In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 392

BETWEEN:

DEBORAH LEE TROTT

Plaintiff

and

DERRICK SEYMOUR
Trading as Water Tech & Development

Defendant

RULING

Date of Hearing: 20 August 2024
Date of Ruling: 20 January 2025

Plaintiff: Terry-Lynn Griffiths of Wakefield Quin Limited
Defendant: Bruce Swan of Bruce Swan & Associates

RULING of Cratonia Thompson, Acting Puisne Judge

INTRODUCTION

1. This is an application by the Defendant seeking to set aside a Judgment in Default entered against the Defendant in default of defence.

2. The application is opposed by the Plaintiff, who seeks an order that the Defendant's application be dismissed, with costs awarded to the Plaintiff on an indemnity basis.

3. It is the Plaintiff's case that the Defendant has not discharged the burden of proof that is required in order to succeed on an application to set aside a regularly obtained judgment in default. Further, the Plaintiff alleges that as a result of the Defendant's litigation conduct, the Plaintiff has incurred unnecessary and unreasonable costs, and it is on this basis that the Plaintiff is seeking an indemnity costs order against the Defendant.

REVELANT FACTUAL AND PROCEDURAL BACKGROUND

4. The Plaintiff commenced these proceedings by way of a Specially Endorsed Writ of Summons (the **Writ**) filed on 16 November 2023. The Writ alleges the following categories of a breach of duty by the Defendant:

    (1) Breach of section 3 of the Supply of Services (Implied Terms) Act 2003 by reason of the Defendant's failure to exercise reasonable care and skill in the provision of construction services;
    (2) Breach of contract due to the Defendant's failure to complete renovations to the Plaintiff's property by 30 September 2020;
    (3) Breach of contract due to the Defendant's failure to complete some of the contracted renovation works at all; and
    (4) Breach of contract due to the Defendant's failure to provide furniture.

5. As a result of the above alleged breaches, the Plaintiff claims, *inter alia*, damages for (i) the costs of remediation; (ii) the loss of rental income; (iii) payments made to the Defendant for work he did not carry out; and (iv) the cost of furniture.

6. The Writ was served on the Defendant via his Counsel at Bruce Swan & Associates on 28 November 2023.

7. The Defendant filed his Memorandum of Appearance on 28 November 2023. In accordance with Order 18, Rule 2 of the Rules of the Supreme Court 1985 (the **RSC**), the

Defendant was required to file and serve his Defence on or before 12 December 2023. The Defendant failed to do so, and by an email dated 14 December 2023, Counsel for the Defendant requested an extension of time until 16 January 2024.

8. Although the Defendant did not seek an extension to file his Defence prior to the expiration of the deadline prescribed by the RSC, the Plaintiff granted the extension, and it was agreed between the parties that the Defendant would file and serve his Defence by 16 January 2024.

9. On 15 January 2024, Counsel for the Defendant requested a further extension of 7 days in which to file his Defence. The Plaintiff instructed her Counsel to refuse the extension, and by an email dated 16 January 2024 (the day on which the Defence was due by prior agreement), Counsel for the Plaintiff informed the Defendant that the second request for an extension had been declined. In that email, Counsel for the Plaintiff gave the Defendant notice that unless his Defence was filed and served by close of business that day (that is 16 January 2024), an application for judgment in default would be filed with the Court.

10. The Defendant failed to file and serve his Defence on 16 January 2024, and at 4:33 pm on 16 January 2024, the Plaintiff filed an application for judgment in default of defence.

11. The Defendant filed his Defence and Counterclaim at 12:02 pm on 17 January 2024. Despite this, the Plaintiff's application for judgment in default of defence was considered and judgment was entered against the Defendant on 19 January 2024 (the **Default Judgment**).

12. On 16 February 2024, the Defendant made an application for the Default Judgment to be set aside by Summons (the **Summons to Set-Aside**), together with an Affidavit in support sworn by the Defendant (the **Set-Aside Application**).

13. The Summons to Set-Aside was issued returnable on Thursday, 29 February 2024. On that date, the parties appeared before the Hon. Justice Subair Williams for directions for the hearing of the Set-Aside Application.

14. It should be noted that at this hearing the Court would have had before it the First Affidavit of Terry-Lynn Griffiths opposing the Defendant's application for the Default Judgment to be set aside (the **Plaintiff's Reply Affidavit**), which was filed on 26 February 2024.

