resulting trust for the Fourth Plaintiff.

17. On or about the 23rd day of August, A.D., 2011, the Defendant caused to be executed a commitment letter addressed to the Fourth Plaintiff, whereby it offered to lend the Fourth Plaintiff the sum of $3,399,000.00 upon certain conditions precedent, which the Fourth Plaintiff complied with. By reason of the compliance by the Fourth Plaintiff of the said conditions precedent a contract arose between the Fourth Plaintiff and the Defendant, whereby the Defendant was obliged to lend the Fourth Plaintiff the sum of $3,399,000.00.

18. In breach of the said contract, more particularly described in paragraph 17 hereof, the Defendant failed to lend the Fourth Plaintiff any money at all, whereby the Fourth Plaintiff has suffered loss and damage.

19. By reason of the said breaches of contract hereinbefore more particularly referred to in paragraphs 12, 14 and 18 hereof, the Fourth Plaintiff suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

I. First Plaintiff

(a) Reimbursement of $60,000.00 paid to the Defendant on 6th October 2010 for which the First Plaintiff received no consideration and in respect of which the Defendant breached the parole contract, together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $79,835.16

(b) Reimbursement of $27,875.00 being legal fees, transactional fees, bank charges, cost of capital and expenses in connection with the breached parole contract, together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $31,005.43

Sub-total Claim: $110,840.59

II. Second Plaintiff

(a) Declaration by the Supreme Court and the Defendant that the mortgage contract dated 22nd March 2010 is void and with no legal effect. Re-vesting of unencumbered fee simple title absolute of Lot 44, Lucayan Beach Subdivision, Freeport, Grand Bahama in the Third Plaintiff at the sole cost and expense of the Defendant. Written confirmation from the Defendant under its Common Seal that neither the Second Plaintiff nor the Third Plaintiff is indebted to the Defendant in respect of any credit facilities.

(b) Reimbursement of $45,300.00 being legal fees, transactional fees, bank charges, cost of capital and expenses incurred as a result of the Defendant's acts or omissions together

with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $50,394.53

Third Plaintiff

(a) Reimbursement of $385,000.00 paid to the Defendant on 15th February 2011 for which the Third Plaintiff received no consideration and in respect of which the Defendant breached the contract, together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $512,276.32

(b) Reimbursement of $52,775.00 being legal fees transactional fees, bank charges, cost of capital and expenses incurred as a result of the Defendant's contractual breaches and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $58,710.18

(c) Reimbursement of $120,000.00 in respect of the distressed sale of Lot 21, Lucayan Beach Subdivision, Freeport, Grand Bahama and reimbursement of $31,000.00 in respect of the distressed sale of shares in ICD Utilities Ltd. which would not have occurred were it not for the Defendant's fundamental and material breach of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $167,987.76

(d) Reimbursement of additional legal fees, title search fees and related costs and expenses in the amount of $40,000.00 together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $44,498.48

(e) Reimbursement of $200,000.00 in respect of the distressed sale of Lot 52, Lucayan Beach Subdivision, Freeport, Grand Bahama and reimbursement of $120,000.00 in lost revenue and lost income which would not have occurred were it not for the Defendant's fundamental and material breach of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $355,987.83

(f) Reimbursement of $158,000.00 in respect of the distressed sale of Lot 54, Lucayan Beach Subdivision, Freeport, Grand Bahama and reimbursement of $60,000.00 in lost revenue and lost income which would not have occurred were it not for the Defendant's fundamental and material breach of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $242,516.71

(g) Sub-Total this Claim: $1,381,977.20

IV. Fourth Plaintiff

(a) Restoration of the Fourth Plaintiff to the position it would have been in had it not been for the Defendant's fundamental and material breach of the contract dated 14th February 2011 and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $2,058,005.37

(b) Reimbursement of $196,755.00 being legal fees, accountancy fees, transactional fees, bank charges, cost of capital and expenses incurred as a result of the Defendant's contractual breaches and other acts or omissions together with interest compounded monthly at the rate of 6. 75% from 29th February 2016 through 30th September 2017. $218,882.45

(c) Reimbursement of $3,222,798.38 to restore the Fourth Plaintiff to the position it would have been in were it not for the Defendant's fundamental, material breach of the contract dated 23rd August 2011 and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $3,585,240.59

(d) Reimbursement of $300,000.00 in respect of the distressed sale of Lots 32 & 33, Lucayan Beach Subdivision, Freeport, Grand Bahama together with reimbursement of $96,000.00 being for loss of lease revenue and other income which would not have occurred were it not for the Defendant's continuing breaches of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $440,534.00

(e) Reimbursement of the Option consideration of $1,800,000.00 together with $144,000.00 being reimbursement of monthly lease fees payable in respect of Lots 32 & 33, Lucayan Beach Subdivision, Freeport, Grand Bahama for a period of Three (3) years pursuant to contract. $1,944,000.00

(f) Reimbursement of $200,000.00 in respect the distressed sale of Lot 30A, Lucayan Beach Subdivision, Freeport, Grand Bahama together with $45,000.00 being reimbursement of fees, costs, expenses and loss/of revenue which would not have occurred were it not for the Defendant's continuing breaches of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $272,553.18

(g) Reimbursement of $435,726.00 being costs, fees and expenses incurred during the Receivership of the Fourth Plaintiff which would not have occurred were it not for the Defendant's continuing breaches of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $484,728.60

(h) Reimbursement of $420,000.00 in respect of the distressed sale of Lot 41, Lucayan Beach Subdivision, Freeport, Grand Bahama together with $120,000.00 being reimbursement for loss of revenue and loss of income which would not have occurred were it not for the Defendant's continuing breaches of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $600,729.46

(i) Reimbursement of $300,000.00 in respect of the distressed sale of Lot 30, Lucayan Beach Subdivision, Freeport, Grand Bahama together with $33,000.00 being reimbursement of fees, costs, and related expenses which would not have occurred were it not for the Defendant's continuing breaches of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $370,449.83.

(j) Reimbursement of $188,567.00 in respect of the distressed sale of corporate vehicles, heavy equipment, heavy trucks, light duty trucks, service trucks and related assets which would not have occurred were it not for the Defendant's continuing breaches of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $209,773.61

(k) Reimbursement of $277,000.00 being legal fees, accountancy fees, title search fees, appraisal expenses and related professional costs together with $23,000.00 in current fees incurred by the Fourth Plaintiff to date which would not have occurred were it not for the Defendant's continuing breaches of contract and other acts or omissions together with interest compounded monthly on $277,000.00 only at the rate of 6.75% from 29th February 2016 through 30th September 2017.

$308,151.36 + $23,000.00 $331,151.36

(l) Sub-total this Claim: $10,666,048.00

V. Fifth & Sixth Plaintiffs

(a) Reimbursement of $48,097.65 being difference between un-escalated monthly lease fees and escalated lease fees for the period 1st July 2012 through 1st February 2016 payable under assigned Indenture of Sub-Lease 1; reimbursement of $72,000.00 being un-escalated lease fee arrears for the period 15th September 2015 through 23rd February 2016 payable under assigned Indenture of Sub-Lease I; reimbursement of $8,010.98 being lease fee arrears for the same period under assigned Indenture of Sub-Lease 2 directly caused by the Defendant's breach of fiduciary duty to the Sixth Plaintiff such that the Defendant, despite having direct Notice of the Lessee's breaches, failed to enforce the terms, conditions and covenants of the assigned Indentures of Sub-Lease pursuant to the Deed of Assignment dated 22nd July 2012 and continuing breaches of contract and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $142,515.98

(b) Reimbursement of $318,794.00 in respect of lost revenue, diminution in value and fees/costs/expenses incurred by the Sixth Plaintiff to enforce the breached covenants in the assigned Indentures of Sub-Lease and to litigate the matter which would not have occurred had the Defendant, despite having direct notice of the said breaches, not breached its fiduciary duty, breached its contracts and other acts or omissions together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $354,646.20

(c) Reimbursement of $670,000.00 being monies paid by the Fifth Plaintiff to satisfy a Third Party Bridging Loan secured by a First Legal Demand Mortgage over Lots 5 1B & 53, Lucayan Beach Subdivision, Freeport, Grand Bahama together with $31,260.00 being legal fees, accountancy fees, title search fees and related statutory costs and expenses to re-vest title in the Fifth Plaintiff none of which would have occurred had the Defendant not breached its contract with the Fifth and Sixth Plaintiffs together with interest compounded monthly at the rate of 6.75% from 29th February 2016 through 30th September 2017. $779,045.44

(d) Sub-total this Claim: $1,276,207.50

Fees, costs and expenses incurred in performing its obligations and undertakings pursuant to a parole contract between the Fifth Plaintiff and the Defendant dating from November/December 2014. $48,392.10

Legal fees, accountancy fees, title search fees, appraisal fees, diminution in value, expectation losses, economic losses and financial losses. $552,061.68

GRAND TOTAL OF PLAINTIFFS' CLAIMS $14,085,920.00

20. On or about the 18th day of June, AD., 2012, the Defendant issued a commitment letter to the Fifth Plaintiff pursuant to which the Fifth Plaintiff executed an Assignment of Sub-Lease and an Assignment of Lease dated 22nd day of June, AD., 2012, from the Sixth Plaintiff as Assignor to the Defendant as Assignee with the Lessee under both Indentures, The Grand Bahama Port Authority, Limited, a Party as well. By virtue of the Deed of Assignment the Defendant stood in the place of the Sixth Plaintiff as the Defendant assumed the legal rights, title and interest in the Indenture of Sub-Lease and Indenture of Lease. The Deed of Assignment created a fiduciary duty as between the Defendant and the Sixth Plaintiff.

21. The said assigned Indenture of Sub-Lease and said Indenture of Lease provided for three (3) year lease fee escalation clauses. Despite repeated demands by the Fifth and Sixth Plaintiffs, that the Defendant invokes and enforces the said escalation clauses, the Defendant failed or refused to do so, thereby increasing the amount of capital required for debt service to the benefit of the Defendant. The Defendant failed or refused to comply with its fiduciary obligation and thereby caused the Sixth Plaintiff to forego revenue which it would otherwise have had for the purpose of paying the Fifth Plaintiffs mortgage obligations.

22. The Defendant deliberately refused to perform its fiduciary duty to enforce the Covenants in the said assigned Indenture of Sub-Lease and said Indenture of Lease, thereby causing the Fifth and Sixth Plaintiffs loss and damage.

23. Copies of each of the documents referred to herein, have been provided to the Defendant and will be relied upon for their full terms and effect.

AND the First Plaintiff claims as against the Defendant for the following reliefs, namely:

1. The sum of $110,840.89;
2. Damages;
3. Interest on such sums as are found due and owing the First Plaintiff pursuant to the Civil Procedure (Award of interest) Act, 1992; and
4. Costs.

AND the Second Plaintiff claims as against the Defendant for the following reliefs, namely:

I. A Declaration that

2. The sum of$50,394.53;

3. Damages;

4. Interest on such sums as are found due and owing the Second Plaintiff pursuant to the Civil Procedure (Award of Interest) Act, 1992; and

5. Costs.

AND the Third Plaintiff claims as against the Defendant for the following reliefs, namely:

I. The sum of$1,381,977.20;

2. Damages;

3. Interest on such sums as are found due and owing the Third Plaintiff pursuant to the Civil Procedure (Award of Interest) Act, 1992; and

4. Costs.

AND the Fourth Plaintiff claims as against the Defendant for the following reliefs, namely:

I. Damages in lieu of specific performance of the contracts dated the 6**th** October, 2010, the 14th February, 2011 and 23rd August, 2011;

2. Equitable interest from the 6**th** October, 2010 to the date of payment of such sums as are found due and owing pursuant to paragraph 1 hereof;

3. Damages;

4. Interest on such sums as are found due and owing the Fourth Plaintiff pursuant to the Civil Procedure (Award of Interest) Act, 1992; and

5. Costs.

AND the Fifth and Sixth Plaintiffs claim as against the Defendant for the following reliefs, namely:

1. Damages for breach of fiduciary duty;

2. Equitable interest in respect of such sums as are found to the said Plaintiffs for the Defendant's breach of fiduciary duty for such period as the Honourable Supreme Court deems just;

3. Damages;

4. Interest on such sums as are found due and owing the Fifth and Sixth Plaintiffs pursuant to the Civil Procedure (Award of interest) Act, 1992; and

5. Costs."

6. The Affidavit of Indira Deal filed June 28, 2019 states in part that she is Legal Counsel of the Defendant, Bank of The Bahamas and duly authorized to make the application. At the below paragraphs she outlines the Bank's reasons for delay and the Bank's probable defence in the action.

"15. On 5th October, 2017, the Plaintiffs filed and served the Statement of Claim (the "SOC") on Chancellors. The SOC included a number of allegations and over 30 separate alleged losses, totaling approximately $14mm. These losses were allegedly caused by five different breaches by the Bank and included claims for unliquidated damages, a declaration, interest and costs. All of the alleged breaches occurred between 2010 and 2012 and none of the individuals who were said to be responsible for the Bank committing such breaches continue to be in the employment of the Bank.

16. Given the number of different claims and the fact that the individuals with direct knowledge of the events were no longer employed by the Bank, it was not feasible for the Bank to file its Defence within 14 days. Accordingly after speaking with Counsel for the Plaintiffs, on 19th October 2017, Chancellors wrote to the Plaintiffs' attorneys, Tynes & Tynes, to request an extension until 8th November 2017 for the Bank to file its Defence.

17. Tynes & Tynes did not respond to the request for an extension of time and by letter dated 19th October 2019 (sic 2017) wrote that "Since there is an outstanding Judgment in Default of Appearance, please state three (3) dates when you will be available for an Assessment of Damages hearing." This is odd given that there was no judgment in place when this letter was received.

18. …

19. Without any further notice to the Bank, the Plaintiffs entered Judgment in Default of Defence on 23rd October 2017 (the "Default Judgment"). I have reviewed a report of a search of the Court file as well as the documents which were retrieved from the said file and I do not see an Affidavit of Service for the Default Judgment.

20. The Bank was not given notice that the Plaintiffs had entered the Default Judgment against it. It recently came to the Bank's attention that Providence Law Chambers was served with a copy of the Judgment in Default of Defence in or around 18th July, 2018. This will be discussed later.

21. On 21st November 2017. Mrs. Antonia Rolle, who was the Litigation Manager for the Bank, left the employment of the Bank and I was appointed as General Legal Counsel,

Being new to the role, I had no knowledge of the Plaintiffs' claim or of the course of proceedings.

22. I recall that sometime in early January 2018 Chancellors had a split and one partner left and joined the Chambers of Mr. Damian Gomez QC, who is connected to the Plaintiffs in these proceedings, as a beneficial owner of 50% in the Fourth Plaintiff, Seaport Construction Limited ("Seaport") and may have an interest in the other Plaintiff companies, and the other members of Chancellors formed a new chambers called Providence Law ("Providence").

23. Providence and the Bank appear to have mistakenly believed that the transfer of the Plaintiffs' portfolios to Resolve meant that the Bank was no longer dealing with the Plaintiffs' claims against the Bank and that Providence were therefore instructed to ceases take any action in relation to the Plaintiffs' claims. On 2nd February 2018, Providence informed the Bank that they would cease carrying out any instructions in relation to the Plaintiffs and sent a final invoice to the Bank.

24. Providence did not, however, advise the Bank that the Default Judgment had been entered or that there was likely to be a hearing for the Assessment of Damages. Further, Providence did not advise the Bank that Chancellors remained on the record, having entered an appearance on behalf of the Bank or that documents might continue to be served on Chancellors unless and until a Notice of Change of Attorney was filed, pursuant to Order 63 of the Rules of the Supreme Court (the "Rules").

25. The hearing for the Assessment of Damages (the "Assessment of Damages Hearing") was listed for 8th and 9th March 2018. Pursuant to Order 3 r.2(2), where an act must be done before a specified date, the period ends immediately before that date. Pursuant to order 3 r.2(5) a period of 7 days or less does not include a Saturday or Sunday. Pursuant to Order 37 r.1(1), the Notice of the Assessment of Damages ought to have been served on 27th February 2018. In Fact, the Notice of Assessment of Damages was served on Providence on 1st March 2018, even though Providence was not on the record as the Bank's attorneys, It was in any event, therefore served out of time.

