[2022] JMSC Civ. 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV01827

BETWEEN	**LORNA DAVIS-BROWN**	**1ST CLAIMANT**
AND	**BASIL BROWN**	**2ND CLAIMANT**
AND	**NICOLE SIMONE DAVIS**	**1ST DEFENDANT**
AND	**LEROY ALEXANDER LEWIS**	**2nd DEFENDANT**
AND	**JENNIFER HOUSEN**	**3RD DEFENDANT**
AND	**KEMAR ROBINSON**	**4TH DEFENDANT**

IN CHAMBERS

Ms. Jamila Thomas instructed by Lambie-Thomas & Co. for the Claimants

Mr. Kemar Robinson for the 1st and 2nd Defendants

Ms. Stephanie Stone for the 3rd Defendant

Ms. Krista Leigh-Cole instructed by Jason Jones Legal for the 4th Defendant

February 22 and March 10, 2022

Application for extension of time to file defence - Application for default judgment to be entered - Rules10.3(9), 12.1, 12.5 and 13.4, 26.1(2) (c) of the Civil Procedure Rules - lengthy and inordinate delay - no good reason provided - good and arguable defence

STEPHANE JACKSON-HAISLEY, J

BACKGROUND

[1] This matter concerns three applications. The first is the Claimants' application for judgment to be entered against all four defendants which was filed on October 28, 2020. The second is the first and second defendants' application for an extension of time to file their Defence which was filed on December 16, 2021. The third is the fourth defendant's application for an extension of time to file his Defence which was also filed on December 16, 2021. The applications to extend time were heard first followed by the application to enter judgment and so they will be dealt with first.

[2] The first and second defendants are Nicole Simone Davis and Leroy Alexander Lewis respectively and the relevant facts which are the subject of this case are similar for both of them. The third defendant Jennifer Housen is an Attorney-at-law and she was the first Attorney-at-law representing the first and second defendants in the transaction for sale of property, which I will refer to in details shortly. She did not file any application for the Court to consider nor has she filed any documents in response to the claim. The fourth defendant Kemar Robinson, is also an Attorney-at-law and he was the second Attorney-at-law representing the first and second defendants.

[3] A brief look at the facts as outlined in the claim reflects that the claimants are wife and husband and were the registered owners of property known as Lot 50 Bridgetown Place, Block E, Caribbean Estates, Saint Catherine registered at volume 1423 folio 701 of the Register Book of Titles. In or about 2013 they entered into an Agreement for Sale with the first and second defendants to sell this property to them. They have averred in their Particulars of Claim that the purchase price was Twelve Million Dollars ($12,000,000.00) however the Agreement for Sale reflects a purchase price of Eight Million Dollars ($8,000,000.00).

[4] According to the claimants, the first and second defendants paid only the sum of Five Million Dollars ($5,000,000.00) and have refused to pay the balance. They indicated further that the third defendant in her capacity as Attorney-at-law having conduct of sale, with the permission of the claimants, obtained the Certificate of Title

from the Jamaica National Building Society who was the mortgagee for the claimants. They further averred that she negligently and in breach of her fiduciary duty to the claimants released the Certificate of Title and the Instrument of Transfer to the first and second defendants and or their agents without their consent and knowledge. Subsequently, the first and second defendants evicted the claimants' tenants and took possession of the subject property. The claimants further assert that when they discovered what had transpired they applied for and obtained a new duplicate certificate of title. They also commenced proceedings in the St. Catherine Parish Court for Recovery of Possession.

[5] Thereafter it is averred that the fourth defendant who was now the first and second defendants' Attorney-at-law took steps to have the property transferred in the name of the first and second defendants.

[6] It is averred that the first and second defendants acted fraudulently in having the property transferred to them and that the third and fourth defendants acted negligently in facilitating this transfer to them. The claimants are seeking Damages, Specific Performance and payment of the balance due, Recovery of Possession, Mesne Profits, a Declaration that they are the lawful owners, a Declaration that the Certificate of Title was fraudulently procured and an Order that the transfer be cancelled.

[7] The Claim Form and Particulars of Claim were filed on April 30, 2019. They were served on the fourth defendant on June 11, 2019 and on July 5, 2019 the fourth defendant filed an Acknowledgement of Service and on August 2, 2019 he filed his Defence. The Claim Form and Particulars of Claim were served on the first and second defendants on February 28, 2020 and an Acknowledgement of Service filed on their behalf on March 13, 2020 and thereafter their Defence was filed on May 18, 2020.

