COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2020/CLE/gen/01226

BETWEEN

RBO ADVISORS COMPANY LIMITED
t/a RBO ADVISORS

Plaintiff

AND

VIDETTE LOBUE BELL

First Defendant

AND

JOHN BELL

Second Defendant

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

Appearances: **Sharanna Bodie for the Plaintiff**
Leon Bethell for the Defendants

Ruling Date: **December 14th 2022**

RULING

1. By Summons filed 8th February 2021, the Defendants seek that the judgment in default issued against them on 13th January 2021 **(the "Default Judgment")** be set aside and subsequently for a stay of the garnishee order made 25th January 2021 **(the "Garnishee Order")**. They also seek an injunction restraining the Plaintiff, its servants or agents from executing on them any other similar order made in the Supreme Court in addition to an order for both the Plaintiff and themselves to file their respective statements of claim.

2. During the hearing to set aside the Default Judgment, a stay of the garnishee application was ordered until the hearing and determination of this application. Additionally, the Defendants were given leave to amend their summons to reflect their reliance on Order 19 rule 9 of the Rules of the Supreme Court **("RSC")** instead of Order 49 rule 2 of the RSC.

3. The grounds relied on by the Defendants were set out in the said Summons and the Affidavit of Ashan Wilson was filed on 8th February 2021 in support of the application. The affidavit which also sums up the background of the substantive action. The Plaintiff was granted a judgment in default of defence on 13th January 2021 for failure by the Defendants to serve a Defence. Judgment was entered against the Defendants in the amount of $33,790.85.

4. Thereafter, a Garnishee Order to Show Cause was granted by Deputy Registrar Carol Misiewicz on 25th January 2021 and filed 27th January 2021 ordering all debts due or accruing from Scotiabank (Bahamas) Limited, the Garnishee to the Defendants be attached to settle the judgment in default in the amount of $33,790.85

5. The Defendants aver that the Plaintiff had filed a Specially Endorsed Writ against the Defendants seeking damages for unpaid legal fees in the amount of $33,790.85 (Thirty-three thousand seven hundred and ninety dollars and eighty five cents) **(the "Writ of Summons")**. The unpaid legal fees related to the Plaintiff's alleged representation to fulfill the Bahamas Road Traffic's Department requirement for licensing the First Defendant's motor vehicle and the appropriate fees surrounding the same.

6. The Defendants are American citizens but are ordinarily resident in Governors Harbour, Eleuthera, one of the islands of the Commonwealth of The Bahamas. They allege that they were out of the jurisdiction when the Plaintiff served its Writ of Summons by email. The Plaintiff should or ought to have known that they were out of the jurisdiction, and in addition, the Defendant's counsel had informed the Plaintiff of the same. Notwithstanding, on 15th January 2021, the Defendants' counsel filed a Defence and served it electronically on the Plaintiff and subsequently informed the Plaintiff that the Defendants were out of the jurisdiction and were expected to return in a few weeks.

7. On the afternoon of 15th January 2021, the Defendants' Counsel was served with the Plaintiff's application for Judgment in Default dated 13th January 2021 or thirteen days after the service of the Defendants Notice and Memorandum of Appearance which was filed 24th December 2020. The Defendants' Counsel informed the Plaintiff that a Defence had been filed and served on their chambers and that there were triable issues to be heard on the merits.

8. The application for a judgment in default of defence was allegedly filed prematurely and was granted despite the Defence having being filed and served within the specified period. It was an interlocutory judgment which was never made final.

9. With respect to the legal work performed by the Plaintiff on their behalf, the Defendants aver that the Plaintiff failed to answer the dispute and failed to file an application for taxation before the Registrar of the Supreme Court. Additionally, the Plaintiff failed to detail a bill of costs setting out the scope of work which would amount to $33,790.85 and that the work was inconsistent with the retainer instructions.

10. The Defendants subsequently filed the affidavits of Vidette Lobue Bell on 3rd March 2021 and 25th March 2021 in support of their application for the Default Judgment to be set aside **(the "Bell Affidavits")**. By the Bell Affidavits, the First Defendant avers that she intended to show that they have a good defence which has a real prospect of success. She explained that she and her husband, the Second Defendant, had made plans to relocate to The Bahamas from California, one of the states of the United States of America after her husband was diagnosed with significant cerebral atrophy and was predisposed to cognitive dysfunction and dementia in early 2019.