26. I do not know to which employee or member of Providence the Notice was delivered or whether it was in fact received by Providence. In any event, Providence did not inform the Bank of the Notice of Assessment of Damages and so the Bank was completely

unaware that a hearing had been listed. I, as the General Legal Counsel, would have been the person who ought to have been notified, and I was not.

27. On 8th and 9th March 2018, there was a hearing for the Assessment of Damages before the Deputy Registrar. It appears from the transcript of the hearing that the Plaintiffs were aware that there was some confusion at the Bank, relating to the transfer of the Plaintiffs' portfolios to Resolve, and that it was likely that the Bank would be unrepresented at the hearing. Despite this, the Plaintiffs did not contact the Bank at any point to ascertain whether the Bank was aware of the hearing and whether they intended to challenge the Plaintiffs' claims.

28. At the time of the hearing, the Plaintiffs had not filed any witness evidence in support of their claims. It appears from the transcript that the hearing consisted of Mr. David E. Jennette Jr. (the Second Plaintiff's son) being asked by counsel for the Plaintiffs to confirm that he believed that the losses claimed were caused by the Bank's actions. During the course of the hearing, the Plaintiffs withdrew a significant number of the claims against the Bank. Rather than claiming for approximately $14 million, as in the Statement of Claim, the Plaintiffs abandoned the claim for a declaration, abandoned a significant number of other claims for damages, and proceeded with claims in the region of $3.7 million. At no point prior to the hearing did the Plaintiffs expressly abandon the additional claims.

29. There appears to have been a further hearing before the Deputy Registrar on 22nd June 2018 which the Bank did not have notice of. At this hearing, counsel for the Plaintiffs again acknowledged that the Bank appeared to be unaware or under a misapprehension about the proceedings. In addition, the affidavit filed post the commencement of the Assessment were not served on the Bank.

30. On 22nd August 2018, Providence Law wrote a legal confirmation letter to KPMG, the auditors for the Bank, in which it was stated that Judgment in Default of Defence had been entered in favour of the Plaintiffs. The letter stated that the file is now under the portfolio of Bahamas Resolve Limited. The letter was copied to the Financial Controller of the Bank, Mrs. Jihanne Hosmillo-Williams. Mrs. Hosmillo-Williams has not been involved in the litigation at any stage and appears not to have realized that the Bank needed to take any action – perhaps as a result of the statement that it had been transferred to Resolve – and did not inform anyone in the Legal Department of the development.

Accordingly, neither I nor anyone else responsible for this litigation was made aware at this stage that the Default Judgment had been entered against the Bank.

31. On 8th March 2019, Deputy Registrar Saunders assessed the damages at $6,049,194.63. While the Deputy Registrar rejected some of the claims pursued by the Plaintiffs, she also awarded the Plaintiffs sums that were not pursued at the Assessment of Damages Hearing.

32. Employees in the Bank's Legal Department first became aware of the Default Judgment and the Assessment of Damages on 29th April 2019.

33. Having become aware of the proceedings, the Bank acted swiftly and appointed Callenders & Co. ("Callenders") and a Notice of Change of Attorney was filed on 9th May 2019. On the same date, Callenders filed a Summons for a stay of the judgment and filed a Summons to set aside the Default Judgment, pursuant to Order 19 r.9, and the Assessment of Damages, pursuant to Order 37 r.1(3) and Order 35 r.2. All of these documents were served on Tynes and Tynes on 9th May 2019.

34. On 23rd May 2019, the Plaintiffs filed a Writ of Fieri Facias in the sum of $6,635,679.30 (albeit the Judgment was for $6,049,194.63) and the Bank no clue how that figure has been derived at. This was not served on Callenders, the Bank's new attorneys. The Writ of Fieri Facias is also the subject of a strike out application.

35. On 27th May 2019, Callenders wrote to the Plaintiffs requesting, inter alia, that they agree to a stay of enforcement of the Default Judgment pending determination of the applications. There is a temporary agreement without prejudice to the parties' rights and reserving all parties' rights not to enforce the Default Judgment. This agreement expires on 1st July 2019.

….

46. The Plaintiffs essentially allege that all of the alleged losses were caused by breaches of five different agreements entered into by the Bank and one or more of the Plaintiffs:

a. Breach of an agreement entered into in March 2010 (the "March 2010 Facility") to provide a credit facility of $250,000 to the Second Plaintiff, Mr. Jennette Sr.;

b. Breach of an agreement entered into in October 2010 (the "October 2010 Facility") to provide a credit facility of $1,500,000 to Seaport;

c. Breach of an agreement entered into in February 2011 (the "February 2011 Facility") to provide a credit facility of $2,600,000 to Seaport;

d. Breach of an agreement entered into in August 2011 (the "August 2011 Facility") to provide a credit facility of $3,339,000 to Seaport; and

e. Breach of a fiduciary duty to ensure compliance with leases assigned to the Bank as collateral for a credit facility provided to Mercantile Land Resources Limited ("MLR") in June 2012.

…

48. The first three alleged breaches relate to credit facilities proposed by Mr. John Sands Jr., the (former) Manager of the Freeport Branch of the Bank. By way of background, Mr. Sands was dismissed from the Bank in May 2011 for gross misconduct and he was previously suspended for his role in extending unathorised credit facilities to Seaport and individuals related to Seaport. In addition, a report was made to the Commercial Crimes Unit of the Royal Bahamas Police Forces in September 2011 in relation to potentially fraudulent transactions entered into by Mr. Sands and individuals connected to Seaport and the Fifth Plaintiff, Meridian Research Corporation Limited ("Meridian Research Corp"). A number of transactions reported to the police concerned properties in relation to which the Plaintiffs allege in the Statement of Claim that they have suffered losses (Lot 30A, Lot 51B and Lot 53).

49. Upon review of the Bank's files at the material time, Mr. Sands had delegated authority to extend credit facilities up to the following limits:

a. $75,000 for Consumer, Commercial and Industrial Loans;

b. $250,000 for Residential Mortgage Loans; and

c. $10,000 for Unsecured Loans.

50. Mr. Sands did not have authority to extend any loan over $250,000 and did not have authority to extend a residential mortgage loan without the loan being secured by way of a mortgage over the relevant residential property.

51. The limit of Mr. Sands' delegated lending authority was known by the Plaintiffs. In an Affidavit sworn by Mr. Jennette Jr. in support of claim 2011/CLE/gen/1480 (the "2011 Jennette Affidavit"), Mr. Jennette stated that "Mr. Sands' discretionary branch lending limit was B$250,000.00" (para 4). In the Jennette Affidavit, Mr. Jennette again states that Mr. Sands told him and Mr. Jennette Sr. that "he could advance credit in the amount of Two Hundred Fifty Thousand Dollars (B$250,000.00) in the said currency as the upper limit of his delegated authority."

52. Mr. Sands was therefore not authorized, and the Plaintiffs knew that he was not authorized:

a. To extend the March 2010 Facility of $250,000 to Mr. Jennette Sr. without that credit facility being properly secured by way of mortgage against residential property owned by Mr. Jennette Sr.;

b. To orally agree to extend the October 2010 Facility of $1,500,000 to Seaport; or

c. To agree to extend the February 2011 Facility of $2,600,000 to Seaport.

53. The Plaintiffs allege that these facilities are binding upon the Bank because "At all material times Mr. John H. Sands Jr. represented to the Fourth Plaintiff that he was vested with the requisite authority from the Defendant to extend the necessary credit facilities to the Fourth Plaintiff and its related companies" (para. 10 of the SOC).

54. It is, however, clear from the authorities that for an agent to have apparent authority, a representation must be made by the principal and not by the agent himself. This proposition is clearly stated in Armagas Limited v Mundogas [1986] A.C. 717. At 783A Lord Keith explained at 783A that there are circumstances in which a principal is bound by the authorized acts of an agent but that:

> "Such circumstances exist where the employed by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer's business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself."

55. The fact that Mr. Sands may have (which is not admitted) represented to Seaport that he had authority does not, therefore, mean that his authorized actions are binding upon the Bank. Furthermore, as set out above, it appears from the Jennette Affidavit and the 2011 Jennette Affidavit that the Plaintiffs knew that Mr. Sands was acting outside of his authority. It cannot therefore be maintained that the Plaintiffs believed that Mr. Sands had authority to extend the alleged credit facilities…

56. The March 2010 Facility was provided to Mr. Jennette Sr. on the basis that it would be secured by a mortgage over Lot 44 Lucayan Beach ("Lott44"). MLR had purported to convey Lot 44 to Mr. Jennette Sr. shortly before the credit facility was provided to Mr. Jennette Sr. In fact, Lot 44 had not been properly conveyed by MLR to Mr. Jennette Sr. and the Bank's mortgage over Lot 44 was not properly recorded.

57. The March 2010 Facility was not properly secured by a mortgage over Lot 44 because Mr. Sands, outside of his authority, and in the full knowledge of Mr. Jennette Sr. and Mr. Jennette Jr., extended the facility to Mr. Jennette Sr. without ensuring that the Bank had a mortgage over Lot 44. Even if it was Mr. Sands' suggestion, as alleged, it was down without the knowledge and agreement of Mr. Jennette Sr. and Mr. Jennette Jr., the conveyance of Lot 44 to Mr. Jennette Sr. was not properly completed and the mortgage of Lot 44 from Mr. Jennette Sr. to the Bank was not properly completed.

58. This was not the only occasion on which Mr. Sands extended a credit facility to an individual connected to the MRC Group, and for the ultimate benefit of the MRC Group, which purported to be secured by a property which has purportedly been conveyed to the individual by a company within the MRC Group. Mr. Jennette Jr. admitted in the 2011 Jennette Affidavit that similarly:

> a. The Fifth Plaintiff, Meridian Research Corp, purportedly conveyed Lots 51B and Lucayan Beach to Mr. Curtis Pinder and Mr. Pinder obtained a credit facility from the Bank, for the ultimate benefit of the MRC Group, purportedly secured against those properties;
>
> b. Seaport purportedly conveyed Lot 37A Lucayan Beach to Ms. Nichole Lightbourne and Ms. Lightbourne obtained a credit facility from the Bank, for the ultimate benefit of the MRC Group, purportedly secured against the property;
>
> c. Seaport purportedly conveyed Lot 21 Lucayan Beach to Ms. Anjanette Bartlett and Ms. Bartlett obtained a credit facility from the Bank, for the ultimate benefit of the MRC Group, purportedly secured against the property; and
>
> d. Lot 31A Lucayan Beach was purportedly conveyed to Ms. Melissa Russell and Ms. Russell obtained a credit facility from the Bank, for the ultimate benefit of the MRC Group, purportedly secured against the property.

…

60. Mr. Jennette Sr. knew that the credit facility was provided to him by the Bank on the basis that it was to be secured by a mortgage over Lot 44. Mr. Jennette Sr. also knew that the mortgage over Lot 44 had not been completed. Mr. Jennette Sr. was provided with the March 2010 Facility and had the benefit of the facility, even though Lot 44 had not been properly mortgaged to the Bank. Having discovered that the mortgage had not been completed, the Bank was entitled to ensure that the facility was in fact properly

secured by a mortgage over Lot 44, in accordance with the alleged agreement between Mr. Jennette Sr. and the Bank.

61. The Plaintiffs have not explained the basis on which they allege that MLR is entitled to be re-vested with the unencumbered fee simple or the basis on which they allege that MLR and Mr. Jennette Sr. are entitled to have their debts to the Bank written off. The Bank's position is that there is simply no basis for either of these claims.

62. The basis for Mr. Jennette Sr.'s claim for "legal fees, transaction fees, bank charges, cost of capital and expenses" is said, in the Affidavit of Mr. Jennette Jr., to be the "misrepresentations, inequality of bargaining power, undue influence, duress, denial of independent representation, unconscionability and breach of fiduciary duty."

63. As set out above, Mr. Sands was acting outside of his authority and the Bank is not liable for his actions. In any event, this was one of a number of occasions on which a mortgage loan was provided by Mr. Sands ultimately for the benefit of the MRC Group and that loan was not properly secured by way of mortgage. It is clear from this that Mr. Jennette Jr. and Mr. Jennette Sr. were fully aware that Mr. Sands was acting in breach of his duties to the Bank and assisted him in doing so, for the ultimate benefit of the MRC Group.

64. The Bank denies that any of these are credible grounds for claiming that Mr. Jennette Sr. is entitled to reimbursement of fees from the Bank in circumstances where he was fully aware and cooperated in obtaining the March 2010 Facility without providing the proper security.

65. It is also important to note that Mr. Jennette Sr., according to his sworn testimony, had already received a payment in relation to this transaction from the law firm, Cafferata & Co. It is incumbent upon Mr. Jennette Sr. to explain why he is now entitled to recover further damages from the Bank and to prove the level of his losses.

66. The Plaintiffs allege that the Bank was bound to provide credit of $1,500,000 to Seaport under the October 2010 Facility because of an oral agreement between Mr. Sands and Mr. Jennette Jr.

67. As set out above, Mr. Sands did not have authority to enter into such an agreement and it is therefore not binding on the Bank. I do not consider it feasible that Mr. Jennette Jr. thought that the Bank would be willing to extend a credit facility of $1,500,000 on the

basis of an oral agreement between him and a branch manager, which clearly exceeded the branch manager's discretionary lending authority.

68. The Plaintiffs allege that the Bank was bound to provide credit of $2,600,000 to Seaport under the February 2011 Facility because of a written agreement between the Bank and Seaport, which was in the form of a series of letters between Mr. Sands and Dupuch & Turnquest & Co.

69. As with the October 2011 Facility, Mr. Sands did not have authority to enter into such an agreement and it is therefore not binding on the Bank.

70. It is also noticeable that the letter including the alleged offer is dated 14th February 2011 and is in response to a letter from Dupuch & Turnquest & Co. dated 11th February 2011. The Plaintiffs are therefore alleging that they believed that the Bank would agree to accept reduced sums of settlement of two mortgage and approve a credit facility of $2,600,000 on request in just three days. I consider it unlikely that the Plaintiffs, who were familiar with the Bank's requirements and procedures for extending credit facilities, believed that such credit facility of $2,600,000 could have been approved internally in this space of time.

71. Even if Mr. Sands did have apparent authority to enter into the October 2010 Facility and the February 2011 Facility (which is denied), the communications from the Bank relied on by the Plaintiffs were not intended to be legally binding. There will only be a binding contract between the parties if an assessment of those communications "leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations" (Lord Clarke at [45] in RTS Flexible Systems LTD v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14).

72. The Plaintiffs have not provided any particulars of the terms of the alleged oral agreement in October 2010. This is telling in itself. Without agreeing all of the relevant terms, there was no intention to create legal relations and there was no contract binding on the Bank.

73. The letter of 14 February 2011 relied on by the Plaintiffs as giving rise to a written agreement does not include, inter alia, any terms as to:

a. The facilities to be consolidated;

b. The rate of interest to be applied;

c. The term of the facility;

d. The monthly repayments; or

e. The fee for the facility.

74. I do not believe that an objective assessment of the letters between Mr. Sands and the Plaintiffs would lead to the conclusion that the parties had agreed upon all the terms and accordingly, the February 2011 Facility was not binding upon the Bank, even if Mr. Sands was acting within his authority.

75. The fourth alleged breach relates to a credit facility proposed by Ms. Annamae Burrows and Mr George Thompson in a letter dated 23 August 2011. The letter stated, inter alia, that:

a. The credit facilities had been "conditionally approved";

b. "All documentation must be in form and substance satisfactory to the Lender and/or its legal counsel prior to the advance of any funds under the facilities noted above";

c. "This Agreement to Lend is contingent upon our prior verification of all information including but not limited to satisfactory credit references, provided by the Borrower during the application stage."

d. "The facilities outlined herein are granted at the sole discretion of Bank of the Bahamas Limited (the Bank), and notwithstanding any previous correspondence to the contrary, all banking facilities, whether drawn or undrawn are repayable on demand or subject to cancellation at the Bank's discretion";

e. "The Lender has the right to demand full repayment of the above facilities in the event of a material adverse change in the financial condition of the Borrower."

76. Although Ms. Burrows and Mr. Thompson did have authority to extend a credit facility to Seaport, the letter was clearly expressed to be conditional and was not intended to be legally binding. It therefore did not give rise to a binding agreement between the Bank and Seaport.

77. If it did give rise to a binding agreement between the Bank and Seaport, it is clear from the terms of the agreement that the Bank had a discretion not to extend the facility or to cancel the facility if it was not satisfied with the documentation provided to the Bank or if there was a change in the financial circumstances of the proposed borrower.