[8] The first, second and fourth defendants' applications for extension of time are made pursuant to Rules 10.3(9) and 26.1(2) (c) of the Civil Procedure Rules.

[9] The second defendant Mr. Lewis deponed on behalf of himself and the first defendant. In the affidavit Mr. Lewis explained that the Claim Form and Particulars of Claim were not served personally on either himself or Mrs. Nicole Davis but rather was

left with the tenants who occupied the property on or about March 9, 2020. They obtained photographs of the documents and sent said photographs to their Attorney-at-law Mr. Kemar Robinson. Mr. Lewis indicated that due to the fact that the documents came to their attention in that way they had little time to respond and this caused the delay in meeting the time within which to file their Defence. The delay was compounded by the Covid 19 pandemic. He further asserted that their failure to file and serve their defence within the forty-two days' requirements was not due to any disrespect or disregard for this Court or the claimant. They are of the view that they have a good arguable case and any prejudice to the claimants can be remedied by an award of costs, whereas they would be significantly prejudiced if their orders were not granted.

[10] Mr. Kemar Robinson in his affidavit outlined that the Claim Form and Particulars of Claim were served on his office on June 11, 2019 and he filed the Acknowledgement of Service ten days late on July 5, 2019 and the Defence nine days late on August 2, 2019. The reason for this, he explained, was that although they were served on his office they did not come to his attention immediately as he was actively engaged in a trial at the Home Circuit Court but that as soon as they came to his attention action was taken immediately.

[11] He also indicated that in relation to the first and second defendants' claim he tried to contact them but was unable to get in touch with them.

[12] He further averred that his inaction to file within the required time was not due to any disregard for the Court or the proceedings herein. He believes that any prejudice can be remedied by an award of costs whereas he would be significantly prejudiced if the orders are not granted as prayed. He states that he has a good arguable defence.

SUBMISSIONS

[13] The submissions on behalf of the first, second and fourth defendants were similar. In the submissions, reliance was placed primarily on the cases of **Adrian Samuda v James Davis and Frania Smith** [2017] JMSC Civ. 156**, Philip Hamilton v Frederick Flemmings and Gertrude Flemmings** [2010] JMCA Civ. 19 and **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1. They

also referred to the cases of the **Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockers** [2013] JMCA Civ. 23 and **Strachan v The Gleaner Company Motion** No. 12/1999 delivered on the 6th December 1999 for the factors that the Court should consider which were identified as the length of the delay; the reasons for the delay; whether there is an arguable case for an appeal and the degree of prejudice to the other parties if time is extended.

[14] Counsel who submitted on behalf of the first and second defendants cited with force the statement of Pettigrew-Collins J in the **Adrian Samuda** (supra) judgment where at paragraph 7 she said:

> ***"…the analogous principle relating to whether or not a defendant should be allowed to file a defence out of time is expressed as whether the defendant has a defence of merit."***

[15] Counsel contended that they have a good arguable case and further that the claimants have committed fraud and so the Court should not assist in granting judgment to a litigant who has not come with clean hands.

[16] The submissions made on behalf of the fourth defendant mirrored those made on behalf of the first and second defendants except that on his behalf it was advanced that he has a good arguable case as the test for negligence has not been proved as he owed the claimants no duty of care.

[17] In response counsel for the claimants placed reliance on the cases of **Peter Haddad v Donald Silvera** S.C.C.A. No. 31/2003 decided July 31, 2007 and also on **The Attorney General of Jamaica v. Roshane Dixon** (supra). She asked that the Court in considering the length of the delay, have regard to the principles enunciated in the **Peter Haddad** case where the court regarded the "reason for the failure to act within the prescribed time" as a "highly material factor" and accepted that the "weaker the reason, the more likely the court will be to refuse to grant the extension" and further stated that the court "should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application", In addition, she contended that the

court found that an applicant who has failed to act promptly to apply for an extension of time must give reasons for not acting promptly.

[18] She contended that the defendants failed to act promptly in making their application for an extension of time and provided no explanation for this failure. She suggested that this absence of an explanation should be decisive and that their inaction shows a frivolous approach to this claim and a blatant disregard for the procedure of the court. She argued that the delay in the filing of these applications is so egregious as to be inimical to the proper and efficient administration of justice so the application for this reason alone ought to be refused.