11. His doctors advised her that they should relocate to another jurisdiction so that he could enjoy peace, quietness and relaxation to cope with his conditions. Prior to this, they had not lived in their former home in Malibu, California since 2018 as they had to abandon their home due to a wildfire that swept through their neighborhood in November 2018. They stayed at the Island House Hotel in October 2019 for a number of weeks. During their stay, the Second Defendant obtained medical care from Doctors Hospital.

12. In November 2019 they were informed of the sale of Sand Castle House in Exuma which they sought to purchase but in fact leased first to assess its suitability. They met and became acquainted with the Plaintiff, Mr. Ryan Brown **("Mr. Brown")** who offered to provide them legal services despite their having already retained counsel. They initially retained the Plaintiff to assist them with a criminal matter and another civil matter. He later befriended them, visited their home and pried into their personal business.

13. Mr. Brown became aware of their desire to purchase a motor vehicle, a house and a lot of land on the island of Eleuthera and represented that he could provide his legal services at a much cheaper rate than the attorney they had originally retained. She felt pressured and agreed however, she never signed an engagement letter to pay the Plaintiff the sum of 3 ¼ or 4% of for any property transaction.

14. They then agreed for the Plaintiff to assist with the purchase of Lots #6 and #7 at Governor's Harbour, Eleuthera in the name of TGB Trust which is a trust company based in California and of which her husband is a beneficiary. Based on their prior communication with the Plaintiff, he should have known that her husband was not physically and mentally able to execute any legal and binding agreement without her assistance. However, the Plaintiff visited with her husband while she was not at home and engaged him to sign a retainer agreement without consulting her as her husband's guardian.

15. Once she became aware of the execution of the said retainer agreement, she contacted the Plaintiff and protested his actions. She later discovered that instead of paying a deposit in the name of TGB Trust as instructed by her and her husband, it was paid in her husband's name which she also protested as it was against her instructions. The Plaintiff also offered to assist her with registering her BMW motor vehicle. He informed her that it could not be registered in her name because she was a U.S. and not a Bahamian citizen. Therefore the vehicle needed to be and was registered in the Plaintiff's name.

16. She then sent him questions regarding the status of the work he had agreed to do. However, the Plaintiff became angry, failed to answer the questions as he claimed to have answered them already and stated that he would withdraw as counsel after her request to return their documents. The legal fees listed by the Plaintiff were outrageous and inconsistent with the inflated bill of costs provided to them for the little work that was done by him.

17. The First Defendant claims that she was forced to retain two additional attorneys to complete the property transactions and to receive the title deed and license plate from the Plaintiff. The Plaintiff had continued to send bills to her without doing any work and failed to explain his billing. Some of the communication the Plaintiff billed them for were forwarded emails containing jokes. She had advised her attorney that she was in Florida attending scheduled medical treatments when she was served with the Writ of Summons.

18. In response to the Defendants' application, the Plaintiff filed the detailed Affidavit of Ryan Brown on 16th March 2021 in which he avers that the First Defendant was referred to him on 7th December 2019 by Cynthia Brown who had reached out to his former co-worker to find an attorney to represent the First Defendant in the Magistrate Court against claims that she had assaulted the Second Defendant by biting off his ear.

19. On the same day he spoke to the First Defendant and they agreed that his company RBO Advisors, would act on her behalf subject to the execution of a retainer agreement and the payment of the necessary legal fees. Because of an issue with her wire transfer his office was not paid until 13th December 2019. Nonetheless, on 10th December 2019 he travelled to Exuma and represented her in the Magistrate Court and also learnt that two civil matters were filed against her as well.

20. The First Defendant was granted bail however, because she was unable to facilitate the wire transfer at the time, he paid for her bail with the understanding that she would reimburse him. Upon her release on bail he was able to contact the landlord to have the Defendants re-enter the rental unit in which they were staying in order for them to retrieve their personal items. The landlord had initially assisted police officers with escorting her from the premises following the incident with the Second Defendant.

21. The First Defendant acted in an unruly manner and as a result he had to enter the rental unit to obtain her belongings which included her passport and one thousand dollars. She offered the funds to him but he turned it down and informed her that he would issue an invoice for his services rendered and that payment could be made thereafter.