15. At the conclusion of the hearing on 29 February 2024, Justice Subair Williams ordered directions for the hearing of the Set-Aside Application, and the matter was listed to be heard on 20 August 2024.

THE LAW

16. The legal test to be applied when considering an application to set aside a default Judgment appears in the Bermuda Case of *David Dangler Moir and Ronald Brown Moir, Jr v Mark Waldron Andrew and Marshal Lynn Andrew [2022] SC (Bda) 11 Civ* (***Moir***). Justice Mussenden (as he then was) set out the law to be applied when setting aside a regular default judgment beginning at paragraph 58 of *Moir*.

17. At paragraphs 59 and 60 of *Moir*, reference is made to Orders 13/9/7 and 13/9/18 of the Supreme Court Practice 1999 (the **White Book**). Reference is also made (at paragraph 62) to the Ruling of the Hargun, CJ (as he then was) in the Bermuda case of *Adam Gibbons and Ryan Heyrana v Sean Desilva [2020] SC (Bda) 43 Civ* **(*Gibbons & Heyrana*).** *Gibbons and Heyrana* confirmed, that in order for a party to succeed on an application to set-aside a judgment in default, the applicant must show that there is a real prospect of success.

18. Having opined on the propositions set out in the English case of *Alpine Bulk Transport Co Inc v v Saudi Eagle Shipping Co. Inc, The Saudi Eagle* and the White Book, Chief Justice Hargun stated as follows at paragraph 20 of *Gibbons & Heyrana*, which appears at paragraph 62 in *Moir*:

> "*It follows that in order to succeed in setting aside a default judgment, the defendant has the burden of proof of establishing that he has a realistic prospect of success [on his defence]. A realistic prospect of success is one which carries some degree of conviction, and must be more than merely arguable. That burden is ordinarily discharged by the defendant filing credible affidavit evidence demonstrating a real likelihood that he will succeed in his defence. In the circumstances where there is a dispute on the facts, the*

> *Court is not bound to accept everything said by a party in his affidavit in support of the application to set aside a default judgment. The Court is entitled to consider whether there is real substance in the assertions being made by the defendant*." [Emphasis added]

19. Helpful guidance on how the Court should interpret the words '*real prospect of success*' was provided by the English Court of Appeal in the case of *Swain v Hillman [2001] 1 All ER 91*, which is cited at paragraph 31 in *Moir*:

> *"[31] The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success, or as Mr. Bidder submits, they direct the court to the need to see whether there is a "realistic" as opposed to "fanciful" prospect of success."*

20. For completeness, it is to be noted that the legal test to be applied in an application to set aside a regularly obtained judgment in default was also cited by Hargun, CJ in the case of *A B C D v Jonathan Cumberbatch [2020] SC (Bda) 50 Civ (**Cumberbatch**)*. At paragraph 49 of *Cumberbatch* it was confirmed (as set out in *Gibbons & Heyrana*) that it is the defendant who has the burden of proof of establishing that he has a realistic prospect of success, and that a realistic prospect of success is one that carries some degree of conviction, and must be one more than merely arguable.

21. It has therefore been established, both in Bermuda and English case law, that the legal test to be applied on an application to set-aside a default judgment is whether the defendant, through the filing of credible evidence demonstrating a real likelihood that he will succeed in his defence, has discharged the burden of proof of establishing that he has a real prospect of defending the Plaintiff's claim.

22. That said, while the test of whether there is a real prospect of success is the primary consideration, the Court is also entitled to consider surrounding factual circumstances, including the reasons provided by a defendant for failing to file a defence. This position is confirmed in the Bermuda Court of Appeal case of *Sean Desilva v Adam Gibbons and Ryan Heyrana [2021] CA (Bda) 2 Civ* **(*Desilva*)**.