[19] She pointed out that the fourth defendant has not hinted as to what the defence is in his affidavit and that none of the defendants have exhibited any document with the proposed Defence. She placed further reliance on the **Peter Haddad** case in pointing out that the Court cannot have regard to the document that was filed on August 2, 2019 to determine what is the fourth defendant's defence as the filing of same is irregular and same is therefore not before the Court. In terms of prejudice, she argued that if the application is granted, the claimants would be denied their right/entitlement to a judgment in default. Further even if there is found to be no real prejudice the award of costs ought not to be regarded as sufficient to address the matter in this case.

ISSUE

[20] The main issue is whether or not the first, second and fourth defendants have met the criteria for an extension of time within which to file their Defence.

LAW AND ANALYSIS

[21] In considering the main issue, the Court is guided by the authorities adverted to. In the case of **Philip Hamilton v Frederick Flemmings and Gertrude Flemmings** (supra) the learning gleaned from Phillips JA's analysis of the criteria to extend time is very instructive and is set out at paragraph 36 of the judgment:

> ***"It is clear that neither rule 10.3(9) or 26.1(2)(c) contain the criteria that ought to be utilized in the exercise of the power to enlarge time. The principle governing the court's approach in determining whether to grant or refuse an application for extension of time was summarized by Lightman, J in an application for extension of time to appeal in the case of Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others [2001] EWHC Ch 456, which has been endorsed by this court in Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4 at [15]. In the latter case, the issue related to the filing of a defence out of time. In her judgment Harris J.A. referred to the dictum of Lightman J which set out the principles, thus;***
>
> > ***"In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice. Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."***

At paragraph 37 of the judgment Phillips JA arrived at this conclusion:

> ***"The questions therefore are - was there sufficient material before the learned Master which could provide a good reason for the delay in failing to comply with rule10.3 (1) of the CPR and also, was there any information before her to satisfy her that there was merit in the case.?"***

[22] Phillips JA in the **Philip Hamilton** case did not find the delay to be an inordinate one and went on to endorse the views stated in the case of **Finnegan v Parkside Health Authority** [1998] 1 All ER 595 'that a procedural default even if unjustifiable, and particularly where no prejudice has been deponed to or claimed, the litigant ought not to be denied access to justice'.

[23] I am guided by the principles enunciated in the **Philip Hamilton** case as well as those set out in the case of **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** (supra), in particular the following proposition enunciated by Phillips JA at paragraph 23 of the judgment in **Merlene Murray-Brown**:

> ***"…there are no longer cumulative provisions which would permit a 'knock-out-blow' if one of the criteria is not met. The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3(2)(a) & (b) of the rules."***

[24] In the **Peter Haddad** case relied on by counsel for the claimant, although the court pointed out the reasons for the delay as being a factor to be considered, it went on to say that notwithstanding the absence of a good reason for the delay, the Court was not bound to reject an application for an extension of time as the overriding principle was that justice has to be done. Despite the court making this preliminary observation, after an examination of the circumstances of the case, the court found the failure to give reasons as being fatal to the applicant's case. After a consideration of the overriding objective of dealing with cases justly, the court went on to say that the applicant having failed to act promptly that "the absence of any explanation for this failure, on the facts of this case, is decisive."

[25] On a review of the cases, it seems clear to me that in the determination of this kind of issue, the circumstances of the case should have some bearing on whether the court exercises its discretion to extend time. The factors that must be considered have been correctly identified by all counsel to be as follows:

a. The length of the delay;

b. The reasons for the delay;

c. Whether there is an arguable case; and

d. The degree of prejudice to the other parties if time is extended

THE LENGTH OF THE DELAY

[26] The court recognizes an essential starting point to be the identification of the length of the delay. The **Roshane Dixon** case is clear on the point that delay is inimical to the good administration of justice in that it fosters and procreates injustice. Counsel for the defendants placed the focus of their arguments on the length of the delay between when the documents were due to be filed and when they were actually filed and not when the application for the extension of time was made. There seems to be two schools of thought as to what the length of the delay refers to. On one hand it is viewed as being referable to the delay in the filing of the application for extension of time and on the other hand it is viewed as being referable to the time it took to file the Defence. In the **Roshane Dixon** case the main point considered under this limb was the time it took to file the application. Similarly, in the **Adrian Samuda** case my sister pointed out that “the length of the delay cannot therefore be considered solely within the context of when a defence was filed, as the case could not have progressed precisely because this application has to be dealt with first”, therefore placing emphasis on the importance of the time within which the application is made.