22. When he returned to Nassau he worked throughout the night to provide her with an opinion on what course of action to take against the landlord. He advised her to file action No: 2019/CLE/gen/01781 which was filed on 11th December 2019. The retainer still had not been deposited to his firm's account. The First Defendant connected him with an account manager at Deltec Bank who confirmed that an account was being opened however, it had not been funded yet.

23. Based on his commitment to the Court, he attended the Magistrate Court on 12th December 2019 for the First Defendant's civil matters. However, they were dismissed by the Magistrate Court as the matters were within the jurisdiction of the Supreme Court and the criminal matter was adjourned. During this time the First Defendant did not know where the Second Defendant was. They later learnt that the Second Defendant had asked the landlord from the rental unit to purchase a ticket for him to return to the United States.

24. The First Defendant had informed him that the Second Defendant attacked her because of his dementia and that he was out on bail due to domestic violence charges in California. She had two letters from doctors in the United States confirming the diagnosis. To confirm the veracity of her story he had requested proof which led to the First Defendant providing him with an email informing one of her US attorneys that the Second Defendant was out on bail and that he needed to be in a controlled living situation. Attached to the email was a letter from a doctor located in California which purportedly indicated that the Second Defendant had dementia. He thought that the letter raised many red flags which caused him to ask her for another letter however, he was not provided with one.

25. On 10th December 2019, the First Defendant introduced him to her US attorneys, who upon being asked about the Second Defendant's diagnosis, informed him that the Second Defendant had sufficient mental capacity to make decisions for himself and that he did not have dementia.

26. Thereafter, on or before 27th December 2019, one of the US attorneys sent him a Court decision dated 6th November 2019 which found that the Second Defendant had the mental capacity to execute the agreement in question. Additionally, Dr. Samuel Berkman, the same doctor who had sent the letter stating that the Second Defendant had dementia, had no certificates for training in psychology, neuropsychology, psychiatry and geriatrics, or of determining capacity issues in the elderly.

27. After he read the case he informed the First Defendant that her instructions on the Second Defendant were misleading and that he had to evaluate her defence in the magistrate court matter. In late December he met with the Second Defendant and found that he was the opposite of what the First Defendant had depicted him to be. The Second Defendant asked him to do what he could to have the charges against his wife withdrawn as it was a domestic matter.

28. On 27th January 2020, after the Defendants informed him that they were interested in purchasing a property in The Bahamas, the First Defendant placed an offer on two lots on Paradise Island. Her US attorneys had advised her to purchase one home. The First Defendant had requested a financial breakdown of the transaction which he provided on 11th February 2020 inclusive of the legal fees of three percent to complete the transaction.

29. The First Defendant asked him to visit the property on numerous occasions and to engage an engineer to obtain a structural report on the houses situate thereon. She later advised him that she and the Second Defendant were having second thoughts about the purchase and asked him to cancel the transaction which he did. Between February 2020 and March 2020 the Defendants placed offers on two other properties but again backed out before the agreements could be signed which was a frustration to everyone involved.

30. The Defendants also faced a potential lawsuit as the First Defendant refused to pay the appraisers, LX Luxury Realty Group, for work performed on both houses despite his

instructions to do so. It was at this juncture that he thought it was necessary to have the Second Defendant execute a retainer with the Plaintiff. On or about 14th April 2020 the First Defendant requested his legal representation to put in the offers for two properties in Eleuthera, hereinafter referred to as Vacant Lot 6 and Occupied Lot 7. She acknowledged that she had been blackballed by realtors due to her previous history with land transactions.

31. He informed her that he would act on their behalf if she was serious and provided that she gave him more information about them. After providing their offers to the Vendors on 21st April 2020, they were accepted. The purchase price for Vacant Lot 6 was agreed at one hundred thousand dollars and for Occupied Lot 7 it was agreed to be six hundred and sixty two thousand one hundred dollars. Closing for both properties was set to take place sixty days from the date of the executed agreement for sale.

32. On 27th April 2020 he received a troubling call from the First Defendant who told him that she had instructed Scotia Bank to wire $2.1 million dollars to his office account. He insisted that she asked the account manager to cancel the wire instructions and threatened to call the account manager himself if she did not. He immediately objected as he perceived it to be an attempt to commit money laundering as that money belonged to the Toni Grant Bell Trust of which the Second Defendant was a trustee **(the "TGB Trust")**.

33. The TGB Trust was executed by the Second Defendant's deceased first wife for the benefit of the Second Defendant and their children. The First Defendant insisted that he draw up agreements to represent that she was completing additional land transactions which would amount to $2.1 million as "lawyers did it all the time".