23. In *Desilva* the Court of Appeal was tasked with considering an application for leave to appeal the decision of Hargun, CJ in *Gibbons & Heyrana*, wherein he refused the

application to set aside a default judgment, as well as his refusal of an extension of time within which to make that application. In his judgment, Justice Bell, referring to the case of *Andrew Mitchell MP v News Group Newspapers Limited [2013] EWCA CIV 1537* accepted that when faced with such an application the Court must consider the reasons for the delay. Justice Bell states as follows at paragraph 17 of *Desilva*,

> *"[17.] Next, the Chief Justice addressed the reason for the default. He referred to the case of Andrew Mitchell MP v News Group Newspapers Limited [2013] EWCA CIV 1537 at [41], where the English court addressed the failure to meet a deadline by reason of overwork or otherwise on the part of the lawyer acting. The case turned on the provisions of the English CPR 3.9, but the Chief Justice considered that the broad principles underlying RSC Order 1A in Bermuda meant that the general statements made in the English case could be taken into account when considering the reasons for overlooking the deadline.* [Emphasis added]

24. In speaking to the relevance of the *Mitchell* case, Justice Bell states as follows at paragraph 31 in *Desilva*,

> *"As to the relevance of the Mitchell case in relation to delay, I agree with the Chief Justice that having regard to the broad principles underlying the provisions of RSC Order 1A (regarding the need for litigation to be conducted efficiently and at proportionate cost) the general statements made by the court in Mitchell can be brought into consideration when the Bermuda court is considering the overall exercise of its discretion in the context of setting aside a default judgment. That is the whole purpose of the overriding objective."*

25. The relevant statements in the *Mitchell* case appear at paragraph 41 of that Ruling, and provides as follows:

> *"[41.] If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be*

> *that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue."*[Emphasis added]

26. Given the comments by Justice Bell in support of the above approach in ***Mitchell*** (which was taken in ***Gibbons & Heyrana***), it is clear that the Court, in exercising its discretion, will also want to consider the reasons the default occurred. If there is a good reason for the default, the Court would be entitled to grant the relief sought. What constitutes a good reason is also set out in ***Mitchell*** and includes if the attorney was suffering from a debilitating illness, or had been involved in an accident. Merely overlooking a deadline, whether on account of overwork or otherwise, will rarely be a good reason.

27. The Bermuda case of ***Desilva*** also established that on applications for the setting aside of a default judgment, it is incumbent upon the Defendant to provide the Court with full and frank disclosure. On this point, Justice Bell commented as follows:

> "*The Appellant was asking the court to exercise its discretion in relation to setting aside the default judgement. In such circumstances, it was incumbent on the Appellant to be full and frank in his evidence*." [Emphasis added]

28. Therefore, in addition to the applicant Defendant providing good reasons for the default, the applicant Defendant must also be full and frank in providing the reasons for the failure to meet the deadline.

29. It should be noted that the above principles were helpfully set out in the Plaintiff's written submissions, and that the Defendant has also accepted these principles to be the correct and established principles to be applied in considering this application to set-aside the Default Judgment.

THE DEFENDANT'S POSITION

Real Prospect of Success

30. Having also submitted to the Court that the legal test to be applied in an application to set aside a reguarly obtained judgment is set out in the case of *Moir* and *Cumberbatch*, it is the Defendant's case that the Defendant has in fact discharged the burden that he has a real prospect of defending the Plaintiff's claim. The Defendant's responses to the Plaintiff's claims are considered in turn.

Breach of duty to exercise reasonable care and skill in the provision of construction services

31. The Defendant avers in his Defence and Counterclaim that he and his workers always acted with reasonable care and skill throughout their time on site and does not accept that their work fell below the acceptable standard (see paragraph 9 of the Defence and Counterclaim).

32. The Plaintiff set out a number of claims in paragraphs 10 – 14 of the Writ regarding the Defendant's alleged breach of reasonable care and skill, including (i) that the Defendant failed to ensure that the foundation beneath the floors was levelled throughout before installing the vinyl plank flooring; (ii) that the Defendant failed to exercise reasonable care and skill when installing the shower manifold; and (iii) that the Defendant's subcontracted electrician failed to exercise reasonable care and skill when installing the electrical boxes.

33. These allegations are denied by the Defendant. At paragraphs 10 and 11 of the Defence and Counterclaim, the Plaintiff is put to strict proof regarding her claims concerning the flooring in particular, and at paragraph 14, the Defendant states that the Plaintiff's claims cannot be proven for reasons that are set out in paragraphs 12 and 13 of the Defence. Those reasons include that the Defendant was not aware of the issues raised pertaining to the electrician's breach of reasonable care and skill, nor was he given the opportunity to address this problem. As to any issues in installing the shower manifold, the Defendant argued that this was a final punch list item, and that the Defendant had been removed from the job prior to this being required by the Plaintiff.