78. The Bank was not satisfied with the information provided by Seaport during the application stage and so determined not to enter into a legally binding commitment to extend credit to Seaport. In addition, shortly after the letter had been sent by the Bank, Seaport was placed in receivership. This constituted a material adverse change in the financial position of Seaport and, in these circumstances, the Bank was entitled not to extend the credit facility.

79. The fifth alleged breach relates to two leases between Dominion Swan Industries Limited ("Dominion") as landlord and the Grand Bahama Port Authority ("GBPA") as tenant. These leases were assigned to the Bank as collateral for a credit facility extended to Meridian Research Corporation Limited ("Meridian Research Corp") in June 2012 (the "Assignment").

80. The Plaintiffs allege that the Bank owed fiduciary duties to Dominion as a result of the Assignment and that the Bank breached these in that it did not enforce a clause which allowed Dominion to increase the rent and did not enforce a clause which required the GBPA to serve notice in writing.

81. Mr. Jennette Jr. had written to the Bank on 23 January 2012 in relation to the Assignment and said that Dominion would activate the escalation clause and remain responsible for maintaining the buildings and grounds at its sole expense.

82. It was therefore the Bank's understanding that it would not be taking on additional burdens as a result of the Assignment, but would simply be receiving the benefit of the security and the payment of rent. It was expected that Mr Jennette Jr and/or Dominion would continue to be responsible for enforcing the terms of the Leases. It is worth emphasizing that Dominion has already brought a claim against the GBPA for breach of the Leases and received a payment from the GBPA of $140,000 in settlement of Dominion's claims. It is incumbent upon Dominion to explain why it is now entitled to bring a second action in relation to the same breaches against the Bank.

83. Whether or not the Bank was responsible for enforcing the terms of the Leases, the Bank did not owe a duty to Dominion as a result of the Assignment.

84. Alternatively, if the Bank did owe a duty to Dominion, that duty was a narrow one and the Bank has not breached it in any way.

85. The Bank therefore has demonstrably meritorious defences to all of the claims and, if the Bank's application to set aside the Default Judgment is allowed, there is a real risk that the Plaintiffs will obtain and unjustified windfall.

86. The Statement of Claim includes a litany of alleged losses, which are said to have been caused by the Bank's breaches. The Plaintiffs now appear to acknowledge that many of the losses cannot be claimed from the Bank, since they abandoned them at the Assessment of Damages Hearing. Even if the Bank is held to have committed the alleged breaches, I believe that the Plaintiffs are unable to recover the claimed losses at law because either they were not caused by the alleged breaches or they are too remote.

87. Further, the Plaintiffs are required to prove that they took reasonable steps to mitigate any losses and to prove the actual quantum of their losses. The evidence provided to date does not establish that they effectively mitigated their losses, nor does it actually prove that the amounts being claimed were incurred by the Plaintiffs.

88. As mentioned above, the Plaintiffs ceased pursuing a significant number of claims included in the Statement of Claim at the Assessment of Damages Hearing. The claims that the Plaintiffs now appear to have abandoned are:

a. A claim for $133,495.44 for lost revenue from Lot 52 Lucayan Beach;

b. A claim for $66,747.72 for lost revenue from Lot 54 Lucayan Beach;

c. A claim for $2,058,005.37 to return the Fourth Plaintiff, Seaport, to the position it would have allegedly been in;

d. A claim for $3,585,240.59 to return the Fourth Plaintiff, Seaport, to the position it would have allegedly been in;

e. A claim for $106,796.20 for lost revenue from Lot 32 and Lot 33 Lucayan Beach;

f. A claim for $1,800,000 for reimbursement of an option;

g. A claim for $144,000 for reimbursement of lease fees for Lot 32 and Lot 33;

h. A claim for $222,492.39 for the distressed sale of Lot 30A Lucayan Beach;

i. A claim for $50,060.79 for lost revenue from Lot 30A;

j. A claim for $133,495.44 for lost revenue from Lot 41 Lucayan Beach;

k. A claim for $779,045.44 for reimbursement of a third party bridging loan over Lots 51B and 53 Lucayan Beach;

l. A claim for $48,392.10 in respect of unexplained fees; and

m. A claim for $552,061.68 in respect of unexplained fees.

89. The Plaintiffs have provided no explanation as to why they have abandoned these claims and the only conclusion must be that they accept that these were not properly recoverable from the Bank, even if the alleged breaches occurred. It is highly questionable why the Plaintiffs substantially inflated their claim if they now accept that these are not properly recoverable and calls into question whether the remaining losses are properly recoverable.

…

91. If the Bank is permitted to defend the claim and/or defend the Assessment of Damages, it is to be expected that the Plaintiffs will be required to give far greater detail justifying the alleged losses both in relation to causation and remoteness and in relation to the mitigation and quantum of the alleged losses. This is properly a matter for trial and cannot be dealt with in any great detail at this stage, but I would make the following observations:

a. Many of the claims are for damages for the distressed sale of properties which had been mortgaged to other lenders prior to any of the alleged breaches by the Bank. The distresses sale of these properties was caused by the various Plaintiffs' inability to service their debt and not by the Bank's refusal to restructure their existing credit facilities with the Bank (which were also in arrears);

b. A number of the distresses sales relate to properties which were the subject of potentially fraudulent transactions reported to the Bahamas Police (Lot 31A, Lot 51B and Lot 53);

c. Further, a number of the distressed sales relate to properties which Mr. Damian Gomez claimed were the subject of fraudulent transactions in claim 2011/CLE/gen/1480 (Lot 30 and Lot 30A);

d. The Plaintiffs have not explained how, if the Bank had agreed to restructure the existing credit facilities, this would have enabled them to meet their existing obligations to other lenders;

e. In any event, loans obtained by the Plaintiffs from third parties and secured by collateral were not in the contemplation of the Bank at the time of the alleged agreements and the Bank is not liable for losses suffered by the Plaintiffs as a result; and

f. The Plaintiffs have claimed substantial sums for legal fees, but have provided no evidence of why these fees were incurred or how they relate to the alleged breaches by the Bank.

92. In these circumstances, I believe that there is a significant likelihood that, given the opportunity to defend the claim and/or the Assessment of Damages, the damages awarded to the Plaintiffs will be substantially reduced, whether or not it is held that the alleged breaches were committed by the Bank. There is therefore a real risk of injustice if the application to set aside the Assessment of Damages is not allowed."

Issues

7. Notwithstanding the Plaintiffs' contention that Deputy Registrar Saunders had no jurisdiction to hear the application and set aside the Judgment in Default of Defence, the issues the Court must determine on this appeal are whether:-
    a. Deputy Registrar Saunders ("Deputy Registrar") had the jurisdiction to hear the application and set aside the Judgment in Default of Defence and if so;
    b. If the Defendant has a defence with a reasonable prospect of success and if it does should the Court set aside the Judgment in Default of Defence.

Appeal to Judge in Chambers from Registrar's Decision

8. Counsel for the Appellants, Mr. Harvey Tynes, QC submits that this Appeal is pursuant to the provisions of Order 58 of the RSC and is by way of a rehearing of the Defendant's summons seeking to set aside the Default Judgment that was entered on October 23, 2017 and refers the Court to **Evans v Bartlam [1937] A.C. 473** at page 478. However, he submits that the Deputy Registrar lacked the jurisdiction to hear the application to set aside the Judgment in Default of Defence for several reasons. It is his submission that the language found in Section 6 of the Supreme Court Act provides two mandatory requirements relating to the hearing and disposal of matters in the Supreme Court. The first requirement that every proceeding and all business arising therefrom shall ("must") be heard and disposed of before a single Judge as far as it is practicable and convenient. The second requirement is that "all proceedings" in an action subsequent to the "hearing" or "trial" shall ("must") be taken before the Judge before whom the trial or hearing took place so far as it is practical and convenient. He submits that the hearing before Acting Deputy Registrar Coccia was a proceeding in the Court in exercise of its civil jurisdiction

within the meaning of Section 6 of the Supreme Court Act and the subsequent appeal had been "heard and disposed of" before Forbes J. Acting on September 22, 2017. Additionally, it is his submission that the Defendant's application to set aside the Default Judgment be taken before a Judge, preferably before Forbes J (Acting) if it was practicable and convenient to do so. Therefore, the application to set aside the Default Judgment be heard by a Judge for two separate and distinct reasons (i) it was business arising from the appeal which had been heard and disposed of by Forbes J. (Acting), and (ii) it was a proceeding subsequent to the hearing of the appeal by Forbes J. (Acting).

9. Mr. Tynes, QC refers to page 7 of the Deputy Registrar's decision whereby she rejected the submissions of the Plaintiffs that she lacked jurisdiction and submits that by her rejection of the same she failed to acknowledge that the general jurisdiction conferred on the Registrar by Order 32, Rule 11 of the RSC is not co-extensive with the jurisdiction of a Judge but is limited to the jurisdiction of a Judge "in chambers". Further, he submits that in her decision the Deputy Registrar did not make any reference to the provisions of Section 6 of the Supreme Court Act which he states does not seek to define the jurisdiction and powers of judicial officers but mandates which matters must be heard and disposed of by a Judge. He illustrates the submission by referred to the provisions of Order 32, Rule 11 and Order 58, Rule 1(1) of the RSC. He states that Order 32, Rule 11 provides that the Registrar shall have the power and jurisdiction of a judge "in Chambers" while Order 58, Rule 1(1) of the RSC provides that an appeal shall lie to a Judge "in Chambers" from any judgment, order or decision of the Registrar. However, he states that the effect of the two provisions is that Order 32, Rule 11 confers a "general jurisdiction" on the Registrar equal to that of a Judge in Chambers while Order 58, Rule 1(1) contains the "specific mandate" that an appeal from the decision of a Registrar must ("shall") be heard by a Judge in Chambers. Moreover, he states that the Registrar may not assume the jurisdiction to hear an appeal from the Decision of a Registrar as Order 58, Rule 1(1) contains the express mandate that an appeal from a decision of a Registrar shall lie to a Judge and not to the Registrar. It is his submission that the present appeal before the Court is an example of the Deputy Registrar and a Judge exercising similar jurisdictions under the Rules in that the present appeal is in the nature of a "rehearing" of the application which was originally heard by the Deputy Registrar. Further, that Order 58 expressly mandates that an appeal

from the Registrar shall lie to a Judge in Chambers and accordingly a Registrar is precluded from hearing an appeal from a Registrar.

10. Mr. Tynes, QC also submits that the Deputy Registrar went beyond the point of assuming jurisdiction to hear the application to set aside the Judgment in Default of Defence and also granted leave to the Defendant to file and serve a Defence on the Plaintiffs within 7 days from the date of her order. He submits that then Counsel for the Defendant acknowledged receipt of the Plaintiffs' Statement of Claim by letter dated October 19, 2017 and that the Defendant was to file and serve its Defence within 14 days after. He submits that the Deputy Registrar "varied" the Order of Forbes J. (Acting) by granting the Defendant leave to file and serve its Defence by extending the time for compliance with the Judge's Order by more than two years. Therefore, he submits that the Deputy Registrar's intrusion upon the Judge's domain of jurisdiction was contrary to the provisions of Section 6 of the Supreme Court Act.

11. Mr. Dawson Malone in reply submits that the Deputy Registrar did have the jurisdiction to set aside the Default Judgment. Counsel for the Defendant submits that the Plaintiffs seek to characterise the application to set aside as an appeal, however as demonstrated by the case of Strachan [2005] UKPC 33 and its in the Bahamas as in Jamaica, at paragraph 14 of that Judgment the Privy Council sets out the comparable rule to The Bahamas Order 19 rule 9 (section 258 of the CPC). The Board stated that: **"...the application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action has never been heard on the merits**." Therefore, he submits that an application to set aside a default judgment (however entered) is not an appeal of that judgment but the invocation of a specific rule of procedure. There is no difference between the nature of a default judgment in Jamaica (or for that matter in England and Wales) and the Bahamas. Any attempt to distinguish *Mason v Desnoes* [1990] UKPC 15 or *Strachan v Gleaner* (supra), which is to the same effect, is misguided. It is his submission that as correctly held by the Deputy Registrar in her ruling, Order 32, Rule 11 of the RSC clearly provides that the Registrar has power to transact such business and there is no basis for arguing that the Bank's application should have been by way of appeal. Moreover it was also logical as the alternative prayer was to re-open an assessment already conducted by the same Deputy Registrar.

12. Mr. Malone further submits that if the Bank was appealing the Order of Forbes J., the Plaintiffs would be correct that such an appeal would lie to the Court of Appeal. However, he submits that the Bank is not, appealing the Order of Forbes J. and has never suggested that it is appealing the Order of Forbes J. The Bank he submits is only applying to set aside the Default Judgment of Defence which was entered pursuant to RSC Order 19, which is a "compendious code".
13. He submits that even if the Plaintiffs are correct that the Default Judgment of Defence was entered pursuant to the Order of Forbes J., rather than under Order 19 of the RSC (which is denied), the Deputy Registrar would still clearly have jurisdiction to determine an application to set it aside. If that were the case it would be an application under Order 31A rule 25, rather than under Order 19 rule 9, but it certainly would not be an appeal to the Court of Appeal.
14. It is his submission that the application is now being heard by a Judge who is entitled to exercise his/her discretion afresh and even if the Deputy Registrar did not have jurisdiction (which is denied), there can be no doubt that a Judge of the Supreme Court has jurisdiction to set aside a default judgment whether under Order 19, Rule 9 or under Order 31A, Rule 25 of the RSC.
15. Mr. Malone made further submissions in response to the Plaintiffs position as to the effect of Section 6 of the Supreme Court Act and refers the Court to that provision. He submits that the Plaintiffs position that this provision *"**mandates which matters must be heard and disposed of by a Judge**"* is wrong. He contends that if the Plaintiffs argument that Section 6 of the Supreme Court Act is a mandatory rule requiring every proceeding in the Court in its civil jurisdiction and all business arising therefrom be heard by a judge, then registrars, deputy registrars and assistant registrars have no jurisdiction to hear any civil proceedings.
16. It his submission that the effect of Section 6 of the Supreme Court Act is and as a general provision has two elements. The first element is as a general rule, proceedings should be heard by a judge where possible and the second element as a general rule that where a judge is seised of proceedings, that judge should oversee the entirety of those proceedings and hear all business relating to those proceedings. Additionally, it is not always possible, or indeed desirable, for all proceedings and all business arising therefrom to be heard by a judge or heard by the same judge.

17. Mr. Malone submits that the general provision contained in section 6 of the SCA is therefore subject to two significant caveats (a) the provision is *"**subject to this or any other Act and to rules of court**"*; and (b) the provision only applies insofar as it is *"**practicable and convenient**"*. He asserts that Section 6 of the Supreme Court Act is a small part of a wider scheme which establishes the jurisdiction of the Justices of the Court, the Registrars, Assistant Registrars, and Deputy Registrars. Additionally, he contends that Section 6 of the Supreme Court Act is expressly subject to the Rules of the Supreme Court and as such there is a contradiction and the RSC takes precedence. Therefore, he submits that there are numerous provisions within the Supreme Court Act the RSC which demonstrate clearly that there is no mandatory rule that all civil proceedings must be heard by a judge or that, once a judge is seised, all business must be heard by the same judge. He refers the Court to Section 5(1) of the SCA; Section 57 of the SCA; RSC Order 1 rule 4(2); RSC Order 32 rule 11(1); RSC Order 33 rule 4(2) in support of his submission. It is his submission that the clear effect of these rules (and others) is to confer upon the Registrars jurisdiction to hear many different types of proceedings and different types of business arising from those proceedings which is established by Order 32, Rule 11 of the RSC and Order 33, Rule 2 of the RSC.
18. In response to the Plaintiffs argument that the second clause of section 6 of the SCA relates to *"**proceedings in an action subsequent to the hearing or trial**"* Mr. Malone submits that the second clause that is no more than a sub-clause of the general provision relating to all proceedings and is not a mandatory requirement. In support of his submission he refers the Court to the case of ***Omar Archer v Commissioner of Police*** Judgment 2017/PUB/con/0024, whereby Justice Klein stated "***I do not read the Court of Appeal's decision as laying down a procrustean rule that once a matter was assigned to a judge it had to be completed by that judge. Indeed the language of section 6 – "practical or convenient" – admits of subjective, discretionary factors, which seem intended to establish a rule of guidance and not black-letter law."***
19. Mr. Malone continues that while it is generally considered preferable for the same judge (or indeed registrar) to hear business relating to the same proceedings, there is no mandatory rule that this must be case. He refers the Court to the following provisions of the RSC which demonstrate that section 6 of the SCA is no more than a general proposition

which include Order 32, Rule 12 and Order32, Rule 13. These rules, among others, he submits clearly demonstrate that different business within proceedings may be heard in different places, by different modes and by different officers of the court. The provision that, once seised, a judge (or registrar) should continue to hear proceedings is subject to these rules and subject to the caveat that it should only apply where practicable and convenient.