34. He, along with the Defendants US attorneys had had extensive conversations with the First Defendant about taking any action that would result in the dissipation of the trust assets. Every few months they would receive suggestions from the First Defendant about the assets and they had determined how best they would manage her. The First Defendant even approached him directly hoping that he would give contrary advice. The Second Defendant never gave him any instruction to suggest that he was interested in using the trust funds in a manner inconsistent with the terms of the trust.

35. The First Defendant was of the opinion that the Second Defendant had been defrauded into funding the trust and on one occasion, 26th December 2019, she had sent him an email setting out the history behind the trust and her desire to purchase the cheapest property which she could find in cash and selling it to the trust for two millions dollars to cash out. On another occasion, 25th January 2020 she had sent instructions to purchase a home with the trust funds in her name only and not in the joint names of she and the Second Defendant.

36. She also suggested putting the home in the name of a trust she referred to as TGB Trust, which was a trust account which she intended to open in the Cook Islands **(the "Cook Island TGB Trust")** which was separate from the aforesaid Toni Grant Bell Trust. The First Defendant would have been the only beneficiary under the Cook Island

TGB Trust. Again on 5th March 2020 the First Defendant told him that she wished to withdraw money from her Deltec account so that it would not be tracked. He informed her that that he could not advise her on that and that she should act in good faith.

37. Based on his breakdown of the fees associated with the sales transaction, the First Defendant wired the sum of seventy six thousand two hundred and sixty dollars to his client account on 13th May 2020. On or about 11th May 2020 he informed the First Defendant that he would be attending their rental unit on West Bay Street to have them execute the agreement for sale. However, she informed him that she was out with a gentleman named Mike who was her new person of interest and that the Second Defendant would be home. The First Defendant called her housekeeper to let him into the home. He spoke to the Second Defendant about the transaction and explained the next steps.

38. The Second Defendant read over the agreement for sale for the Occupied Lot 7 and asked many questions before signing and expressed his excitement about moving as he was eager to relocate to Eleuthera to live on the beach. He later emailed the agreement for sale for Vacant Lot 6 to the First Defendant for her signature. The Defendants never approached him about visiting their unit. They had invited him to lunch and dinner on a number of occasions. With the exception of two invitations concerning work he declined. The First Defendant never cautioned him about visiting the Second Defendant.

39. On 14th May 2020 he personally delivered the deposits and both agreements for sale to the Vendor. The Vendor's counsel and he got to work immediately. On 25th May 2020 they began settling the terms of the conveyance to ensure that they would be sent to Spain where the Vendors resided and returned in June 2020. On 26th May 2020 he engaged Computitle to conduct a title search for both properties. On 5th June 2020 he again sent the Defendants an email of the breakdown of fees for each property.

40. He requested the balance of the purchase price in US dollars and the sum of one hundred sixty four thousand and eleven dollars and ninety seven cents in Bahamian dollars which sum was to cover legal and government fees. The local fees could be paid in Bahamian dollars which would reduce the foreign exchange fees and would translate into savings for the Defendants who did not object.

41. On 10th June 2020 the conveyances returned from Spain executed by the Vendors. The week prior the First Defendant had copied him on emails to her US attorneys. She had indicated that a bank had frozen her assets in the US and another US bank had refused to take her instructions to cash a cheque without receiving instructions from the Second Defendant, *inter alia*. She also complained about not being able to close the purchase sooner. He also noticed the way she berated her US attorneys and informed her that the relationship between client and attorney should be one of respect and that the moment she did not respect him he would no longer represent her.

42. Thereafter, during a phone call between him and the First Defendant she revealed that she had very little money left and suggested that she was going broke because he allowed her to pay for Vacant Lot 6 when the TBG Trust could have paid for it. He made

it clear to her that he nor his firm would be a part of any scheme to steal money from the said trust. He found it to be a breach of the agreement between the Plaintiff and the First Defendant and informed her that he would need the weekend to re-evaluate their relationship. That weekend she sent several emails and made numerous calls to him throughout the day and the night.

43. By letter dated 15th June 2020 he terminated the relationship with the Plaintiff and the First Defendant and enclosed his final invoices; an invoice for the non-land matters and an invoice for Vacant Lot 6 and Occupied Lot 7. He then, *inter alia*, engaged the services of police officer Christopher Whyms to deliver the letter. The First Defendant accepted some of the enclosures and signed the duplicate of the said letter. The Defendants now live in the house in Eleuthera along with Mike. The First Defendant now owns Occupied Lot 7 however, they have refused to pay the legal fees for the transaction.