[27] On an examination of the **Philip Hamilton** case, where the court was considering whether to grant an extension of time as in this case, the court identified what it considered to be the relevant starting time for consideration as being “when the litigant is in breach of the rules”, in that the time has expired and the matter cannot

proceed without reference to the courts. The court identified that as being four and a half months which was the time by which the defence was overdue. The court did not find this delay to be inordinate.

[28] When these cases are considered, it is therefore my view that although it is the length of the delay in filing the application that should be the starting point, the court could not ignore the length of time it took to file the Acknowledgement of Service and the Defence. In the case of the first and second defendants, the filing of the application for the extension featured a delay of over one year and eight months. In the case of the fourth defendant the delay in filing the application was almost two and a half years.

[29] In both of these instances the delay could easily be described as lengthy and inordinate.

[30] In respect of the first and second defendants, they were nine days late in filing the defence. In respect of the fourth defendant, the delay in filing the defence amounted to ten days. The delay relative to the filing of each Defence could therefore be described as a short delay.

REASONS FOR THE DELAY

[31] Neither the first and second defendants nor the fourth defendant provided any reason for the delay in filing the applications for extension of time. Their focus was on the reason for the delay in filing the defences.

[32] Based on what Mr. Lewis outlined in his affidavit the delay in filing the defence was essentially because of how the documents came to their attention and because of the impact of the Covid 19 pandemic. They did not explain how the pandemic impacted them directly however they did suggest that they were not immediately able to retain counsel to file their defence. Although they have failed to provide a reason for the delay in filing the application, they have provided some explanation for the delay in filing the defence out of time. In light of the fact that the defence was filed within a short space of time thereafter I find the explanation provided by them to be reasonable in all the circumstances.

[33] The fourth defendant explained what seems to be inadvertence on his part for not having filed the Defence within the required time as well as his work commitments as he explained that he was actively engaged in a trial and that as soon as it came to his attention action was taken immediately. He has provided some reasons but taking into account that he is by profession an Attorney-at-law and this is a matter in which he is being sued personally, it would have been expected that he would have acted expeditiously. He did not state the date on which the documents came to his attention relative to the date on which he took action. He has not provided adequate material for the court to be able to say how soon he acted after becoming aware. It is difficult in those circumstances to say that he has provided any good reason for the delay.

WHETHER THERE IS AN ARGUABLE CASE

[34] It is a fact that none of the defendants exhibited their proposed Defence but rather took comfort in the fact that they had filed it however, by virtue of their submissions have asked the court to pay regard to it. Counsel for the claimants has submitted that the Defence is not properly before the Court and therefore the Court cannot consider it and she relied on the **Peter Haddad** case (supra) to support this position. Now the provisions of CPR 13.4. clearly speak to the fact that in an application to set aside a Default Judgment the proposed Defence must be exhibited. However, there is no similar provision regarding an application for extension of time as seen in CPR 10.3(9). From that it can be deduced that the Court is not as strict in this regard and has a discretion as to what material to use in considering this question. My sister in the **Adrian Samuda** case adverted to this when she postulated at paragraph 35 of the judgment that:

> ***"…I am of the view that in applying the overriding objective of dealing with cases justly, the court should perhaps not ignore completely the existence of relevant information presented because it was not presented strictly in the correct format as required by the procedure. Rule 1.1(2) enumerates matters that are relevant when seeking to deal with a case justly. One is not in my view limited to those considerations only. The fact that the rule says "dealing justly with a case includes" means just what it says "includes" which clearly cannot be interpreted to mean "limited to". I am in no way suggesting however that a wholesale disregard of rules of procedure is in any wise acceptable, I am simply saying that if in an***

> ***instance such as this the court were to find that material amounting to a good defence is put forward in the draft defence, but not contained in an affidavit, I would be hard pressed to ignore it for want of procedure.…"***

[35] The defendants have expressed that they have a good arguable defence. In the case of the first and second defendants they have set out in their supporting affidavit the nature of this defence. They have also referred to the fact of filing their Defence albeit late.