20. Mr. Malone further contends that given the Plaintiffs' position before the Court as stated above, then the natural course subsequent to the Order of Forbes J, would have been that all hearings, in particular the hearing of the assessment of damages should have been conducted by him, or failing him, another Judge and not conducted by the Deputy Registrar. Therefore, the Plaintiffs were not entitled to proceed with the assessment of damages hearing before the Deputy Registrar as at that point she lacked jurisdiction. It is his submission that it was correct for both the assessment of damages by the Plaintiffs to be heard by the Deputy Registrar and for the application to set aside the Default Judgment of Defence by the Bank to be made to the Deputy Registrar. It might, in fact, he submits, be said that the Order of Forbes J having been made on an appeal from an application made to the Deputy Registrar, that it was in fact the Deputy Registrar who was the court officer seised.
21. Further, and in any event, Mr. Malone asserts that given that Forbes J had retired and the Plaintiffs had come before Deputy Registrar Saunders for the assessment of damages, it was in fact Deputy Registrar Saunders who was seised of the matter and it was entirely correct for her to hear the application to set aside the Default Judgment of Defence. Lastly, he submits that the Deputy Registrar had jurisdiction to hear the Bank's application to set aside the Judgment in Default of Defence for precisely the same reasons that she had jurisdiction to hear the Plaintiffs' application for an assessment of damages. Therefore, she was entitled to order that the Judgment in Default of Defence be set aside and the Court ought to uphold that decision.
22. Mr. Tynes, QC in response to Mr. Malone's submissions, in part submits that the Plaintiffs argument arises from Order 32, Rule 11 of the RSC in that that provision speaks to the jurisdiction of the Registrar. He submits that that provisions states that the Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or the Rules and exercised by a Judge in chambers. He further submits

that the jurisdiction of the Registrar is tied by the provision of that rule and powers of a Judge but the jurisdiction of the Registrar is not co-extensive. He contends that Registrars cannot hear petitions for divorce or civil claims and trials, winding up petitions of Companies as those are open court functions of a Judge. Mr. Tynes, QC refers the Court to Section 7(1) of the Supreme Court Act under the caption "Jurisdiction of the Court". He also refers the Court to Section 5 of the Supreme Court Act which provides the powers of a single judge in court or in chambers and submits that the law recognizes the difference between the overall powers of a Judge whether exercised in court or in chambers. Moreover, he submits that the Court has unlimited civil jurisdiction and the Judge may exercise all the jurisdiction of the Court however the jurisdiction of the Registrar is limited by the words in Order 32, Rule 11 of the RSC to that of "in chambers". He refers to Order 58 of the RSC as an example for his submission in that that provision provides that an appeal from a Registrar shall lie to a Judge in chambers. It is his submission that the use of the word 'shall' is mandatory and in the circumstances Order 58 of the RSC makes express provision as to who should hear appeals from a Registrar in the same manner that Section 6 of the Supreme Court Act makes express provision as to how matters go when one is dealing with hearing or trials. He submits that Section 6 applies to both trials as well as hearings in the Supreme Court. He seeks to distinguish the case relied on by the Defendant, in particular **Smith Point Ltd et al v Customs**, SCCivApp 64 of 2012. He states that in that case the matter was commenced before and heard by then Justice Longley, however before rendering of the Judgment the matter was transferred to Justice Gray Evans who exercised her discretion to refuse leave to the Applicant to apply for judicial review. Justice Adderley in his decision at the Court of Appeal in the matter stated that Section 6 of the Supreme Court Act was applicable in the circumstances. He submits that in that case there was nothing to show that it was not practicable or convenient for Longley, J to dispose of the action. Further, he states that there was nothing to show, as Longley, J was seized of the action and having heard it up to the point of regular judgment, Gray Evans, J did not have jurisdiction to render the decision she delivered. He submits that had there been evidence before the Court to show that it was not practicable or convenient for Longley, J to dispose of it. Moreover, he submits that Justice Adderley in his decision determined that in the absence of such evidence Section 6 of the Supreme Court Act is mandatory. It is his submission in the instant case that there is no evidence

to show that it was not practicable or convenient to make the application before Forbes, J (Acting). Therefore, he submits in closing that the Deputy Registrar lacked the jurisdiction to hear the application to set aside the Default Judgment of Defence and as such there essentially is no hearing to which the parties are able to appeal from.

The Effect of Forbes, J. Order/Two Outstanding Judgments in Default

23. Mr. Tynes, QC submits that the Order by the Deputy Registrar setting aside the Judgment in Default of Defence did not affect the rights of the parties because the Judgment in Default of Appearance remained in effect. He submits that both the Ruling of Forbes, J. (Acting) dated September 22, 2017 and the Order perfected by then Counsel for the Defendant Chancellors Chambers on October 18, 2017 clearly stated "The Acting Deputy Registrar Ruling of 5th May, 2017 is set aside." He submits that the effect of the Ruling by Forbes, J (Acting) was to set aside the decision of then Acting Deputy Registrar Coccia and thereby restore the Judgment in Default of Appearance. He further submits that at the hearing of the appeal before Forbes, J. (Acting), he was faced with two options only either to dismiss the Plaintiffs' appeal and thereby affirm the decision of the then Acting Deputy Registrar or to allow the appeal by setting aside the decision of the then Acting Deputy Registrar. Mr. Tynes, QC submits that the ruling of Forbes, J (Acting) to set aside the Acting Deputy Registrar's ruling was in effect restoring the Judgment entered in Default of Appearance on March 31, 2016. It is his submission that the Defendant did not seek to clarify the meaning and effect of the Order of Forbes, J (Acting); they did not appeal against the said decision by Forbes, J (Acting); nor did their application by Summons filed May 9th, 2019 seek to set aside the Judgment in Default of Appearance for a second time.
24. Mr. Tynes, QC also submits that in addition to setting aside then Acting Deputy Registrar's decision to set aside the Judgment in Default of Appearance, he also issued a directive to the parties requiring the Plaintiffs to file and serve their Statement of Claim 14 days from the date of his ruling and the Defendant to file and serve its Defence on the Plaintiffs 14 days after the service of the Statement of Claim on the Plaintiffs and the matter then proceed in the usual manner pursuant to the Rules. He asserts that the Plaintiffs complied with the Order by filing their Statement of Claim and serving it on the Defendant on October 6, 2017 however the Defendant did not file and serve a Defence on the Plaintiffs in compliance with the Order. Further, he states that following the expiration of the 14

days fixed by the Order of Forbes, J, Counsel for the Plaintiffs proceeded to file a Judgment in Default of Defence on October 23, 2017. Mr. Tynes, QC contends that there were two Judgments in Default (Appearance and Defence) which conferred identical rights and imposed identical obligations on the Defendant to pay damages to the Plaintiff to be assessed. He states that in accordance with the terms of the Judgment in Default of Appearance the Plaintiffs obtained an Assessment of damages and the Notice of Appointment for the assessment of damages was filed since April 25, 2016 and was scheduled to take place on June 8, 2016. Further, he states having obtained an Assessment of Damages the Plaintiffs filed both a Certificate of Assessment of Damages and a Final Judgment for Damages on March 7, 2019. It is his submissions that at that stage there were three Judgments in existence against the Defendant (Judgment in Default of Appearance, Judgment in Default of Defence and the Final Judgment on Damages) however the Defendant's May 9, 2019 Summons only sought an Order to set aside the Judgment in Default of Defence and the Final Judgment on Damages. Therefore, he contends that the proceedings before the Deputy Registrar Saunders were an exercise in futitlity as the Judgment in Default of Appearance was not assailed and remained intact and was the basis upon the Plaintiffs were entitled to obtain and did obtain the Assessment of Damages on March 6, 2019. He also contends that the Order of Deputy Registrar Saunders setting aside the Judgment in Default of Defence was contrary to the established principle that the function of the Court is to determine the rights of parties and not to determine hypothetical or academic questions. He refers the Court to Glasgow Navigation Company v Iron Ore Company [1910] A.C. 293 per Loreborne at page 294.

25. In addition to the above, Mr. Tynes, QC submits that the Deputy Registrar set the Judgment in Default aside by applying the principles relevant to an application made pursuant to the provisions of Order 19, Rule 9 of the RSC. However, he submits that the Defendant's failure to comply with the Order of Forbes, J could not by itself become the basis upon which the Deputy Registrar could invoke the provisions of Order 19, Rule 9 to govern the continuation of the matter. It is his submission that the directive of Forbes, J by his Order was that the Defendant had 14 days to file and serve their Defence after service of the Plaintiffs Statement of Claim and the hearing of the matter was to proceed thereafter in the usual manner pursuant to the Rules of the Supreme Court. Therefore, he submits that according to the directive from the Judge the Rules were to be applied to

the continuation of the proceedings after the Defendant had served its Defence on Counsel for the Plaintiffs and not before. Further, that as the Defendant never filed and served the same the time never came for the Rules to govern the continuation of the matter and that the conclusion by the Deputy Registrar that the Rules should govern the continuation of the matter before the Defendant filed and served its Defence was contrary to the directive of the Judge.

26. He contends that Order 19 of the RSC contains a regulatory regime relating to the entering and setting aside of Judgments in Default of Defence and that rules 2 to 7 each contains a provision whereby a plaintiff may enter final judgment against a defendant if the defendant fails to serve a defence on the plaintiff after the expiration of the period fixed by or under those rules for service of the defence. Additionally, Order 19, Rule 9 provides for the Court to set aside or vary any judgment entered in pursuance of that Order. Therefore, he submits that the Judgment entered in Default of Defence was not entered after the expiration of any period fixed by or under any rule contained in Order 19 for service of a defence. Mr. Tynes, QC contends that the Judgment in Default of Defence was entered after the Defendant failed to comply with the directive issued by Forbes, J and as such the provisions of Order 19, Rule 9 have no relevance to govern the continuation of the proceedings or to the application to set aside the Judgment in Default of Defence. Moreover, he contends that the inherent jurisdiction of the Court relied on by the Defendant, Counsel for the Defendant failed to make any reference to any statutory provision or case law in the course of their argument that the court had an inherent jurisdiction to set aside the said Judgment or the manner in which such inherent jurisdiction should be exercised.

27. Mr. Malone in response submits that the Deputy Registrar was correct in her Ruling whereby she held that the intent of Forbes, J in his Ruling was for the Judgment in Default of Appearance was to be set aside and the matter to proceed to trial for the case to be heard on the merits. He submits that in a claim for unliquidated damages, a judgment in default of appearance is a judgment on liability. Therefore, if there is an extant judgment on liability, there is no need for a statement of claim and there is no need for a defence, because the defendant has already been judged to be liable (albeit without any hearing of the merits).

28. Accordingly, he submits if the Order of Forbes J. reinstated the Judgment in Default of Appearance there would have been no need for the Plaintiffs to file a statement of claim and no opportunity for the Bank to file a defence since the Bank would already have been held to be liable under the Judgment in Default of Appearance and as such the claim should have immediately proceeded to an assessment of damages and this is not what happened.
29. He contends that the Plaintiffs argument is unsupportable as the filing of a statement of claim and the provision of an opportunity to file a defence is entirely at odds with the reinstatement of a judgment in default of appearance. The basis for the Plaintiffs' argument is the language employed by Forbes J. and the fact that he spoke of setting aside the decision of the Deputy Registrar. While it is accepted that Forbes J.'s use of language could perhaps have been more precise, it is entirely clear from the terms of the Judgment that he meant by this that: (1) he disagreed with the Deputy Registrar's application of the principles, but importantly (2) he agreed with the Deputy Registrar's conclusion that the Judgment in Default of Appearance ought to be set aside.
30. He refers the Court to paragraph7 of the Judgment of Forbes J. whereby he stated that: *"the Court finds that her [the Deputy Registrar's] decision is flawed as she failed to apply the principles nevertheless the Court agrees that the Judgment ought to be set aside."* From this, he submits that there can simply be no doubt that Forbes J. disagreed with the Deputy Registrar's application of the principles but not with her conclusion and that he was not reinstating the Judgment in Default of Appearance. Further, he provides that Forbes, J quoted from Evans v Bartlam (supra) in support of his reasoning, the same case the Plaintiffs rely on as authority that a judge can exercise his discretion afresh on an appeal from the Registrar.
31. While he asserts that the Plaintiffs position is that Forbes J. had two options when hearing the appeal, as illustrated in Evans v Bartlam (supra) the judge in this position in fact has four options (a) to hold that the Deputy Registrar applied the principles correctly and make the same decision; (b) to hold that the Deputy Registrar applied the principles incorrectly but, in the exercise of his discretion, make the same decision (albeit for different reasons); (c) to hold that the Deputy Registrar applied the principles incorrectly and make a different decision; and (d) to hold that the Deputy Registrar applied the principles correctly but, in the exercise of his discretion, make a different decision.

32. Mr. Malone also notes that at no point in his judgment did Forbes J. state that he was allowing the appeal or use any words to that effect. Therefore it was abundantly clear that Forbes J.'s judgment was in line with the second of these options. The reasons provided by Forbes J. for reaching his conclusion that the then Acting Deputy Registrar applied the wrong principles is found at paragraph 8 whereby he said *"the Court can in reviewing the endorsement of the Plaintiffs' note that the Defendant can make a defence"* and that *"The application may have been flawed in its substance nevertheless, one was filed thus there can be no question of delay."* Forbes J. applied his mind to the requirements for setting aside a judgment in default of appearance (i.e. the merits of the defence and reasons for the delay in the application) and found that those requirements were met. Moreover, he submits that in the conclusion to the Judgment in Forbes J. stated: *"**I am of the view that the matter should be heard on its merits**."* , therefore it is not arguable that Forbes J, sought to reinstate the Judgment in Default of Appearance.
33. Additionally, Mr. Malone submits that it is not possible to obtain two judgments on liability in respect of the same matter as a judgment in default of appearance and a judgment in default of defence are mutually exclusive and they cannot co-exist. Just as it is impossible to have an outstanding judgment in default and a judgment following trial, it is impossible to have a judgment in default of appearance and a judgment in default of defence outstanding at the same time and in the same matter.
34. For this reason, it is impossible for there to be two default judgments on the same file. The fact that there cannot be two judgments on liability outstanding on the same file is supported by the authority of *Levine v Callenders & Co.* [1997] BHS J. No. 65 [**V2/TH**] in which Sawyer C.J. said that *"**while the first judgment remained on the file, in my view it was not open to the plaintiff to enter the second judgment**"*. If the Plaintiffs contend that the Judgment in Default of Appearance was effective and on the file, it follows that it was irregular for them to enter the Judgment in Default of Defence. Therefore, he submits that it is flawed that the Judgment in Default of Appearance was reinstated by Forbes J. and also flawed that the Assessment of Damages was made pursuant to the Judgment in Default of Appearance rather than the Judgment in Default of Defence and unsupported by the documentation as submitted.