44. At no time during their legal relationship did the First Defendant express any misgiving about the Plaintiff's legal representation of her. The Plaintiff would normally prepare a detailed invoice and send to clients for review and for any questions. This same process was applied to the First Defendant, who approved the invoices sent to her.

45. After he terminated their relationship, the First Defendant appointed Mr. Julian Smith to accept the files and negotiate the invoices. He and Mr. Smith reviewed the last three invoices and Mr. Smith agreed to the invoice relative to the two property transactions in full. The First Defendant satisfied payment in full on 18th June 2020. He also instructed her to pay for the property transactions and she did not. He denied that he had over billed the Defendants and added that he had decreased previous invoices.

46. On 26th January 2020 the First Defendant informed him of a 2017 BMW X5 Hybrid that she wished to purchase from a car dealership in Florida. She questioned him about import tax, insurance and licensing requirements and informed him that she had reached out to the Road Traffic Department to obtain a Bahamian licence. On or before 4th March 2020 the First Defendant informed him that the vehicle had arrived.

47. The First Defendant and Mike arranged third party insurance and registration for the vehicle. She later informed him that the broker had not cleared the vehicle and requested assistance. He engaged Island Maritime Services Limited to assist. The First Defendant then informed him that she needed his assistance with physically obtaining the vehicle because she did not want to drive it to the insurance company or have Mike involved. He deduced then that they were having problems again.

48. Upon her request to assist with registering the vehicle, he contacted the Road Traffic Department and was informed that because the First Defendant did not have a national insurance card, residency card or Bahamian driver's licence the vehicle could not be registered. James Joseph of Ultimate Messenger Service, who provided the service of licensing vehicles, confirmed the same. At no time did he defraud the First Defendant. On 18th June 2020 he engaged the services of Police Constable Christopher Whyms to deliver the Certificate of Title for the vehicle to her after he had terminated their relationship.

49. On 16th December 2020 he contacted Officer 1774 McNeil Johnson **("Officer Johnson")** to seek his assistance with serving the Writ of Summons. He advised him that he would send a package containing the Writ of Summons, a confirmation of service for the Defendants, a picture of their residence, a copy of their passport photographs and the First Defendant's telephone number. Officer Johnson advised him that on 17th December 2020 he called the First Defendant and they agreed to meet at the house first thing the following day.

50. Officer Johnson further advised him that he did meet with the Defendants as set out in his Affidavit of Service filed 25th January 2021. Officer Johnson called him immediately after effecting service upon the Defendants and sent him pictures via Whatsapp of the confirmation of service signed by the Defendants. There was no dispute that it was their signatures as he had seen them sign several documents.

51. He never emailed the Writ of Summons to the First Defendant or her Counsel. Prior to copying the First Defendant in an email addressed to her Counsel, Mr. Leon Bethell **("Mr. Bethell")** on 24th December 2020, he had not sent an email to her since June 2020. There was no information to contradict Officer Johnson's evidence against the Defendants' claims that he should have known they were out of the jurisdiction.

52. Only after the Default Judgment was served on 15th January 2021 did he speak to Mr. Leon Bethell for the first time about the matter. They never had a conversation about the need to seek instructions to file a Defence. It would have been an unnecessary subject of conversation on 15th January 2021 because the judgment was entered on 13th January 2021. He informed Mr. Bethell that a cause list search could have been conducted to determine whether judgment had been entered before he filed the Defence and that it was irregular.

53. On a later call, he suggested to Mr. Bethell that he could have messaged him before the time for filing the Defence had expired to request more time. Mr. Bethell advised that the Defendants were out of the jurisdiction during the call however, he did so in the context that he needed to have a stern conversation with the First Defendant based on the information which he disclosed to him during the call. He undertook to provide him with the information in support of the disclosures.

54. Since the calls between himself and Mr. Bethell, he indicated that he did not believe there was a defence but that he had to do something since he was fully retained. In response he reminded him of the Code of Ethics which spoke about proceeding with a defence that Counsel did not believe would succeed.