Breach of contract for failure to complete the renovations by 30 September 2020, or at all

34. The Defendant's Counsel states in his written submissions that the agreed timelines were missed as a result of the COVID-19 Pandemic, and the public health mandates (to shelter-in-place) that were issued by the Government of Bermuda as a result. It is further averred, that given these mandates, there were forces outside of the Defendant's control that caused the delays, and therefore the defence of *Force Majeure* applies.

35. Curiously however, in the Defendant's Defence and Counterclaim, it is stated (at paragraph 8) that "*the Defendant does not recall the completion date of 30 September 2020 being agreed between the parties*". Paragraph 8 goes on to state that this timeline may have been reasonable "*in a normal occurrence*", but the COVID-19 Pandemic caused work to cease and thereafter there was a reduction in construction work that could be completed.

36. Then, at paragraph 22 of the Defence and Counterclaim, it is stated that "*the work was never set a deadline of 30 September 2020 and due to the act of God being the Pandemic it was absolutely no way the Defendant could have worked any faster than he did*."

37. As to the Plaintiff's claim for loss of rental income, the Defendant avers that the Plaintiff cannot seek to be awarded loss of rental income when a shelter-in-place, public health mandate was in force that restricted movement between households.

38. Additionally, the the Defendant avers that the Plaintiff cannot expect to be compensated for works that were not completed as agreed, when it was the Plaintiff who unreasonably removed the Defendant from the work site. This is stated in the Defendant's written submissions in support of this application, having been initially stated in paragraphs 22 and 23 of the Defence and Counterclaim.

39. It is further asserted that the Defendant did substantially all of the agreed work, plus some extras that became required due to the property's age and at the Plaintiff's request (see paragraph 24 of the Defence and Counterclaim). The Defendant did not expand upon these assertions in his evidence filed in support of this application, nor did Defendant's Counsel do so at the hearing of the application.

Breach of contract for failing to provide furniture

40. As to the allegation of breach of contract for failing to provide furniture, in paragraph 25 of the Defence and Counterclaim, the Defendant accepts that the furniture was to be ordered and delivered from overseas, but avers that it was impossible to travel as a result of the COVID-19 Pandemic. The Defendant further argues that this was out of the Defendant's control.

Reasons for Default

41. It is also the Defendant's case that the Defendant has provided a justifiable reason for the delay in filing the Defence and Counterclaim. The Defendant argues that the reason for the delay was explained to the Plaintiff, and that the Defendant did seek additional time. When that request was not granted, the Defendant made reasonable efforts to comply with the agreed deadline and filed the Defence and Counterclaim within a reasonable time thereafter.

42. To further support the argument that the Defence and Counterclaim was filed in a reasonable timeframe, the Defendant notes that the Defence and Counterclaim was filed a mere 3 business hours later than the agreed deadline of 16 January 2024. It is also noted that the Defendant is not seeking to delay matters or to waste this honorable Court's time and that the Defendant has engaged with the Plaintiff to avoid the hearing of this application. It is also on this basis that the Defendant refutes the Plaintiff's claim for indemnity costs.

THE PLAINTIFF'S POSITION

Real Prospect of Success

43. In line with the aforementioned legal principles, the Plaintiff argues, that in order to satisfy this Court that he has a real prospect of success, the Defendant must provide the court with credible affidavit evidence, which demonstrates that there is a real likelihood that he will

successfully defend the Plaintiff's claim. The Plaintiff set out a number of reasons why the Defendant has not discharged this burden.

Breach of duty to exercise reasonable care and skill in the provision of construction services

44. The Defendant's response to the Plaintiff's allegation that the Defendant breached his duty to exercise reasonable care and skill appears at paragraph 9 of the Defence and Counterclaim. It is the Plaintiff's case that the Court has been provided with examples of the manner in which the Defendant failed to exercise reasonable care and skill at paragraphs 10 to 14 of the Writ. Additionally, the Plaintiff argues this assertion is further supported by photographic evidence, which shows that the flooring throughout the Plaintiff's apartment lifted, and also by the numerous receipts confirming the costs of remediation.

45. Although it is recognized that the photographic evidence referred to by the Plaintiff has not been provided to the Court, the Defendant (on whom the burden to establish a meritorious defence rests) has not provided any evidence to counter the allegations made by the Plaintiff beside the brief reasons set out in paragraphs 12 and 13 of the Defence and Counterclaim.