35. In response to the Plaintiffs argument that the Judgment in Default of Defence was not entered pursuant to rules 2, 3, 4, 5, 6 or 7 of Order 19, Mr. Malone submits that this is contrary to the clear provisions of the Rules of the Supreme Court.
36. He refers the Court to the Plaintiffs submissions before the Deputy Registrar whereby they submitted that the Judgment in Default of Defence was filed *"pursuant to the Rules"* . However, they now seek to argue that it was not. He submits that without the sanction being specified in an unless order, there is no other basis on which a plaintiff can obtain judgment in default of defence other than pursuant to Order 19. The Plaintiffs have not provided any reason why they should be in a different position to all other plaintiffs in civil proceedings. An order without sanction simply cannot form the basis for a final judgment on liability and damages save for pursuant to the procedural rules contained in Order 19 of the RSC.
37. He refers the Court to *Levine v Callenders & Co.* [1997] BHS J. No. 65, whereby Sawyer C.J. accepted the submission of counsel, Mr. Tynes, Q.C. (who represents the Plaintiffs in this appeal), that *"Order 19 rules 2 through 7 provide a compendious code governing the circumstances and the manner in which judgments in default of defence may be obtained."* It is his submission that there is no distinction between the situation in *Levine v Callenders (supra)* and the instant matter. Therefore, Order 19 is a compendious code governing the circumstances and manner in which judgments in default of defence may be obtained.
38. Mr. Malone contends that there if, as the Plaintiffs argue, the default of failing to file a defence is a breach of the Order of Forbes J., rather than a breach of the procedural rules, there is no basis for the Plaintiffs entering the Judgment in Default of Defence and they were wrong to do so and as such the Judgment in Default of Defence was wrongly entered and ought to be set aside. He refers the Court to Order 31A, Rule 18(3)(b) of the RSC in support of his submission.
39. Additionally, he asserts that the Order of Forbes J. does not specify the consequence of failure to comply but merely states that the matter should proceed, after the filing of the Defence, *"in the usual manner pursuant to the Rules of the Supreme Court of the Bahamas"*. Therefore, tithout the Order specifying that the consequence of failure to comply was that the Plaintiffs were entitled to default judgment, the Order did not provide the basis for the Plaintiffs to enter the Judgment in Default of Defence. It is his submission

that the only basis for entering the Defence DJ was therefore pursuant to Order 19 which is the only provision within the RSC which permits judgment in default of defence to be entered.

40. Moreover, he contends that it was incumbent on the Plaintiffs to make an application (as provided by Order 31A, Rule 21(1) of the RSC) to seek sanctions (such as an unless order) for the non-compliance of the Forbes, J's Order by the Defendant.

41. If, he submits as the Plaintiffs contend, they are relying on breach of the Order of Forbes J., rather than the procedural rules, an application should have been made to a Judge in Chambers requesting that compliance with the Order of Forbes J. be enforced by an unless order. The Plaintiffs did not make such an application and did not obtain an unless order from the Court. Therefore, there is no basis for the Plaintiffs argument that the Judgment in Default of Defence was entered other than pursuant to the provisions of Order 19. Moreover, the Plaintiffs position that the Judgment in Default of Defence cannot be set aside under Order 19, Rule 9 of the RSC is incorrect.

Analysis/Discussion

42. Considering the submissions made by Counsel above, it is incumbent on the Court to draw the parties' attention to the Ruling of Forbes, J on September 22, 2017.

"Bahamas Law Reports/2017/Volume 2/Kaydee Limited and others v. Bank of the Bahamas Limited - [2017] 2 BHS J. No. 87

[2017] 2 BHS J. No. 87

Kaydee Limited and others v. Bank of the Bahamas Limited

CASE NO. 2016/CLE/gen/FP/00081

Bahamas Supreme Court, Common Law and Equity Side

Justice Andrew D. Forbes

Heard: .

Judgment: September 22nd, 2017.

Attorney Harvey Tynes QC on behalf of 1st thru 6th Plaintiff

Attorney Clinton T. Clarke on behalf of the Defendant

1 This matter before this Court arises by way of an appeal of the Order of the Acting Deputy Registrar dated 5th May, 2017 pursuant to Order 58 of the Rules of the Supreme Court which reads as follows:

> "An appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar....."

2 This case commenced when a Writ of Summons was filed on 11th March 2016 and served on the Legal Department of the Defendant Company. Service was accepted and the Plaintiffs Attorney proceeded to file an Affidavit of service. The Court notes it was a generally endorsed writ stating the following:

> "The Plaintiffs' claim is against the defendant for breach of fiduciary duty, breach of contract (fraudulent misrepresentation, unconsionability, and undue influence/duress, inequality of bargaining power and denial of independent representation) and/or negligence and damages (general and specific damages) sustained as a result of the Defendants, its agents' and servants' direct, continuing and imminent breaches of a series of lending commitments (expressed, implied and verbal) dating from the 7th day of October, A.D. 2010 through the present and breach of a deed of assignment dated 18th June between the fifth plaintiff, its tenant and the defendant. The defendants, its agents and servants failure to perform their contractual obligations and fiduciary duties under the said Lending commitments and deeds of assignment caused the plaintiffs (jointly and severally) to suffer substantial economic loss and financial loss of revenue, diminution in value of assets and other losses."

3 The defendant failed to enter an appearance after the time prescribed the Rules allow.

4 Order 12 Rule 4(a) States: ***"in case of a writ served within the jurisdiction, to fourteen days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these Rules to that time as so extended; and..."***

5 That the Plaintiffs' through their Counsel entered a judgment in default of Appearance which was filed on 31st March 2016.

6 The Defendant through their Counsel filed a Summons seeking to set aside the Judgment obtained in default and the application was heard by the Acting Deputy Registrar who said the following:

> "In seeking to do justice in the instant case and applying the principles of Evans v. Bartlam and the Saudi Case, the Court will exercise its discretion in favour of the Defendant. I find that in this particular case where no judgment was entered where appearance have been entered and where the writ is generally enclosed and does not outline a claim against the defendant, does not afford the defence with sufficient particulars to even put forth a draft defence if they wish. The defence argues setting aside against the judgement in default of appearance as an alternative to judgment in default of defence. I accept Mr. Tynes argument that Order 19 Rule 9 is irrelevant. Order 13 Rule 8 however is relevant and is applied. Without knowing what is the proposed defence the Court is not able to properly assess whether there is an arguable case or whether there is real prospect of success. The primary consideration applied to those particular set of circumstances is whether there are merits to which the Court should pay heed

to, there is the need to not let the judgment stand; there is no proper adjudication when there is a possibility that there may be sound merits to the defence. For the above mentioned reasons the judgment is set aside. Cost is awarded against the defence in favour of the plaintiff to be taxed if not agreed."

7 The plaintiffs' filed an appeal against the decision of the registrar pursuant to Order 58 of the Rules of the Supreme Court. At the hearing the Plaintiffs' Counsel argued that the Acting Deputy Registrar misapplied the law and in fact her decision was totally contrary to the principles established in the decided cases regarding the exercise of the Court's discretion in setting aside a regular judgment entered in default of appearance. The defendant argued the Acting Deputy Registrar properly exercised her discretion. There was also the argument that the plaintiff had not filed and served a statement of claim. The defendant cited the cases of **Smith v. Atlantic First Insurance Co.** (2004) BHS.J. No. 419 and **McPhee v. McPhee** (No.12. 1969) (1965-70) 1 LRB 344. Whereas Plaintiffs had cited **Evans v. Bartlam** (1937) AC 473 and **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.** (1986) Lloyds Law reports 221 (hereinafter referred to as the (Saudi Eagle)).

8 The Court notes order 13 Rule 8 states as follows: ***"The Court may, on such terms as it thinks just, set aside or vary any judgement entered in pursuance of this Order."***

9 In the English Rules of the Supreme Court which are similar Order 13 Rule 9 states as above however unlike the Rules of the Supreme Court of the Bahamas, the English rules provide notes. It is observed that there is a distinction between a regularly obtained judgment and one which was irregularly obtained. As for the Irregular judgment the notes suggest that to set aside such a judgment the summons must specify the irregularity and the affidavit in support of the application ought to state the circumstances under which the default arose and should disclose the nature of the defence. Where the judgment is obtained irregularly, the defendant is entitled ex debito justistiae to have the judgment set aside. However where it is a regularly obtained judgment, then the notes citing various cases suggest that it is almost an inflexible rule that there must be an affidavit of merits. In fact in the decision of **Evans v. Bartlam** (supra) Lord Wright at page 489 noted ***"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 judgment pass on which there has been no proper adjudication."*** And additional in a case cited by the Defendant **McPhee v. McPhee** (supra) Sinclair P at page 345 said, ***"There are three main considerations to which a Court should have regard when excising its discretion as to whether a default judgment should be set aside. First, has the defendant a defence on the merits. Second, the reason for allowing the judgment to go by default. Third, has there been any unreasonable delay in making the application to set aside? The most important of these considerations is whether the defendant has shown a defence on the merits..."***

10 Before the Acting Deputy Registrar the defendant had filed two (2) affidavits the first was filed on the 17th January 2017 (hereinafter referred as January affidavit) and another filed on the 2nd June 2017 (hereinafter referred as June Affidavit) The January affidavit was sworn by Merrit Storr who avers he is a Law Partner in the firm of Chancellors Chambers and was assisting Mrs. Nadia Wright also a Law Partner of the said Firm and that he authorized by the defendant to make this affidavit in support of its application to strike out the action brought by the plaintiff. He further avers that the application is made pursuant to Order 19 rule 1 of the Rules of the Supreme Court, in that the Plaintiff have failed to file and serve a statement of Claim in this action. Additionally, that he avers that the application is made pursuant to Order 18 Rules 19 1(a),(b) & (d) as it discloses no reasonable cause of action against the defendant and is scandalous, frivolous or vexatious and it is otherwise an abuse of the process of the Court.

11 Clearly the affidavit failed to address itself to the fact that the application was that of setting aside a regularly obtained judgment in default of appearance and not that of a judgment in default of defence. And was thus misconceived. The June Affidavit sworn by Eugeina T. Butler states she is an associate Attorney in the law firm of Chancellors Chambers and is assisting Mrs. Nadia Wright. She further avers that she is

making this affidavit in support of an application seeking leave pursuant to Order 19 Rule 9 of the Rules of the Supreme Court to set aside the Judgment in default of defence. She avers that the defendant seeks to fully defend this action. However it would need to know the full particulars of the plaintiffs claim. Counsel simply repeats the statements made by Merrit Storr filed in January. Neither Affidavit offered a defence but rather sought to suggest that the Plaintiff need file a statement of claim. There was lack of appreciation as to the state of the proceedings. Hence the defendants failed to offer the Acting Deputy Registrar any defence as to the merits and thus if accepting the principles of **Evans v. Bartlam** (supra) then her decision would be flawed. Whereas this Court finds that her decision is flawed as she failed to apply the principles nevertheless the Court agrees that the Judgment ought to be set aside.

12 Citing Lord Atkin at page 478 in **Evans v. Bartlam** (supra) he says the following:***I only stay to mention a contention of the respondent that the master having exercised his discretion the Judge in Chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge in Chambers is in no way fettered by the previous exercise of the Master discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will of course, give the weight it deserves to the previous decision of the Master but he is in no way bound by it."***

13 He again at page 480 says as follows: ***"But in any case in my opinion the Court does not, and I doubt whether it can lay down ridge 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..."***

14 The Question for this Court is notwithstanding the failure of the defendant to file an affidavit which outlines a case on its merits and as Counsel for the Plaintiff argues so forcefully a defence which has ***"a reasonable prospect of success."*** Should it allow the judgment to stand?

15 The Court having reviewed what limited pleadings there are considers that there is a defence that may have a reasonable prospects for success borrowing the phrase from the "Saudi Eagle". The plaintiff has file a generally endorsed Writ which contains a number of allegations against the lending institution. Certainly a trial would allow all parties to adduce the various documents to substantiate the allegations being made by the Plaintiffs'. Then there is the question as to which plaintiff is substantial affected by the breach of contract or of fiduciary relationship, so if the judgment was allowed to stand how would the Court in assessing damages discern which of the parties to be awarded and in what proportion. It would appear to the Court that in the interest of full transparency, this matter proceed to a full trial. In relying upon the dicta of Sir Roger Ormrod at page 223 of The Saudi Eagle (supra) case, he said***:"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..."***

16 It is the view of the Court that although the defendant has not presented a defence in any of its affidavits', the Court can in reviewing the endorsement of the Plaintiffs' note that the Defendant can make a defence, by asserting that there was no breach of contract or that there was no contract whatsoever. Off course this would require then a development by the plaintiffs' as to the substance of their claim and reference where possible to dates, events, documents and or persons and permit the Defendant to reject or admit those allegations.

17 The Court also notes that Judgment was obtained on 31st March 2016 and the defendant filed an Application to set aside the Judgment on the 1st June 2016. Which was, but, perhaps a day that elapsed. The application may have been flawed in its substance nevertheless, one was filed thus there can be no question of delay. In the premises the Acting Deputy Registrar ruling of the 5th May 2017 is set aside and the Plaintiffs' has 14 days from the date of this Ruling to serve the Defendant with a Statement of Claim and thereafter the Defendant has 14 days after service of Statement of Claim to file and serve a Defence on the Plaintiffs' Counsel. The matter can then proceed in the usual manner pursuant to the Rules.

18 Although I am off the view that the matter should be heard on it merits, the Plaintiffs' shall have their costs below for the tardiness to file an appearance in time, and the Cost of this appeal. Cost to be taxed if not agreed. "

43. As I understand the submissions of Mr. Tynes, QC he makes the following observations/submissions as it relates to the Ruling of Forbes, J:-

    a. That the Deputy Registrar did not have jurisdiction to hear the application to set aside the Default Judgment as Forbes, J (or another Judge of the Supreme Court) was seized of the matter following his ruling;

    b. That Forbes, J's Ruling to set aside then Acting Deputy Registrar Coccia's Ruling setting aside the Judgment in Default of Appearance, reinstated the Judgment in Default of Appearance;

    c. That the directions given by Forbes, J in his Ruling that "the hearing of this matter is to proceed thereafter in the usual manner pursuant to the Rules of the Supreme Court" were to be applied to the continuation of the proceedings after the Defendant served its Defence on the Plaintiffs and not before;

    d. That the Defendant's failure to file and serve the Defence on the Plaintiffs meant that the continuation of the proceedings pursuant to the Rules of the Supreme Court never happened;

44. Forbes, J's Ruling was the result of an appeal from then Acting Deputy Registrar Coccia. It is imperative to note that the nature of an appeal to a Judge in Chambers is dealt with by way of an actual rehearing the application which led to the order now under appeal. The Judge will give the weight it deserves to the previous decision of the Master but is in no way bound by it (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473 at 478). Additionally, a Judge hearing such an appeal from a Master is entitled, if he/she thinks fit, to adopt the Master's reasoning in his own judgment without setting out the reasoning himself, and by doing so does not fail to exercise the discretion conferred on him/her. [The Supreme Court Practice, Volume 1, Notes 58/1/3 at page 967; Rae v Yorkshire Bank plc (1989) The Times, October 16, CA).