SUBMISSIONS

Defendants' Submissions

55. The Defendants submit that the Default Judgment be set aside on the ground that they have a good defence on the merits to defend the action and that the Default Judgment

was obtained irregularly. They rely on **Order 19 rule 9 of the Rules of the Supreme Court** in support of their application to set aside the Default Judgment. Order 19 rule 9 states:- **"The court may on such terms as it thinks just set aside or vary any judgment entered in pursuance of this order."**

56. If the judgment was regular, the Court in **Miller v City Services Ltd [2008] 1 BHS J No. 4** held that:-

> **"If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit on the merits i.e. an affidavit stating facts showing a defence on the merits".**

57. Order 19 rule 9 of the RSC confers a discretionary power on the Court to set aside any irregularly entered judgment in default. In **L.T. Investments Inc. v. Harbour Lobster & Fish Company Ltd 2012/CLE/gen/FP/00228** Evans J reiterated:-

> **"It is common ground that the Court has an unfettered jurisdiction to set aside even a regularly entered judgment. However, when a judgment is regular, in the exercise of its discretion, the court is aided by certain principles as set in the case of Evans v. Bartlam [1937] A.C. 473 and Alphine Bulk Transport v. Saud Eagle [1986] 2 Lloyds Rep. 221."**

58. Crane-Scott JA in **Hanna and another v Lausten [2018] 1 BHS J. No. 172** also noted that the starting point for any discussion on the law and practice relating to the discretionary power of a judge to set aside a judgment in default of defence began with Evans v Bartlam (supra) which laid down the following principles:-

> **(i) "A judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;**
> **(ii) The Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms "unconditional" and the Court should not "lay down rigid rules which deprive it of jurisdiction (per Lord Alkin at p. 486);**
> **(iii) The purpose of this discretionary power is to avoid the injustice which might be cause if judgment followed automatically on default;**
> **(iv) The primary consideration is whether the defendant "has merits to which the Court should pay heed", not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown "merits" the Court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication (per Lord Wright at p. 489 and per Lord Russell of Killowen at p. 482);**
> **(v) As a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence (per Lord Russell of Killowen at p. 482)."**

59. In **Saudi Eagle [1986] 2 Lloyds Rep 221** the principle of the primary consideration being whether the defendant has merits to which the court should pay heed was considered by Sir Roger Orman J:-

> **".....it is important in our judgment to be clear what the "primary consideration really means. In the course of his argument Mr. Clarke, Q.C. used the phrase "an arguable case" and it, or an equivalent occurs in some of the reported cases....This phrase is commonly used in relation to R.S.C. O. 14, to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their Lordships in Evans v. Bartlam. All of them clearly contemplated that a defendant who is asking the Court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success...Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertions that there is no defence) were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff. 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."**

60. The Defendants maintain that they complied with the RSC with respect to serving their defence on the Plaintiff however, they were not afforded the opportunity to mount the same or be heard on their claim which should be heard on the merits. They submit that the Default Judgment is irregular and entered prematurely before the end of time allowed for filing the defence. Further, that they filed their defence within the allotted time.

61. The Defendants submit that they have an arguable defence as evidenced in the First Defendants affidavits which details the Plaintiff's failure to carry out their instructions to enter a bid for the lots in Eleuthera in the name of TGB Trust and not in the Second Defendant's name. Additionally, his failure to answer the Defendants on the status of his legal work and to satisfy the Defendants in relation to the alleged outrageous legal fees.

62. They deny that they are indebted to the Plaintiff for the amount of legal costs claimed as the Plaintiff communicated with the First Defendant as a friend on numerous occasions; which he in turn billed them for. There was a conflict with respect to what the Plaintiff was retained to carry out for them and he had also inflated his legal fees.

Plaintiff's Submissions

63. In addition to the Plaintiff's contention that the Default Judgment should not be set aside, he submits that the Affidavit of Vidette Lobue Bell filed 3rd March 2021 is inadmissible as it was noted to be sworn before a Notary Public in Miami, Florida, USA on 2nd March 2021 and it offends **Order 41 rule 11 of the RSC** which states:-

> **"A document purporting to have affixed or impressed thereon or subscribed thereto the seal or signature of a court, judge, notary public or person having authority to administer oaths in a part of the Commonwealth outside The Bahamas in testimony of an affidavit being taken before it or him shall be admitted in**

evidence without proof of the seal or signature being the seal or signature of that court, judge, notary public or person:
Provided that no such document signed, sealed, executed or sworn outside The Bahamas or other part of the Commonwealth shall be admitted in evidence unless the seal or signature is proved by a certificate of the person having authority to give such certificate, which shall be conclusive in all respects, if it states that the person signing the certificate has such authority."