Breach of contract for failure to complete the renovations by 30 September 2020, or at all

46. The Plaintiff argues that the Defendant's response to the allegation of breach of contract for failing to complete the renovations by 30 September 2020 (appearing at paragraph 8 of the Defendant's Defence and Counterclaim) is categorically untrue because the parties attended a meeting at the Bank of N.T. Butterfield Ltd., wherein Ms. Undrea Robinson informed the parties that the construction works needed to be completed by 30 September 2020. Additionally, this deadline was clearly set out in the Bank's Offer letter dated 14 January 2020 (a copy of which was provided to the Defendant and appears at Tab 4 of the Plaintiff's Authorities Bundle), confirming that the works needed to be completed by this date.

47. A number of subsequent paragraphs of the Defendant's Defence and Counterclaim aver that the delay in completing the works was attributable to the COVID-19 Pandemic. This argument is refuted by the Plaintiff. It is accepted that the Bermuda Government passed the Emergency Powers (COVID-19 Shelter in Place) Regulations 2020 on 3 April 2020, which placed the country into mandatory lockdown. However, on 21 May 2020, the Government announced Phase 2 of its "Reopening of Bermuda" Plan. In that plan, construction businesses were given the green light to continue their operations, which means that construction businesses were prohibited from operating for a period of only 7 weeks. As such, it is the Plaintiff's case that the Defendant's argument that the COVID-19 Pandemic, and the health mandates issued as a result, does not justify a delay of eight months.

48. This delay, the Plaintiff asserts, resulted in a loss of rental income for the Plaintiff, and it is the Plaintiff's case that the Defendant's position that the Plaintiff would not have been able to secure tenants due to the lockdown is not made out. Given the facts set out above relating to the lockdown restrictions, the Plaintiff argues that had the Defendant completed the works by 30 September 2020 as agreed, the Plaintiff would have been able to secure tenants in October 2020 as anticipated.

Breach of contract for failing to provide furniture

49. Given the Defendant's admission at paragraph 25 of the Defence and Counterclaim regarding his obligation to order furniture, it is the Plaintiff's case that the Defendant has accepted that he has breached the contract. It is also the Plaintiff's case that the Defendant's averment is not a justifiable defence. The Plaintiff submits, that if the Defendant was unable to travel to purchase the furniture as he argues, he should have immediately refunded the monies back to the Plaintiff, but he did not.

Reasons for Default and the Requirement for Full and Frank Disclosure

50. As to the remaining factors that can be considered in determining this Set-Aside Application, starting with the Defendant's reasons for default, the Plaintiff first referred

the Court to an email from the Defendant's Counsel dated 14 December 2023 (Exhibit TVG-1 at page 8), wherein he set out his reasons for the default:

> *"We apologise as we only just observed the deadline for filing the Defence is upon us. We have not been able to get our client to take instructions, which is solely at our feet.*
>
> *With that said, we are closing for Christmas tomorrow and I will be out of office until 8 January. Is it possible we can have your grace to file our defence on or before close of business 16 January 2024[?]"*

51. The Plaintiff then referred the Court to a subsequent email from Counsel for the Defendant dated 15 January 2024 (Exhibit TVG-1 at page 6), wherein he requested a further extension, stating as follows:

> *"We are seeking our instructions as such we know that matters have slowed but we ask for your further understanding until next Monday, 22nd January. We appreciate your understanding"*

52. The Plaintiff argues that it is evident from these emails that the Defendant's Counsel had not been involved in an accident or a medical emergency, nor was he dealing with the death of a loved one i.e. the requirements set out in the ***Mitchell*** case. The Plaintiff notes that Mr Swan failed to adhere to the deadline as set out in the RSC due to him being on vacation. The Plaintiff argues that this is not a good reason for missing the deadline imposed by the RSC and/or the extended deadline later agreed by the parties. Therefore, his application should be dismissed.

53. Additionally, or in the alternative, it is also the Plaintiff's case that the Defendant has not been full or frank in his disclosure in this Set-Aside Application. In support of this assertion, the Plaintiff referred the Court to the following evidence given by the Defendant at paragraph 5 of his Affidavit filed in support of the Set-Aside Application:

> *"[5] That I am aware my Counsel upon filing the Defence and Counterclaim reached out to Ms. Terry-Lynn Griffiths on 18 January 2024 to invite her to withdraw her application for Default Judgment as the Defence was filed and as officers of the Court it was Counsels overriding objective to not [unnecessarily] cause application to be heard when Counsel can settle the same out of court, I understand this was not agreed."*

54. The Plaintiff argues that this sworn statement by the Defendant is entirely untrue and referred the Court to the Plaintiff's Reply Affidavit. At paragraph 17 of the Plaintiff's Reply Affidavit it states that Counsel for the Defendant never invited the Plaintiff to withdraw the Default Judgment, and alleges instead that the Defendant's Counsel was "*quite intent on having his client's application to set aside heard*" despite offers for the parties to agree to the Default Judgment being set aside by consent.