45. At paragraph 11 of his Ruling, Forbes, J states:-

    "Clearly the affidavit failed to address itself to the fact that the application was that of setting aside a regularly obtained judgment in default of appearance and not that of a judgment in default of defence. And was thus misconceived. The June Affidavit sworn by Eugeina T. Butler states she is an associate Attorney in the law firm of Chancellors Chambers and is assisting Mrs. Nadia Wright. She further avers that she is making this affidavit in support of an application seeking leave pursuant to Order 19 Rule 9 of the

Rules of the Supreme Court to set aside the Judgment in default of defence. She avers that the defendant seeks to fully defend this action. However it would need to know the full particulars of the plaintiffs claim. Counsel simply repeats the statements made by Merrit Storr filed in January. Neither Affidavit offered a defence but rather sought to suggest that the Plaintiff need file a statement of claim. There was lack of appreciation as to the state of the proceedings. Hence the defendants failed to offer the Acting Deputy Registrar any defence as to the merits and thus if accepting the principles of Evans v. Bartlam (supra) then her decision would be flawed. Whereas this Court finds that her decision is flawed as she failed to apply the principles nevertheless the Court agrees that the **Judgment** ought to be set aside."(**emphasis mine**)

46. Considering the above paragraph, as the appeal was made to a Judge in Chambers, Forbes J, was entitled by virtue of the provisions of Order 58, Rule 1 of the RSC and Evans v Bartlam (supra) following a rehearing of the said application to either affirm the ruling of then Acting Deputy Registrar Coccia (whereby she set aside the Judgment in Default of Appearance) or set it aside and impose his own ruling which he did. In clear terms, Forbes, J states at paragraph 11 that the Acting Deputy Registrar's decision on the application before her was flawed as she failed to apply the principles relevant to the said application. He continues that the Court agrees with her that the Judgment, i.e. the Judgment in Default of Appearance ought to be set aside. Further at paragraph 17 of his Ruling he provides that "In the premises the Acting Deputy Registrar ruling of the 5th May 2017 is **set aside** and the Plaintiffs' has 14 days from the date of this Ruling to serve the Defendant with a Statement of Claim and thereafter the Defendant has 14 days after service of Statement of Claim to file and serve a Defence on the Plaintiffs' Counsel. The matter can then proceed in the usual manner pursuant to the Rules (**emphasis mine**)." Forbes, J's decision to set aside then Deputy Registrar Coccia's decision was well within his right to do so and in turn imported his own ruling to which he is also entitled to do.
47. Therefore, the Court is of the view that Forbes, J's Ruling of September 22, 2017 set aside the Judgment in Default of Appearance that had been entered by the Plaintiffs on March 31, 2016.
48. Additionally, the directions given by Forbes, J at paragraph 17 of his Ruling after a careful review of the Rules of the Supreme Court, fall in line with the provisions found at Order 18 of the RSC. Forbes, J noted in his Ruling that at the point in which the application came before then Deputy Registrar Coccia there had only been the Generally Indorsed Writ filed by the Plaintiffs. In an effort to ensure that all of the claims to which the Plaintiffs sought to be determined by the Court (whether it be a full trial of the merits or should another

Default Judgment be entered) he ordered that the Plaintiffs file and serve their Statement of Claim within 14 days from the date of the Ruling and the Defendant to file and serve its Defence within 14 days from the date on which the Plaintiffs serve their Statement of Claim and that the matter will proceed in the usual manner pursuant to the Rules. The 14 days' time frame ordered by the Court is provided by Order 18, Rule 1 of the RSC which states "Unless the Court gives leave to the contrary or a statement of claim is indorsed on the writ, the plaintiff must serve a statement of claim on the defendant or, if there are two or more defendants, on each defendant, and must do so either when the writ, or notice of the writ, is served on that defendant or at any time after service of the writ or notice but before the expiration of 14 days after that defendant enters an appearance." Order 18, Rule 2 of the RSC also states "(1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later." To my mind, the 14 days turnaround time for the filing and serving of the pleadings falls in line with the time for service as stipulated or provided for by the Rules of the Supreme Court. Moreover, it is not lost on this Court that the intention of Forbes, J was to ensure that this matter proceed in the usual manner as his penultimate paragraph of his Ruling was that he was of the view that this matter should be heard on the merits. I am not of the view that the Rules of the Supreme Court were to be invoked after the filing and serving of the Defence. The use of the language as found at Order 18, Rules 1 and 2 demonstrate to the Court that at all times the intention of the Learned Judge was for this matter to proceed pursuant to the Rules from the filing and serving of the Statement of Claim. Moreso, the usual manner following the filing and serving of the Statement of Claim and Defence would be the expiration period of 14 days after the service of the defence deeming the pleadings to be closed (Order 18, Rule 20(1)(b)). Following the close of the pleadings, under Order 31A, Rule 8(1) of the RSC, the Registrar will cause to be fixed a case management conference. Order 31A, Rule 8(2) provides that the Registrar will give the parties 14 days' notice of the time, date and place for the case management conference. Under this provision, the case management conference is conducted by a Judge and once directions are given during the case management conference the Judge by whom the parties appear is then seized of the matter. It is

important to make this distinction as the Plaintiffs argue that the Deputy Registrar (Saunders) did not have jurisdiction to hear the application to set aside the Judgment in Default of Defence as Section 6 of the Supreme Court Act applies. While Mr. Tynes, QC has submitted that Section 6 of the Supreme Court Act contains two mandatory requirements that (i) every proceeding and all business arising therefrom shall be heard and disposed of before a single judge so far as it is practicable and convenient and (ii) that all proceedings in an action subsequent to the hearing or trial must be taken before the Judge before whom the trial or hearing took place so far as it is practical and convenient, he has not provided the Court with any authority (outside of the interpretation of the word "shall) in support of this submission. To my mind, this submission fails in that the caveat to both "requirements" are that it is practical and convenient. Considering the history of this matter, following the Order made by Forbes, J, this matter was to proceed in the usual manner, i.e. exchange of pleadings, close of pleadings, case management, and directions to be given. It would have been at that juncture, case management, that a Judge would have been seized of the matter. Additionally, following the determination of the appeal, Forbes, J demitted office.

49. The Court also considered the provisions of Order 32, Rule 11 of the RSC which states:-

> "(1) The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a judge in chambers except in respect of the following matters and proceedings, that is to say —
>
> (a) matters relating to criminal proceedings;
>
> (b) matters relating to the liberty of the subject;
>
> (c) proceedings to which Order 57 applies and with respect to which a judge in chambers has jurisdiction; any other matter or proceeding which by any of these Rules is required to be heard only by a judge."

50. The above provision empowers a Registrar with the jurisdiction to transact all such business and exercise all such authority and jurisdiction under the Act or rules which may be transacted and exercised by a judge in chambers and gives exceptions. Mr. Tynes, QC has submitted that the above provision when considered against Section 6 of the Supreme Court Act precluded the Deputy Registrar from invoking her jurisdiction to hear the said application. It would follow then that if the Court were to accept that submission the same

Deputy Registrar did not have the jurisdiction to hear the Assessment of Damages and award the Certificate of Damages and as a result the same should also be set aside. Moreover, Order 32, Rule 12 provides a Registrar with the opportunity to refer any matter to a Judge which he/she thinks should be properly decided by a Judge and the Judge may either dispose of it or refer it back to the Registrar with directions he/she sees fit. Therefore, taking into consideration the history of this matter and all of the above factors I find that it would have been practicable and convenient for the Deputy Registrar to hear and determine the application to set aside the Judgment in Default. More so, I find that the learned Deputy Registrar had the jurisdiction to hear and determine the same.

51. In my consideration of the above, I also accept the submissions of Mr. Malone in opposition of the Plaintiffs submissions on the points highlighted above.
52. Therefore, in determining that the Deputy Registrar did indeed have jurisdiction to hear the application to set aside the Judgment in Default, the Court at this juncture will consider whether the Defendant has a Defence on the merits.

Whether Judgment in Default of Defence Ought to be Set Aside

53. Mr. Malone submits that the Bank has strong defences to all of the claims included in the Statement of Claim and denies that it is liable to the Plaintiffs for any of the alleged breaches. The Plaintiffs have already accepted that many of the alleged claims are spurious in reducing their claims from approximately $14mm to approximately $3.7mm at the Assessment of Damages (when the Bank had not even entered its Defence). A draft defence was submitted for consideration by the Deputy Registrar along with the Deal Affidavit which explained some of the background to the Bank's position. The Defence was filed immediately following the Deputy Registrar's decision on 25th October, 2019.
54. He further submits that the Plaintiffs have not entered any submissions in relation to the merits of the Defence. It is his submission that the merits of the Defence are very strong and it would be entirely contrary to the interests of justice for the Bank to be prevented from entering its defence. Doing so would permit the Plaintiffs to obtain a windfall judgment of over $6mm in circumstances where the Bank has good defences to all of the claims. Further, this windfall judgment would be obtained by the Plaintiffs in circumstances where there are issues of fraud pertaining to the Plaintiffs' claims.
55. The Court was invited to read the Bank's Defence to fully understand the strength of its position and the Deal Affidavit which sets out the agreements which are alleged to have

been breached and the Bank's defences to the alleged breaches. He submits that it is clear from the Bank's Defence and Deal Affidavit that the Bank has meritorious and, in fact, very strong defences to all of the claims by the Plaintiffs. This is the principle consideration for the court and strongly favours allowing the Bank to enter a defence. Therefore, he submits the Deputy Registrar recognized this principle and was correct to exercise her discretion to set aside the Judgment in Default of Defence.

56. On the issue as to the effect of the Defendant's delay, Mr. Malone submits that the Deputy Registrar was correct to conclude that, given the strengths of the Bank's defence, the delay (albeit the Bank resists the assertion of delay based on lack of knowledge) by the Bank in making the application did not mean the she should not exercise her discretion. As set out in detail in the Deal Affidavit, the Bank's position is that there were good reasons for the delay.

57. He submits unlike in *The Saudi Eagle* case, the Bank did not deliberately allow the Judgment in Default of Defence to be entered and there are good reasons which explain why the same occurred and why the Bank did not act immediately to set it aside. These include Chancellors' (previous Counsel for the bank) failure to inform the Bank that the Judgment in Default of Defence had been entered; around the time of the entering of the Default Judgment (October 23, 2017) there were significant changes in the Bank's legal department (persons who had knowledge of the proceedings); confusion following the transfer of the Plaintiffs' portfolios to a new entity, Bahamas Resolve Limited (**Resolve**), in August 2017 and uncertainty as to whether the Bank remained responsible for the litigation; the Bank was not s informed either by their attorneys or by the Plaintiffs that there was an Assessment of Damages Hearing listed or that an Assessment of Damages Hearing had been held; and a year passed between the Assessment of Damages Hearing and the Decision of Deputy Registrar Saunders. It is all of these events he submits that the Bank did not realise that the Judgment in Default of Defence had been entered until it was served with the Deputy Registrar's award of damages in or around the end of April 2019/ being of May, 2019.

58. In these circumstances, it is understandable that the Bank did not enter a Defence and it is understandable that the Judgment in Default of Defence was allowed to occur. Furthermore, it is understandable that the Bank did not make the current application until

May 2019. Having learnt of the Judgment in Default of Defence the Bank immediately applied to have it set aside.

59. Mr. Malone further submits that the failure to enter a Defence and the subsequent delay in applying to have the Judgment in Default of Defence set aside should not be held against the Bank in determining whether the court should exercise its discretion. These were innocent mistakes and if the Bank is not permitted relief from these mistakes, there is a real risk of injustice.

60. Also, he submits there is no evidence of the Bank ever having been served with the following documents all of which it is respectfully submitted should have been served and evidence of service produced in order to proceed in absentia. If any of these documents had been properly served on the Bank, the Plaintiffs' actions would have been brought to its attention and it would have been in a position to make the application to set aside the Defence DJ at an earlier date.

61. While Mr. Malone contends that the Deputy Registrar was correct to exercise her discretion to set aside the Judgment in Default of Defence having accepted that the same was entered regularly he submits that she was wrong to conclude that the same was entered regularly and that it ought to have been set aside *ex debito justitiae*.

62. He refers the Court to the Statement of Claim which included claims for (a) a declaration that the mortgage contract dated 22nd March 2010 is void; (b) re-vesting of unencumbered fee simple title absolute of Lot 44, Lucayan Beach Subdivision ("**Lot 44**") to the Third Plaintiff, Mercantile Land Resources Limited ("**MLR**"); and (c) written confirmation that neither the Second Plaintiff, Mr. Jennette Sr., or MLR are indebted to the Bank in respect of any credit facilities. He submits that pursuant to Order 19 of the RSC, a plaintiff is only entitled to enter default judgment against a defendant, without making an application to the court, if the claim includes only claims of a description mentioned in Order 19, Rules 2-5 of the RSC. However, where a claim includes a claim of a description not mentioned in Order 19, Rules 2-5 of the RSC, pursuant to Order 19 Rule 7 of the RSC, the plaintiff must make an application to the court and it is for the court to give such judgment as the plaintiff appears entitled to on his statement of claim. This is an important distinction between straightforward claims and those that are more complex. It also has an important practical effect which is that the defendant ought to receive notice of the application and is in a position to apply for relief immediately.

63. He asserts that the Plaintiffs did not expressly abandon these claims and ought to have applied to the court rather than entering the Judgment in Default of Defence and therefore the same was obtained irregularly and should be set aside *ex debito justitiae*. It is his submission that the Deputy Registrar was wrong to ignore this substantial procedural failing by the Plaintiffs.
64. Alternatively, as set out above, if the Judgment in Default of Defence was not entered pursuant to Order 19 of the RSC, there was no sanction contained in the Order of Forbes J. and the Plaintiffs had no right to enter default judgment without it being so specified in the Order. The Plaintiffs ought first to have applied for an unless order under Order 31A Rule 21(1) of the RSC.
65. He submits in response to the Plaintiffs' submission that the Bank cannot rely on irregularity because the ground of irregularity was not specified in the summons that Order 19 is a self-contained and compendious code and so the requirement of Order 2 rule 2 to specify the irregularity within the summons does not apply.
66. Without prejudice to the foregoing submission, if the Bank ought to have included the ground of irregularity within the summons itself, rather than within the Deal Affidavit, RSC Order 2 r.1(1) makes it clear that this does not nullify the application and if it was an irregularity the Plaintiffs have arguably waived the same by appearing and arguing the application on the merits.
67. In these circumstances, the Court has the power to cure the irregularity (if such one does exists which is not accepted), especially where it would be a technical irregularity such as this and has not caused any degree of prejudice to the Plaintiffs as they had notice of the grounds in the affidavit and submissions. Should it be required then leave is sought to include the grounds already set out in the affidavit and submissions in the summons.
68. It is therefore respectfully submitted that the Judgment in Default of Defence ought to be set aside on the ground that it was entered irregularly.
69. What is important to note is that any such argument in any event would only go to setting aside for irregularity which does not prevent or effect the validity of the court's power to set aside judgment in default if regularly entered. In practical terms it would only affect the issue of costs (i.e. if irregular, the Plaintiffs pays costs, if regular the Bank pays costs after hearing the parties as requested by the Bank).

70. Mr. Tynes, QC submits in response that the Defendant's lack of knowledge is not relevant. In particular he refers to paragraphs 19-21, 23, 24, 26, 32, 100 and 101 of the Deal Affidavit and submits that the complaint of lack of knowledge on the part of the Bank or its employees would be shallow, senseless and frivolous. He refers the Court to Order 63, Rule 1(i) of the RSC and submits that there can be no dispute that between June 1, 2016 and May 9, 2019 that Chancellors Chambers were required by law to be regarded as the Attorneys for the Defendant. He refers the Court to the exchange of correspondence between Counsel for the Plaintiffs and Chancellors Chambers found at pages 41 to 43 of the 3rd Affidavit of Indira Deal and submits that this exchange shows that Chancellors Chambers were fully aware of the events leading up to the filing of the Judgment in Default of Defence and the complaint of lack of knowledge on the part of the Bank is irrelevant and frivolous.

71. Mr. Tynes, QC contends that the directive of Forbes J. (Acting) permitted the Rules of the Supreme Court to be applied to the proceedings after the Defendant had filed its Defence and not before. However, he submits that if the Deputy Registrar was correct to determine that the Rules of the Supreme Court governed the continuation of the matter, the Defendant would face insurmountable hurdles by virtue of the requirements of Order 31A, Rule 25 of the RSC which provide for an application for relief from any sanction imposed for a failure to comply with any rule, order or direction. He refers the Court to the timeline following the filing of the Judgment in Default of Defence on October 23, 2017 which was the result of the Defendant failing to comply with the directive of the Judge to file and serve its Defence within 14 days after being served with the Plaintiff's Statement of Claim. The Defendant's application to set aside the Judgment in Default of Defence was not made until May 9, 2019 (more than 18 months later). The Order by Forbes, J. (Acting) dated September 22, 2017 was perfected by Chancellors Chambers on October 18, 2017 and the Defendant cannot state it was not aware of the terms of the Order. He submits that the Defendant was aware of the deadline for compliance with the directive contained in the Order and on October 19, 2017 Chancellors Chambers wrote to the Plaintiffs advising they had received the Statement of Claim and required additional time. Therefore, Mr. Tynes, QC contends that Chancellors Chambers acknowledged that they appreciated the urgent need to comply with the Judge's Order. He also refers to the said correspondence whereby Chancellors Chambers indicated that due to the Plaintiffs unwillingness to agree

to the extension, the Defendant will make the necessary application for the extension; the Plaintiffs in response advised that there was an outstanding Judgment in Default of Appearance advise three dates of availability for an Assessment of Damages hearing. He submits that for the next 18 months the Defendant did not seek an extension of time to comply with the Order of Forbes, J (Acting); they did not file a Defence however insufficient or incomplete and later seek to amend the same; they did absolutely nothing.

72. Therefore, he submits that the Defendant's application was fatally flawed by the Defendant's failure to act promptly as required by the provisions of Order 31A, Rule 25(1)(a) of the RSC. He refers the Court to two additional hurdles for the Defendant contained in Order 31A, Rule 25(2) which states that the Court only grants relief if satisfied that there is a good explanation for the failure and the defaulting party has generally complied with all other relevant rules, practice directions, orders and directions. It is his submission that the Affidavits filed in Support of the Defendant's application do not provide a "good explanation" for its failure to comply with the Order of Forbes, J (Acting). He contends that the Defendant's failure to comply with the Judge's directive to file and serve a Defence on the Plaintiffs was the second time the Defendant found itself in default proceedings.
73. Therefore, he submits that even if the Registrar had jurisdiction to hear the application before her she would be restrained from granting relief as a result of the Defendant's failure to satisfy the pre-conditions contained in Order 31A, Rule 25(2) of the RSC.