64. It cannot be disputed that it was sworn outside of The Bahamas and that the seal or signature of the Notary was not provided by an apostille certificate of the person having authority to give such certificate.

65. The Plaintiff prayed that the Defendants' application be dismissed in the absence of a meritorious defence with a good prospect of succeeding at trial. Also relying on **Hanna v. Lausten (supra)**, the Plaintiff set out the following portion of Crane-Scott JA's judgment:-

> **"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 Evans v. Bartlam to mean.....At page 223 the Court of Appeal interpreted all of the judgments of the House of Lords in Evans 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"**

66. In **McGowan v The CSB Management Company Ltd [2019] 1 BHS J. No 47** Winder J applied Hanna v Lausten when he determined that he would not set aside a default judgment based on the fact that the defendant had not shown a meritorious defence with a good prospect of success. He also struck out the defence that was entered and stated:-

> **"The requirement to show a meritorious defence with a real prospect of success was recently examined and accepted by the Court of Appeal in The Bahamas in Hanna and another v Lausten [2018] 1 BHS J. No. 172 where it was observed as follows:**
> **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.]

...

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."

...

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."

67. The absence of an Affidavit of Merit in support of an application to set aside a judgment in default is likely fatal to an application. In **Ramkissoon v Olds Discount Ltd (1961) 4 WIR 73**, McShine CJ stated:-

> "The case of Farden v Ritcher [1889] 23 QBD 124 is sufficient authority for holding that before a judgment which has been regularly obtained and propery signed could be set aside, an affidavit of merit was required as an almost inflexible role and when such an application to set aside the judgement is not this support it ought not to be granted except for some very sufficient reason."

68. McShine CJcontinued:-

> "In the absence of an affidavit showing that he has a good defence on the merits the judgment against him ought not to be set aside. This is, we think, the effect of the decision of the Court of Appeal in *Watt v Barnett*.....the defendant may in a separate affidavit or conjointly with his solicitor show such merit as would enable a court or judge to set aside the judgment, and in the same affidavit disclose such excuse as may be advanced for his failure to follow any of the rules of procedure. In his affidavit the solicitor does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence. Since the facts related in the statement of defence have not been sworn to by anyone, consequently there was not, in our view, any affidavit of merit before the judge nor before us.

69. The findings of McShine CJ are consistent with Practice Direction 1 of 1995 which provides that Counsel should not swear an affidavit in contentious matters.

70. The Defendants have not provided the Court with any evidence which would assist the Court in forming a provisional view of the probable outcome if the judgment were to be set aside and the defence developed as the "arguable" defence does not carry any degree of conviction. The affidavit filed by Ashan Wilson did not constitute an affidavit of merit and in any event the information set out is inadmissible as it constitutes hearsay. Additionally, they do not set out a meritorious defence. There is no evidence which suggests that the work was not done by the Plaintiff and the Defendants were not the legal owners of the properties referred to herein.

DECISION

71. The Defendants have invoked the Court's jurisdiction to set aside the judgment entered in default of the filing of a defence pursuant to **Order 19 rule 9 of the RSC**. The jurisdiction is dependent on several factors and was considered and discussed at great length in **Hanna and another v. Lausten [2018] 1 BHS H. No. 172**.

72. In **BH RIU Hotels Ltd. v Barbara Johnson 2019/CLE/gen/00436** this Court considered and adopted the findings of Crane-Scott JA in **Hanna and another v. Lausten** in relation to the Court's jurisdiction to set aside a judgment in default of defence. It was held that where a default judgment was obtained irregularly, the applicant must be able to convince the Court that it should be set aside once the application was made within a reasonable time, no fresh step was taken and if there is a meritorious defence.

73. Order 18 rule 2 of the RSC provides for a defendant who has entered an appearance and intends to defend an action, to serve a defence on the plaintiff before the expiration of fourteen days after the time limited for appearing or after the statement of claim is served on him, whichever is the latter.