55. In support of this, Plaintiff's Counsel referred the Court to a letter from the Plaintiff's Counsel dated 20 February 2024 (Exhibit TVG-1, page 19), which reads as follows:

> *"Notwithstanding this, and in an effort to be reasonable, our client is prepared to agree to the Default Judgment being set aside by the consent of the parties. We note however that the parties have been placed in this predicament because your client has failed to adhere to the Rules and the timeline which was agreed by the parties. It is on this basis that our client is prepared to consent to the Default Judgment being set aside, provided that your client agrees to pay our client's costs occasioned by the filing of the Default Judgment.*
>
> *Separately and in an effort to move this matter forward, we are proposing that our client file and serve her Reply and Defence to Counterclaim by* ***Wednesday, March 6th, 2024.****"*

56. In the ***Moir*** case, Justice Mussenden (as he then was) ultimately decided against the Defendant, having accepted the Plaintiff's submission that the Defendant failed to provide the Court with a good reason for the default, and that he also failed to provide the Court with full and frank disclosure in his evidence. Justice Mussenden gave the following reasons in his judgment:

> *"[71]. I have considered the reasons provided by the Defendants for their failure to file a Defence. In my view, those reasons are not good reasons primarily because the Defendants were served with the Writ and had instructed counsel, who had thereafter caused an appearance to be entered on their behalf. It seems to me that an inference can be properly drawn from that that the Defendants knew that the next step was that a Defence had to be filed, failing which some other litigation step would have to be performed…*
>
> *[74.] This view is also supportive of my findings that the reasons given by Mark Andrew do not amount to good reasons for failing to file a Defence. Also, I remind myself that any failure by a defendant to provide full and frank evidence will weigh against the Court exercising its discretion in their favour."*

57. The Plaintiff submits that the circumstances of the case at hand are the same as those in ***Moir***, in that having been served with the Writ and instructing counsel, the Defendant knew that he was required to file his Defence within fourteen days of entering an appearance. Additionally, the reasons submitted for not having complied with this requirement are not "*good reasons for failing to file a Defence*".

58. Moreover, it is the Plaintiff's case that the Defendant has not been full and frank in his disclosure. In fact, the Plaintiff alleges that the Defendant has attempted to mislead the Court, and that his "*false and untruthful statements*" should be significant factors that the Court should take into account in deciding whether to grant the Defendant's application.

59. For these reasons, the Plaintiff invites this Court to dismiss the Defendant's application for the Default Judgment to be set aside on the grounds that the Defendant has failed to demonstrate that he has a real prospect of defending the claim, he has failed to provide good reasons for the default and he has failed to provide the Court with full and frank disclosure.

Indemnity Costs

60. Given the circumstances of this case, and in particular the Defendant's alleged litigation conduct, the Plaintiff is seeking an order for indemnity costs against the Defendant.

61. It is the Plaintiff's case that the Defendant was given more than one opportunity to withdraw the Set-Aside Application so that the parties could agree to the Default Judgment being set aside by consent. In addition to correspondence referred to earlier in this Ruling that set out the Plaintiff's initial invitation to settle, reference was also made to a letter to the Defendant's Counsel dated 22 February 2024 (Tab 12 of the Plaintiff's Authorities Bundle), which provides as follows:

> *"You will note from our letter dated 20th February that we invited your client to agree for the Judgment to be set aside.*
>
> *Please confirm whether your client wishes to proceed with its application. If the matter does proceed, we will be seeking costs on an indemnity basis a. on the ground that the*

normal rule is that the party in default should pay the costs of its application to set aside and b. that we made an offer for the judgement to be set aside by consent.

We should be grateful to receive your response before close of business today, so that we may prepare an affidavit in response if necessary."