Analysis/Discussion

74. Accordingly Order 19, Rule 9 of the RSC provides "The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."
75. On an application to set aside a Default Judgement the Court is obligated to set aside the same when it has been irregularly (wrongly) obtained. However, where a Judgment has been regularly obtained the Court may choose to set it aside or vary it if (a) the defendant has a good and arguable defence with a real prospect of success (under the English CPR, in the words of Part 13.3(1)), the Defendant has a real prospect of successfully defending the claim) or (b) it appears to the court that there is some other good reason why - (i) the judgment should be set aside or varied; or (ii) the defendant should be allowed to defend the claim.

76. Mr. Tynes, QC submits that the provisions of Order 19, Rule 9 of the RSC were not available to the Defendant in its application to set aside the Judgment in Default of Defence as their failure to comply was a breach of the Judge's Order (Forbes, J.). Mr. Malone however submits that Order 19 is a self-contained and compendious code and as such the Defendant was entitled to bring its application pursuant to those provisions.
77. Additionally, as I understood the submissions of the Plaintiffs, the above submission was predicated on the Plaintiffs position that the Order given by Forbes, J was that the filing and serving of the Defence was not governed by the Rules of the Supreme Court and only after the filing and serving of the same then the Rules of the Supreme Court would be invoked and as such the Defendant's failure to do so means that the Defendant breached the Order of the Judge and any application to set aside should have been made under Order 31A, Rule 25(2) of the RSC that deals with relief from sanctions. Having determined in the above paragraphs that based on the language and the provisions of the Rules of the Supreme Court it was evident that Forbes, J intended for the Rules of the Supreme Court to continue to govern the matter following his Ruling, i.e. the filing and serving of the Statement of Claim within 14 days of the Ruling and the filing and serving of the Defence within 14 days of the service of the Statement of Claim. It is also noted that the Judgment in Default of Defence filed October 23, 2017 makes no reference to any subsequent breach of the Order of Forbes, J and merely states that "NO DEFENCE having been entered by or on behalf of the Defendant herein, it is hereby adjudged that the Defendant do pay the Plaintiffs' damages to be assessed together with interest accruing thereon and costs to be taxed if not otherwise agreed." Therefore, I find that in the circumstances, the Defendant was well within its right to apply pursuant to Order 19 of the RSC to set aside the Judgment in Default of Defence.
78. Mr. Malone has also submitted that the Judgment in Default of Defence was irregularly entered as the claims to which the Plaintiffs entered judgement for do not fall in the categories of claims found at Order 19, Rule 2-5 of the RSC and as such the Plaintiffs should have made an application pursuant to Order 19, Rule 7 of the RSC. Order 19, Rule 7(1) of the RSC states "(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service

of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim." The description of claims found at Rules 2-5 include claims for liquidated demand; claims for unliquidated damages; claims for detention of goods and claims for possession of land. The Plaintiffs in their Statement of Claim all seek some form of reimbursement of sums of money they allege were paid to the Defendant or sums to which the Plaintiffs allege they are entitled to and damages. It is also noted that the Second Plaintiff specifically claims a Declaration by the Court that the mortgage contract dated March 22, 2010 is void and with no legal effect; the re-vesting of unencumbered fee simple title absolute of Lot 44, Lucayan Beach Subdivision to the Third Plaintiff at the expense of the Defendant and written confirmation from the Defendant that neither the Second Plaintiff nor the Third Plaintiff is indebted to the Defendant in respect of any credit facilities.

79. The Judgment in Default of Defence does not specify or identify which Plaintiffs the Judgment is entered for, it merely provides that the Defendant do pay the Plaintiffs' damages to be assessed.

80. However, the application to set aside in any proceedings is pre-conditioned on not only a duty to apply under RSC O.2 r.2 (1) to set it aside "within a reasonable time" but also, to give a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be; and the defendant has a real prospect of successfully defending the claim. These principles have been restated in the Court of Appeal case of **Hanna & another v Lausten SCCiv App. No. 3 of 2014** where the cases of **Evans v Bartlam (supra)** and **The Saudi Eagle 1986 2 Lloyds Rep. 221** were applied. At paragraphs 82 to 90 of the Judgment, Crane-Scott JA stated:

> "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) 7 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]"

81. Considering the above, the Court has two options as it relates to this Default Judgment. If the Court accepts that the Default Judgment was irregularly entered, the Defendant's failure to specify such irregularity in its Summons to set aside poses a hurdle for the Defendant to climb. Mr. Malone has submitted that as Order 19 of the RSC is a self-contained and compendious provision the requirement to specify pursuant to Order 2, Rule 2 of the RSC does not apply. He further submits that Order 2, Rule 1(1) of the RSC makes it clear that it does not become a nullity and even so the Plaintiffs have waived such irregularity by appearing and arguing the merits. As I understand it, should the Court set aside the Default Judgment ex debito justitiae on the basis of it being irregular, the Court cannot impose any terms whatsoever on the Defendant (See Halsburys 4th Edition, Volume 37, Practice and Procedure, Page 296-298, Paragraph 403. Setting Aside Default Judgment, Footnote 13. White v Weston [1968] 2 QB 647).
82. While the Defendant has submitted that the Judgment was irregular, it has still provided submissions and an Affidavit on the merits of the Defence because should the Court determine that the Judgment itself was regularly entered then the Court is required to

review the Defendant's Affidavit of the merits which would show whether there is an arguable case or a triable issue. Further, the Defendant has however already filed its Defence.

83. The Plaintiffs' Statement of Claim is 21 pages long which I believe is a result of the inclusion of the six Plaintiffs individual claims against the Defendant. The Plaintiffs allege breach of contract and breach of fiduciary duty as against the Defendant. The Defendant following the Decision of Deputy Registrar Saunders to set aside the Judgment in Default of Defence filed its Defence which the Court takes notice of and the Deal Affidavit which sets out the agreements which are alleged to have been breached and the Bank's defences to the alleged breaches. It is on the strength of the filed Defence and the Affidavit evidence of the Deal Affidavit that the Court accepts that there is indeed a meritorious claim. However, how then does the Court reconcile the Defendant's failure to comply with the previous directions of the Court and its subsequent delay?

84. Mr. Tynes, QC has submitted that the Defendant's lack of knowledge as alleged in the Deal Affidavit whereby she complained that the Defendant and its employees or agents were not aware of the events leading up to the filing of the Judgment in Default of Defence on October 23, 2017 and the subsequent Assessment of Damages is not a sufficient excuse for the delay. Mr. Malone submitted that the Bank's intention was not to deliberately allow the Default Judgement to be entered and appraised the Court of the reasons for the delay. These reasons include the former attorneys requesting an extension to file which the Plaintiffs ignored/refused; a change in legal Counsel at the Bank; the former attorneys' failure to inform the Bank of the ongoing proceedings; the former attorneys of the Bank or the Plaintiffs failure to inform the Bank of the Assessment Hearing. He submitted that it was only after the Bank was served with the award of damages by the Deputy Registrar in April/May 2019 was the Bank made aware of the Judgment in Default however, following its receipt the Bank made an application in May 2019 to have it set aside. He further asserted that there was no evidence to support that the Bank was served with the documents relative to the Judgment in Default and the Assessment of Damages.

85. The Court must have some regard to the Defendant's excuses for the delay in not complying with the procedural rules. It is incumbent on a Plaintiff to move his/her case forward and should the Defendant fail to participate then the Plaintiff has numerous

avenues available to him/her. In these circumstances, the Plaintiffs sought to utilize one of those avenues in an attempt to obtain their Judgment. However, the Court does note that the change in Defence Counsel appears to have awoken the Bank to its continuous non-compliance (whether it was a result of ineffective Counsel or changes within the Defendant Bank). Following the service of the award of damages, Counsel for the Defendant immediately filed its application to set aside the Judgment in Default. To my mind, it is evident that the intention of the Defendant at this juncture is to defend the action. Considering the above, I find that although there have been a long delay on the part of the Defendant, the Court's obligation at this point is simply to consider whether the Defendant has an arguable defence with a prospect of success. I have set out here the relevant portions of the Defendant's Defence which disclose such an arguable defence with a prospect of success:

> "4. As to paragraph 2:
>
> a. It is admitted that the individuals referenced were formerly employees of the Bank; and
>
> b. It is admitted that the individuals were authorised to extend credit facilities; but
>
> c. There were strict limits on the authority of the individuals to extend credit facilities, as set out below.
>
> 5. The individuals had discretionary lending authority up to certain limits as set from time to time by the Bank, based on the individual's credit experience, knowledge, demonstrated ability to exercise sound credit judgment and the business environment.
>
> 6. The individuals were authorised to extend credit facilities within those limits as long as they complied with internal procedures, for example assessing whether the client was an acceptable credit risk and, in relevant circumstances, ensuring that the client was able to provide security and did provide security.
>
> 7. The provision of more than one loan within an individual's discretionary lending authority for the same purpose to multiple borrowers was expressly prohibited. This meant that an individual could not extend loans to relatives, partners, shareholders or associated companies to inject funds into an entity that had outstanding loans or contingent liabilities.

8. At all material times, no individual within the Bank had discretionary lending authority to extend credit facilities of more than $500,000. The only individual who was authorised to extend credit facilities up to the limit of $500,000 was Mr. Paul McWeeney, the (then) Managing Director.

9. For credit facilities above $500,000 the following approvals were required:

a. For all credit facilities between $500,000 and $1,000,000, the approval of the Managing Director and Chairman was required;

b. For all credit facilities between $1,000,000 and $1,500,000, the approval of the Executive Credit Committee was required;

c. For all credit facilities over $1,500,000, the approval of a majority of the Board Members was required.

10. In particular, Mr, John Sands had discretionary lending authority:

a. To extend secured consumer, commercial and industrial loans of $75,000;

b. To extend residential mortgage loans of $250,000; and

c. To extend unsecured loans of $10,000.

11. Paragraphs 3-8 are admitted. …

12. Mr. David Jennette Jr. ("Mr. Jennette Jr.") was at all material times the Vice President and Director of MLR, Seaport and Meridian Research Corp.

13. As to paragraph 9:

a. It is admitted that Kaydee, MLR, Seaport, Meridian Research Corp and Dominion are part of the MRC Limited Group (the "MRC Group");

b. The Plaintiffs are required to prove that they attempted to obtain financial support from non-banking sources in September 2009; and

c. While it is admitted that Seaport approached the Bank for funding, the Plaintiffs are required to prove that this was for or on behalf of the other Plaintiffs.

14. In December 2009, Mr. Jennette Jr. approached Mr. Sands and requested that Mr. Sands provide assistance to Seaport to meet its obligations. Without obtaining proper approval from the Bank and in excess of his authority, Mr. Sands permitted Meridian Research Corp and Seaport to significantly exceed their approved overdraft limits.

15. In January 2010, the Plaintiffs had the following credit facilities with the Bank (the "Credit Facilities"):

a. Meridian Research Corp had a loan with a current balance of $1,046,205 and an authorised overdraft of $150,000. Mr. Sands had permitted the authorised overdraft to be exceeded by $94,136 without obtaining the proper internal approvals;

b. Seaport had a loan with a current balance of $694,126, with an authorised overdraft of $150,000. Mr. Sands had permitted the authorised overdraft to be exceeded by $589,317 without the proper internal approvals.

16. In January 2010, the total lending from the Bank to the MRC Group was therefore $2,743,784, of which $683,453 was unauthorised lending obtained with the assistance of Mr Sands.

17. As to paragraph 10:

a. It is admitted that Mr. Jennette Jr. acted on behalf of Seaport;

b. It is admitted that Mr. Sands acted on behalf of the Bank in so far as such actions were authorised by the Bank;

c. It is denied that Mr. Sands represented to Seaport that he was vested with the requisite authority from the Bank to extend credit facilities to Seaport and its related companies in excess of his discretionary lending authority, set out above;

d. It is denied that Mr. Sands represented to Seaport that it was within his capacity to commit on behalf of the Bank to approve, grant and extend the necessary credit facilities to Seaport and its related companies in excess of his discretionary lending authority set out above;

e. It is denied that the Plaintiffs believed Mr. Sands' representations to be true and that they relied on such representations; and

f. It is denied that Mr. Sands' representations as to his authority are determinative of the extent of his authority.

18. The unauthorised overdrafts to Seaport and Meridian Research Corp were subsequently brought to the Board's attention and a review was instigated to determine whether Mr Sands had extended any other unauthorised credit facilities.

19. Given the level of collateral held by the Bank in relation to the Credit Facilities and the length of the relationship with the MRC Group, the Bank was willing to allow the companies within the MRC Group time to repay the amounts due, rather than immediately realising its security. However, the Bank was not

willing, in the circumstances, to provide additional credit to any or all of the companies within the MRC Group, without settlement of, or payment towards, the overdue sums.

20. Each of the Plaintiffs, or their representatives, knew through their long associations with the Bank that credit facilities could not be extended without complying with the necessary formalities and knew that the Bank would not authorise extending credit facilities to customers without a significant level of due diligence.

21. In February 2010, MLR obtained a bridging facility from Mr. Lester De Gregory, secured against a conveyance in escrow of Lot 21, Sea Grape Lane, Lucayan Beach. Lot 41 Lucayan Beach was also provided as security for a loan obtained from Mr. De Gregory.

22. On 16 March 2010, Seaport obtained a bridging facility from West Mall Developments Limited, secured against a conveyance in escrow of Lot 44, Sea Spray Lane, Lucayan Beach.

23. In or around March 2010, Mr. Jennette Jr. and Mr. Jennette Sr. again asked Mr. Sands to provide assistance to Seaport. Mr. Sands knew that the Bank would not approve extending a further credit facility to Seaport at this time. Mr. Sands also knew that he was expressly prohibited from extending credit facilities to individuals or companies related to Seaport. Notwithstanding this, Mr. Sands proposed to Mr Jennette Jr. and Mr. Jennette Sr. that:

a. Documents should be produced to give the impression that MLR had conveyed Lot No. 44 Lucayan Beach to Mr. Jennette Sr., even though it was being used as collateral for the bridging facility from West Mall Developments Limited;

b. Without authority to do so, and contrary to the prohibition on extending credit facilities to individuals related to entities with outstanding liabilities, Mr. Sands would waive the usual credit risk assessment and loan qualification requirements and personally approve a mortgage loan to Mr. Jennette Sr. up to the limit of his discretionary lending authority of $250,000;

c. Documents would be produced to give the appearance that Lot 44 had been mortgaged to the Bank as security for the loan provided to Mr. Jennette Sr.; and

d. Mr. Jennette Sr. would then transfer the $250,000 to Seaport so that Seaport could satisfy its debts.

24. The proposal made by Mr. Sands was a breach of his fiduciary duty to the Bank and was made without actual or apparent authority. It is averred that Mr. Jennette Jr. and Mr. Jennette Sr. knew that Mr. Sands was not authorised to enter such a transaction on behalf of the Bank, without undertaking the necessary credit risk assessments and without the facility being properly secured against Lot 44 Lucayan Beach.

25. Although Mr. Sands was not authorised to extend the credit facility to Mr. Jennette Sr. in these circumstances, the Bank ratified the agreement. In doing so, the Bank was entitled to enforce the terms of the agreement by requiring Mr. Jennette Sr. to provide security to the Bank in the form of a properly recorded mortgage over Lot 44.

26. This was not the only occasion on which Mr. Sands effected similar transactions, in the full knowledge and cooperation of Mr. Jennette Jr., in order that additional funds could be obtained from the Bank by companies within the MRC Group without proper internal approval. Other transactions included:

a. The purported sales of Lot 51B and Lot 53 Lucayan Beach to Mr. Curtis Pinder by Meridian Research Corp and the provision of a loan facility to Mr. Pinder which was for the ultimate benefit of the MRC Group;

b. The purported sale of Lot No. 37A Lucayan Beach by Seaport to Ms. Nichole Lightbourne and the provision of a loan facility to Ms. Lightbourne which was for the ultimate benefit of the MRC Group;

c. The purported sale of Lot No. 30A to Ms. Melissa Russell and the provision of a loan facility to Ms Russell which was for the ultimate benefit of the MRC Group; and

d. The purported sale of Lot No. 21 Lucayan Beach to Ms. Anjanette Bartlett by Seaport, notwithstanding that it was collateral for the bridging facility from Mr.