74. The Writ of Summons was filed 11th December 2020. Based on the Affidavit of Service sworn by Officer Johnson and filed 25th January 2021, it was personally served on the Defendants on 18th December 2020. Following service of the Writ of Summons, Counsel for the Defendants filed both the Notice and Memorandum of Appearance on 24th December 2020. A Notice of Appointment of Attorney was also filed that day **(collectively referred to as "The Notices")**. Therefore, the Defendants fourteen day timeframe ended on the 7th January 2021. The Defence and Counterclaim was filed 15th January 2021. The Judgment in Default was issued January 13th, 2021.

75. It is important to note that a defence must not only be filed but served on a plaintiff either fourteen days after an appearance has been entered or the statement of claim is served. Order 18 rule 2 (1) specifically states:-

> **"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."**

76. Though not raised by any of the parties, it is important to note that the filing deadlines fell within the Christmas holidays. The RSC and the Interpretation of General Clauses Act

addresses when a holiday or a weekend should be excluded in the calculation of a period specified by the rules.

77. **Order 3 rule 4 of the RSC** states:-

> **"(4) Where the act is required to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date."**

78. **Order 3 rule 5 of the RSC** states:-

> **"(5) Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include a Saturday, Sunday or public holiday, Christmas Day or Good Friday, that day shall be excluded. In this paragraph "public holiday" means any day declared to be a public holiday under the Public Holidays Act."**

79. **Section 69 of the Interpretation and General Clauses Act** provides:-

> **"In computing time for the purposes of any written law — (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, no Sunday or public holiday shall be reckoned in the computation of that time."**

80. The Defendants had fourteen days to file and serve their Defence. Therefore, according to Order 3 rule 5 of the RSC and Section 69 of the Interpretation and General Clauses Act weekends and holidays were included in the fourteen day count. This meant that the Defendants' defence should have been filed and served by the 7th January 2021. However, it was not filed until the 15th January 2021 and there is no evidence of when the Notices or the Defence were actually served.

81. To avoid such conundrums, the RSC mandate the filing of an affidavit of service to prove service of documents served on any party. **Order 61 rule 8 of the RSC** states: -

> **"An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, where it was served and how."**

82. There are no affidavits of service filed by the Defendants. In all of the circumstances, it cannot be said that the Default Judgment was issued irregularly. The filing date of the Judgment in Default was after the deadline for filing of the Defence and before the Defence was actually filed. The Judgment was not irregularly entered.

83. The Defendants sought a stay of the garnishee order which was also made against them. This application for a stay however, was included in the application to set aside the Default Judgment. In **Hanna and another v Lausten**, the appellate court found that the appellant had taken a fresh step by filing an application to stay the writ of possession made against him instead of first applying to set aside the default judgment. In this case, because the Defendants sought to have the stay of the garnishee order and the Default Judgment set aside heard together, I find that no fresh step was taken by them.

84. Finally, it must be determined whether the Defence filed by the Defendants is a meritorious one, worthy of invoking the Court's jurisdiction to order the Default Judgment to be set aside. The Plaintiff seeks damages from the Defendants' for unpaid legal fees after providing legal services to them. In their Defence they disputed agreeing to a certain amount for legal fees in a real estate transaction and claimed that the work done

by the Plaintiff was as a result of his forcing himself to act for them in all legal matters and that he billed them for miscellaneous tasks which were not considered legal work. The First Defendant claimed that the Second Defendant did not have the requisite mental capacity to enter into any legally binding agreement and that the Plaintiff had become angry towards them.

85. In the Plaintiff's affidavit of Ryan Brown filed in objection to this application, Mr. Brown, set out information and evidence disputing the Defendants' claims herein and ultimately the claims made in the Defendants' defence. He provided evidence that the Second Defendant did not suffer from any mental illness which was supported by a U.S. based court decision stating same, he provided evidence that he emailed the Defendants with a breakdown of his legal fees for the property transactions and he also provided messages which the First Defendant had sent him seeking to commit certain offences by transferring money outside the U.S. jurisdiction.

86. I am satisfied that if the matter were to proceed to trial the Defendants would not be successful in their defence against the Plaintiff. Importantly, the Defence holds no merit. While it is true that the rules are not so rigid that a court cannot correct any irregularity with its process, it must ensure that justice is achieved by both parties. There does not appear to be an issue with owing the Plaintiff fees.

87. Accordingly, the Defendants' summons filed 8th February 2021 is hereby dismissed. The stay of the garnishee order hereby falls away.

88. The Plaintiff is awarded the costs of the application to be taxed if not agreed.

Dated this 14th day of December 2022

Hon. G. Diane Stewart