62. It is the Plaintiff's case that the Defendant's Counsel failed to respond to this correspondence, and as a result the Plaintiff had no alternative but to instruct her counsel to file the Reply Affidavit. It is also the Plaintiff's case that upon receipt of the Affidavit, Counsel for the Defendant sent an email to the Plaintiff's Counsel apologizing for having missed her email because it was his birthday. Mr Swan's email (appearing at Tab 13 of the Plaintiff's Authorities Bundle) states as follows,

"Please accept my apologies so last week I was out as it was my birthday and your communication was missed with that said we will draft a CONSENT Order for your review so that we as officers of the court can in the best interest settle the matter."

63. It is the Plaintiff's case that Mr Swan's statement that he was unable to attend to this matter because it was his birthday is yet another poor excuse, which led to increased and unnecessary costs for the Plaintiff. Had Mr. Swan responded in a timely fashion, Counsel for the Plaintiff would not have incurred the costs associated with the drafting of the Reply Affidavit.

64. It is also the Plaintiff's case that a third offer for the parties to agree to the setting aside of the judgment was made. An email from Counsel for the Plaintiff on 28 February 2024 (Tab 14 of the Plaintiff's Authorities Bundle) reads as follows:

"We served our Affidavit of response by an email dated 27th February, and in less than 2 hours, after having read our affidavit, your client now seeks to accept our offers. Unfortunately, our client has already incurred significant costs associated with drafting the affidavit as well as preparing submissions in response to your client's application. You are now seeking for the parties to consent to the setting aside of the judgment, in circumstances where our client is now left to bear wasted costs, which could have been avoided had you responded to our offers in a timely fashion

Notwithstanding this, and in an effort to be reasonable, Ms. Trott instructs that she will consent to the Default Judgment being set aside, ***on condition that your client agrees to pay our client's wasted costs occasioned by this application****, which we confirm now*

amounts to $6,000.00, which would need to be paid now, forthwith. The consent order would need to be amended to clearly reflect this position.

Should your client decline this offer, thereby causing our client to incur wasted costs, we will have no alternative but to proceed to the hearing of your client's application so that our client is not penalized in the form of wasted costs."

65. At the hearing of this application, Plaintiff's Counsel was asked whether the amount the Plaintiff was seeking for costs was put to the Defendant's Counsel prior to her letter dated 28 February 2024. It was confirmed that the amount being sought on the Plaintiff's behalf had not been put to the Defendant until the letter dated 28 February 2024.

66. It was also put to the Plaintiff that the filing of the Plaintiff's Reply Affidavit was not in fact necessary (at the time it was filed) as the filing of responsive evidence is ordinarily dealt with at the directions hearing. As noted, the Summons to Set-Aside was issued returnable on 29 February 2024, and the Plaintiff's Reply Affidavit was filed on 26 February 2024.

67. The Plaintiff disagreed with this position and argued that the Plaintiff's Reply Affidavit was useful given assertions made at the directions hearing by the Defendant. According to the Plaintiff, Counsel for the Defendant argued at the directions hearing that the Default Judgment should be set aside on the basis that it was irregular as judgment had been entered despite a Defence having been filed. The Plaintiff stated that Justice Subair Williams disagreed with this preliminary point and indicated that because the judgment was filed after the time fixed by the RSC, it was a regular judgment.

68. It was also submitted that the Justice confirmed that because the time for filing the Defence had expired, judgment against the Defendant had been correctly entered. The Plaintiff then argued that Justice Subair Williams would not have been in a position to set out these preliminary views without the benefit of the Plaintiff's Reply Affidavit.

69. The Plaintiff recognized that the established principle for the awarding of indemnity costs is that there must be some conduct or circumstance that takes the case outside of the norm. Reference was made to the case of *Epsom College v Pierse Contracting Southern Limited (In Liquidation) [2011] EWCA Civ 1449* (***Epsom College***) at paragraph 71 in support of

this, where it was stated that this requirement "*can be met where there has been an unreasonable failure to accept offers for settlement, or a party has unreasonably resisted a sensible approach to finding a solution to the proceedings*." Further, at paragraph 72 of *Epsom College*, it is noted that a *"claimant's refusal of two reasonable offers to settle would have been enough in itself to warrant an order on the indemnity basis"*.

70. In line with *Epsom College*, it was argued that the Defendant had refused not one, but three offers to settle the Set-Aside Application and that the Defendant was insistent on this application being heard. Accordingly, the Plaintiff is seeking the costs of the Set-Aside Application on an indemnity basis.