De Gregory to Seaport, and the provision of a loan facility to Ms. Bartlett which was for the ultimate benefit of the MRC Group.

27. In these circumstances, it is to be inferred that Mr. Jennette Jr. was fully aware of the actions of Mr. Sands and agreed to the actions of Mr. Sands. It is also to be inferred that Mr. Jennette Jr. knew that Mr. Sands was acting outside of his authority in providing these and other credit facilities to the Plaintiffs or individuals connected to the Plaintiffs. The Bank shall also refer to documents filed in other actions, particularly 2012/CLE/gen/FP00102, an action by the Bank against Ms. Lightbourne and 2014/CLE/gen/FP00062, an action by the Bank against Mr. Pinder.

28. As to paragraph 11:

a. The Plaintiffs are required to prove that Mr. Sands represented to Mr. Jennette Jr. in October 2010 that the Bank was willing to extend credit facilities to Seaport and that Mr. Sands represented to Mr. Jennette Jr. that the Bank would do so if $60,000 was deposited with the Bank;

b. It is denied that Mr. Sands was acting with actual or apparent authority on behalf of the Bank in making any such representations;

c. It is denied that Mr. Sands had actual or apparent authority to enter into a binding oral agreement on behalf of the Bank to extend credit facilities;

d. It is denied that Mr. Sands had actual or apparent authority to accept on behalf of the Bank a payment of $60,000 as consideration for the Bank extending credit facilities to Seaport;

e. It is averred that the Plaintiffs and/or their representatives were fully aware that a credit facility of $1,500,000 needed to be approved by the Executive Credit Committee, or a similar internal body, and that they knew that Mr. Sands did not have authority to enter into a binding oral agreement;

f. It is denied that any discussions between Mr. Sands and Mr. Jennette Jr. gave rise to an agreement which was legally binding on the Bank; and

g. It is denied that an oral agreement binding on the Bank arose as a result of the payment of $60,000.

29. Alternatively, it is averred that all of the terms necessary for creating legally binding relations had not been agreed and there was therefore no agreement

which was legally binding on the Bank. Inter alia, no terms had been agreed as to:

a. The term of the credit facility;

b. The rate of interest;

c. The security to be obtained; or

d. The fee to be paid.

30. The payment of $60,000 was applied to outstanding amounts due under the credit facilities provided to Meridian Research Corp and Seaport. $37,440.56 was applied to the loan provided to Meridian Research Corp and $22,559.44 was applied to the loan provided to Seaport. This was to the benefit of Seaport, and the MRC Group generally, as it reduced the outstanding loan balances and the amounts due in interest and penalties on those loan balances.

31. Paragraph 12 is denied for the reasons set out above.

32. As to paragraph 13, it is denied that the Bank holds $60,000 on resulting trust for Seaport.

33. On 11 February 2011, Dupuch & Turnquest & Co. ("Dupuch & Turnquest"), wrote to Mr. Sands on behalf of Seaport and MLR in relation to loan facilities extended by Mr. Sands to Ms. Bartlett and Seaport, secured by Lot 21 Lucayan Beach and Lot 41 Lucayan Beach. As detailed above, Lot 21 Lucayan Beach had purportedly been conveyed by MLR to Ms. Bartlett, despite the fact that it was being used as collateral for a separate bridging facility provided by Mr. De Gregory to Seaport.

34. Dupuch & Turnquest wrote that "we understand that your Bank has now indicated its preparedness to accept $385,000 in full settlement of the $425,000.00 owed with respect to the 'Seaport and Bartlette' Mortgages over the above-referenced properties. We further understand that in consideration of your receipt of the said sums the Bank will: (i) issue Deeds of Release with respect to the above-mentioned properties; and (ii) capitalize all existing Overdrafts and credit lines of the Companies together with any arrears of mortgage payments as at the date of receipt of the said $385,000."

35. On 14 February 2011, Mr. Sands responded to this letter stating that the Bank was willing to accept $385,000 in settlement of the mortgages referenced

above, that the Bank would issue deeds of release, and that the Bank would consolidate the remaining balance of $2,600,000.

36. Mr. Sands was not authorised by the Bank to:

a. Accept $385,000 in settlement of the sums owed under the two mortgage loans;

b. Issue deeds of release for the two properties; or

c. Agree to consolidate all of the outstanding balances into a single credit facility of $2,600,000.

37. Mr. Jennette Jr., acting on behalf of Seaport and MLR, knew that Mr. Sands had provided the credit facilities without the authority of the Bank and knew that Mr. Sands did not have authority to enter into an agreement to issue Deeds of Release or capitalize outstanding sums on behalf of the Bank.

38. The payment of $385,000 was applied by the Bank to sums overdue from Seaport, MLR, and the loan in the name of Bartlett (Lot 21 and 41):

a. $165,958.85 was applied to the loan provided to Ms. Bartlett;

b. $219,041.15 was transferred to a chequing account in the name of Seaport. Of this amount, $31,118.04 was applied to the credit facility provided to Seaport and $57,441.44 was applied to the credit facility provided to Meridian Research Corp.

39. This was to the benefit of Seaport, and the MRC Group generally, as it reduced the outstanding loan balances and the amounts due in interest and penalties on those loan balances.

40. As to paragraph 14:

a. For the reasons set out above, it is denied that Mr. Sands had actual or apparent authority to enter into a binding agreement on behalf of the Bank to issue Deeds of Release or to capitalize outstanding sums;

b. It is denied that a binding contract arose between the Bank and MLR and Seaport as a result of the payment of $385,000; c. It is denied that the Bank was obliged to make payment to Seaport of the sum of $2,600,000 or to capitalize the existing facilities debts owed to the Bank in that sum.

41. Alternatively, it is averred that all of the terms necessary for creating legally binding relations had not been agreed and there was therefore no agreement

which was legally binding on the Bank. Inter alia, no terms had been agreed as to:

a. The term of the credit facility;

b. The rate of interest;

c. The facilities to be consolidated; or

d. The fee to be paid.

42. Paragraph 15 is denied for the reasons set out above.

43. As to paragraph 16, it is denied that any monies are held on a resulting trust for Seaport.

44. On 23 March 2011, the Internal Audit Department of the Bank (the "IAD") received a tip that Lot 21 Lucayan Beach Subdivision had been conveyed to an individual other than Ms. Bartlett, even though it had been used as security for the loan to Ms. Bartlett.

45. The IAD undertook a review into the loans provided to the MRC Group and identified a number of issues including:

a. Lack of due diligence by Mr Sands;

b. Exposure for the Bank of approximately $3mm due to unperfected security documentation;

c. Inaccurate title search confirmations and incomplete registration of mortgage and conveyance documents;

d. Irregularities and inconsistencies in the financial information for customers related to the MRC Group provided in support of loan applications;

e. Instances where properties had been conveyed to more than one individual or financial institution;

f. Unauthorised overdrafts extended to customers with insufficient security; and

g. Suspicious transactions between parties related to the MRC Group, including short term pay out of mortgage facilities, high level of cash deposits and large cash withdrawals made to and from their accounts.

46. On the basis of their findings, the IAD recommended that, inter alia:

a. Mr Sands' credit authority ought to be suspended;

b. Further investigation should be undertaken into the source of funds for individuals related to the MRC Group; and

c. A further review should be undertaken to verify the beneficial ownership of Meridian Research Corp, and MLR.

47. Further and in relation to these matters, for these reasons the Defendant would not have found the parties credit worthy.

48. On 23 August 2011, the Bank wrote to Mr. Jennette Jr. stating that the Bank had "conditionally approved credit facilities aggregating B$3,399,000.00 to Seaport Construction Company Limited". This was in order to consolidate the following loans and or monies owed to the Bank:

a. A credit facility of Seaport in the sum of $1,355,866;

b. A credit facility of Meridian Research Corp in the sum of $1,425,876;

c. A credit facility of MLR in the sum of $137,376;

d. A credit facility of Mr. Jennette Sr. in the sum of $366,601; and

e. Legal and closing costs of $53,715.

49. The letter expressly stated that Seaport needed to fulfil certain obligations in order for the credit facilities to be approved. It also expressly stated that:

a. "All documentation must be in form and substance satisfactory to the Lender and/or its legal counsel prior to the advance of any funds under the facilities noted above.";

b. "This Agreement to Lend is contingent upon our prior verification/ratification of all information including but not limited to satisfactory credit references, provided by the Borrower during the application stage."

c. The facilities outlined herein are granted at the sole discretion of Bank of the Bahamas Limited (the Bank), and notwithstanding any previous correspondence to the contrary, all banking facilities, whether drawn or undrawn, are repayable on demand or subject to cancellation on the
Bank's discretion."

d. "The Lender has the right to demand full repayment of the above facilities in the event of a material adverse change in the financial condition of the Borrower."

50. The letter expressly stated that approval of the facility is conditional and that until the Bank was satisfied with the information provided by Seaport, it would be in the "application stage". As such, the letter was not intended to be legally binding on the Bank and any credit facility was contingent on the Bank being satisfied with the documentation provided to it by Seaport.

51. Alternatively, even if the letter was binding on the Bank, the Bank had a discretion to cancel the credit facility or demand its immediate repayment at any time.

52. Around the same time, the Bank engaged Graham, Thompson & Co to conduct a review of the loan transactions involving Rocelia Smith, Curtis Pinder, Nicole Lightbourne and Melissa Russell. All of these individuals were connected to the MRC Group and all of these individuals had purportedly purchased properties from the MRC Group.

53. The report by Graham Thompson & Co concluded that there was good reason to believe that these customers, with the assistance of Mr Sands, had induced the Bank to make loans on the basis of fraudulent information presented to the Bank.

54. On 8 September 2011, the report was sent by the Bank to the Commercial Crimes Unit of the Royal Bahamas Police Force with a request that the police investigate the matters contained therein and take any appropriate action.

55. On 12 September 2011, the Court made an Order that Seaport must not dispose of or deal with or diminish the value of any of their assets up the value of B$525,000. By the Order of the Court, Seaport was also placed in receivership and Mr. Philip Galanis was appointed to the role of Receiver and Manager. The Order restricting Seaport from dealing with its assets and placing it in receivership was made as a result of a claim by Mr. Damian Gomez in relation to fraudulent conveyances by Seaport to third parties similar in kind to those described above.

56. In light of the report by Graham Thompson & Co, the request to the Royal Bahamas Police Force to investigate transactions connected to Mr Jennette Jr and the MRC Group, and the receivership of Seaport, Seaport was no longer considered to be of sufficient creditworthiness for the Bank to consider capitalizing the existing debts of the MRC Group. Seaport failed to provide satisfactory proof of its

creditworthiness to the Bank and therefore the Bank determined not to approve its application for a credit facility or, alternatively, exercised its discretion to cancel the credit facility.

57. As to paragraph 17:

a. For the reasons set out above, it is denied that the letter of 23 August 2011 gave rise to a binding contract between the Bank and Seaport;

b. It is denied that the Bank was obliged to make payment to Seaport of the sum of $3,399,000 or to capitalize the existing facilities debts owed to the Bank in that sum; and

c. It is averred that it was in the Bank's discretion to withdraw the conditional offer contained in the letter in any circumstances, but in particular in light of Seaport being placed in receivership.

58. Paragraph 18 is denied.

59. On 23 January 2012, Mr. Jennette Jr. wrote to Ms. Annamae Burrows of the Bank proposing new arrangements for the Bank to consolidate the various loans of MLR, Seaport and Meridian Research Corp. In that letter, Mr. Jennette Jr. proposed providing additional security in the form of Assignments of Leases between Dominion and the Grand Bahama Port Authority. Mr. Jennette wrote that: "The company will, in the first instance, activate the 3year COLA clause in both Indentures of Lease and, in the second instance, formally enter into Assignments of Lease between the company, GBPA as Tenant and the bank. Despite the fact the Leases are fully repairing the company will continue to maintain the buildings and grounds at its sole expense. In concert with the bank the company will, in due course, attempt to negotiate extensions to the Leases beyond the initial 12-year term."

60. This proposal was consistent with previous agreements between MLR, Seaport, and Meridian Research Corp and the Bank for rents due to the companies to be paid directly to the Bank to meet the interest payments of the companies.

61. On 18 June 2012, the Bank agreed to consolidate the existing loan and overdraft of Meridian Research Corp, along with outstanding legal and closing costs in one credit facility in the sum of $1,552,545.

62. As part of the security to be obtained, Dominion was required to assign the Lease Agreements between Dominion and the Grand Bahama Port Authority for the "Southern Ridge Building" located at East Section 3, East Atlantic Drive, Freeport, Grand Bahama, along with the "IT Annex".

63. The Bank accepted the Assignment of the Lease Agreements as collateral on the basis set out by Mr. Jennette Jr. above, namely that Dominion would remain responsible for agreeing any escalation of rent, would remain responsible for the maintenance of the properties, and would fulfil generally the responsibilities of landlord.

64. In the alternative, it was agreed that Mr. Jennette Jr. would act as the Bank's agent for the purposes of collecting rent and ensuring that the terms of the Lease were complied with.

65. In the further alternative, even if the Bank was entitled to undertake the role of the Lessor under the Assignment, the Bank did not owe fiduciary duties to Dominion as a result of the Assignment.

66. The Lease Agreement for the Southern Ridge Building was for a term of 12 years starting from 1st December, 2004 and the Lease Agreement for the IT Annex was for a period of 8 years starting from 25 July 2008.

67. At the time of the assignment, the rents obtained for the properties were:

a. $6,000 per month for the Southern Ridge Building; and

b. $2,500 per month for the IT Annex.

68. It was a provision of the Lease Agreements that the rent would be reviewed every three years and increased or decreased in proportion to any increase or decrease in the United States Cost of Living Index. Neither of the parties had invoked the relevant clauses of the Lease Agreements and the rent accordingly remained at $6,000 per month and $2,500 per month respectively.

69. For the reasons set out above, at all times, Dominion remained responsible for ensuring that the Tenant complied with any obligations under the Leases. In accordance with it continuing to perform as the Lessor, Dominion has subsequently brought proceedings against the Grand Bahama Port Authority for alleged breaches of the Leases and a settlement was entered in 2017.

70. As to paragraph 20:

a. The first sentence is admitted;

b. It is denied that the Bank stood in the place of Dominion as a result of the agreement detailed above;

c. It is denied that the Bank was responsible for enforcing any of the provisions of the Lease or for ensuring compliance with any of the provisions of the Lease; and

d. In any event, it is denied that the Deed of Assignment created a fiduciary duty between the Bank and Dominion.

71. As to paragraph 21:

a. For the reasons set out above, it is denied that the Bank was responsible for invoking and enforcing the escalation clauses;

b. It is denied that the Bank owed a fiduciary duty to Dominion;

c. Even if the Bank were responsible for invoking and enforcing the escalation clauses, it is denied that the failure to invoke the escalation clause was a breach of any such duty."

86. I now conclude as follows, I find that the Affidavit of Indira Deal filed June 28, 2019 and filed Defence shows an arguable defence with a prospect of success and I am of the view that in the interest of justice this matter should be fully ventilated at trial.

Disposition

87. Therefore, after considering the sequence of events, hearing the submissions from Counsel, and accepting the submissions of Counsel for the Defendant and considering the relevant case law I hereby set aside the Judgement in Default of Defence. Additionally, as a result of setting aside the Judgment in Default of Defence, the Assessment Hearing and the Certificate of the Award of Damages is also hereby set aside.

88. The Court must also address the issue of whether the Judgment in Default was entered regularly or irregularly. As I read the Plaintiffs claim they seek a mixture of liquidated damages, unliquidated damages and include other diverse claims. As I understand Order 19, Rule 7 of the RSC the Plaintiffs ought to have sought the leave of the Court before entering Judgment in Default of Defence. I therefore accept the submissions of Mr. Malone on this point.

89. In the circumstances, as the Plaintiffs were not successful on their appeal, the usual costs order is therefore awarded, i.e. costs to follow the event. The costs of the appeal together with the costs below are to be paid by the Plaintiffs/Appellants to the Defendant/Respondent to be taxed if not agreed.
90. I also apologize for the delay in the delivery of this Decision, which was as due the Covid 19 pandemic and the resulting and numerous lockdowns, which created a backlog encompassing previously heard matters and matters displaced by the lockdowns.

This 16th day of February, 2022

Petra M. Hanna-Adderley
Justice