APPLYING THE FACTS TO THE LAW

71. Having applied the facts of the present case to the law, it is my view that the Defendant has not discharged the required burden of demonstrating that his defence has a real prospect of success.

72. I have reviewed the Defendant's Defence and Counterclaim, which the Defendant's Counsel argues is "*full*". I disagree with this contention. In my view, the Defence and Counterclaim does not provide a coherent defence to the Plaintiff's pleaded claims, and the defence provided cannot be described as more than *merely arguable*. For example, the Defence and Counterclaim states that it is the Defendant's belief that he and his workers met the standard of reasonable care and skill, without sufficient detail on how this duty was effectively discharged in response to the Plaintiff's claims.

73. Additionally, it appears that the crux of the Defendant's defence is that the works were delayed as a result of the COVID-19 Pandemic. However, as argued by the Plaintiff, the Defendant has not demonstrated (in his Defence and Counterclaim or otherwise) that these delays were purely as a result of the Pandemic and not the Defendant's inaction.

74. The same can be said regarding the evidence filed in support of the Set-Aside Application. It is my view that the evidence filed does not demonstrate a real likelihood that the Defendant will succeed in defending the Plaintiff's claim.

75. As to the remaining factors that the Plaintiff invited the Court to consider, I accept that the Defendant has not provided any *good* reason for not having complied with the timeframe prescribed by the RSC and/or the timeframe subsequently agreed between the parties. The reasons provided by Counsel are, in essence, that he overlooked the deadline, that he was unable to obtain instructions due to the holiday period and his office being closed as a result, and that it was his birthday.

76. In line with the authorities submitted by the Plaintiff, these are not good reasons to have failed to file the Defence. I have come to this determination begrudgingly, as it is noted that the Defendant's Defence and Counterclaim was filed on 17 January 2024, i.e. the following day after the agreed timeframe, and that the Default Judgment was granted thereafter on 19 January 2024.

77. As to the Plaintiff's arguments that the Defendant has attempted to mislead the Court and has not provided full and frank disclosure as a result, I do not agree that the Plaintiff has made out her case in this regard. Whilst there is a typo in an email from the Defendant's Counsel on 19 January 2024, it is clear from the tone of that email (and in particular Counsel's reference to the Overriding Objective) that the Defendant sought from the very outset for the Default Judgment to be set aside without proceeding to a hearing.

78. For the avoidance of any doubt, although I have provided my view on the Plaintiff's assertions regarding the reasons for default and the requirement to provide full and frank and disclosure, I am of the view that this application turns on whether the Defendant has discharged his duty to demonstrate that he has a real prospect of success. I do not believe that he has done so.

79. On the subject of indemnity costs, once again I do not accept that the Plaintiff has made out her case in this regard. It is clear, that the Defendant (although belated in his replies) was willing to consent to the Default Judgment being set aside by consent, and that the only matter which came to be in dispute was the Plaintiff's proposal that the Defendant cover the *entirety* of the Plaintiff's costs.

80. In my view, any apprehension on the Defendant's part in agreeing to cover the entirety of the Plaintiff's costs, which included the drafting of the Plaintiff's Reply Affidavit, was

warranted. I do not agree that the filing of the Plaintiff's Reply Affidavit was necessary *prior* to the first return date of the Summons to Set-Aside.

81. I also find it curious that the Plaintiff's Counsel did not set out the costs being sought until after the filing of the Reply Affidavit and appeared unwavering in the negotiations for these costs to be covered. Had the matter proceeded to a substantive trial, an application could have been made at the conclusion of the trial for these costs to be covered.

82. Additionally, it simply isn't correct that the Defendant refused all three of the Plaintiff's offers to set aside the Default Judgment by consent. In an email referenced by the Plaintiff (shown at paragraph 62 of this Ruling), the Defendant's Counsel stated expressly that he would draft a Consent Order to settle the matter [application].

83. Therefore, although the Plaintiff has succeeded in opposing the application to set aside the Default Judgment, I do not agree that the circumstances of this case, which cannot be characterized as "*out of the norm*", warrant an indemnity costs order.

CONCLUSION

84. For the reasons set out above, I refuse the Defendant's application to set aside the Default Judgment.

85. The costs of this application shall be awarded to the Plaintiff on a standard basis, to be taxed if not agreed.

Dated this 20th day of January 2025

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

HON. MRS. CRATONIA THOMPSON
ACTING PUISNE JUDGE