[36] The first and second defendants in their affidavit have averred that in relation to the substantive matter, there was an agreed sale price of Eight Million Dollars ($8,000,000.00) and an additional agreement that they would pay all legal fees associated with the sale which would be deducted from the sale price. Further to the agreement, they paid the full purchase price and were given letters of possession and put into physical possession of the property. It was subsequent to this that the claimants did a fraudulent lost title application in 2015 without their knowledge and obtained a new Certificate of Title and thereafter attempted to fraudulently sell the property. This came to their attention when they noticed an advertisement of the property for the price of Twenty-Six Million Dollars ($26,000,000.00). They then realized that the property was never put into their names and so made a report to the Fraud Squad.

[37] In support of their averments, they have exhibited several documents to include the executed Agreement for Sale which reflects an agreed purchase price of Eight Million Dollars ($8,000,000.00), a figure also supported by the Transfer purportedly signed by all the parties to include the claimants. Of note is the lost title application dated 10th February, 2015 in which the claimants both stated that the Certificate of Title bearing volume number 1423 and folio number 701 was kept in their wardrobe drawer and that they later discovered it was not there. At the end of the application, they signed to the fact that any person who makes a fraudulent declaration is liable to criminal prosecution. This is to be contrasted with the averments made in the Particulars of Claim that in respect of the said Certificate of Title they signed a letter of authorization for it to be released to third defendant in her capacity as the Attorney-at-law having

carriage of sale, and that she thereafter released same to the first and second defendants. The claimants conceded that having discovered this they applied for and obtained a duplicate certificate of title. They did not mention that this was a lost title application.

[38] Based on all that is outlined in the affidavit it is clear to me that they would have a good defence which is more than arguable. I would even venture to say that they have a realistic prospect of success. This is not a requirement here as all they are required to prove at this stage is an arguable defence. This has opened the door for the court to pay regard to what has been set out in their Defence. The Defence filed out of time is also supportive of the positions articulated in their affidavit however goes further to elucidate the facts. They asserted that an application to dispense with the production of the Certificate of Title was made on their behalf however no fraud was ever committed by them as full disclosure was made to the Registrar of Titles.

[39] In the case of the fourth defendant he failed to set out the nature of his defence in the supporting affidavit. However, he has also referred to the filing of his Defence albeit out of time. In his submissions, he asked the Court to consider the contents of his Defence and to find that he has a good arguable defence. The question as to whether the Court will consider the content of this document filed out of time must be determined based on the particular facts of this case. I am quite attracted to the comments by my sister Pettigrew-Collins J in the **Adrian Samuda** case that she would be hard pressed to not consider other material for want of procedure. From my understanding of all the authorities referred to earlier, it seems to be that each case ought to be decided based on its particular facts. The allegations made against the claimants here as seen in the affidavit evidence of the first and second defendants are serious allegations which could have implications in the criminal arena. The claimants themselves in their Particulars of Claim although not mentioning a lost title application indicated that having discovered that the third defendant had given the duplicate Certificate of Title to the first and second defendants without securing due payment of the purchase price, they applied for and obtained a new duplicate Certificate of Title for the property which bore a different folio and volume number. If there is any truth in these averments, it would mean that the claimants would stand to benefit from an illegal act perpetuated by them.

[40] In all these circumstances, with the very concerning allegation of fraud being made against the claimants, I am of the view that the court should not ignore the information presented in the Defence of the fourth defendant. In the fourth defendant's Defence he asserted that he was retained by the first and second defendant to complete the sale of the subject property and that they handed over to him the executed Agreement for Sale and Transfer. His investigations revealed that the claimants had made a fraudulent lost title application. Taking into account all of that information, this strikes me as a case worthy of further investigation, exploration and a full ventilation of the issues raised.

[41] The defendants have argued that the claimants have not come to the Court with clean hands and if their case is accepted, this may very well be so. However, the clean hands principle is usually one which is relevant in the law of equity and would not be applicable here.

PREJUDICE

[42] On the question of prejudice, if the claimants were to succeed they would be able to recover possession of property under circumstances where it is being alleged that they were paid the full purchase price and under circumstances where the allegations of fraud have not been ventilated. The defendants on the other hand if they were to succeed would merely be getting an opportunity to have the case subject to the trial procedures.

CONCLUSION

[43] There has been a failure on the part of the first, second and fourth defendants to abide by the Rules of the Court. It cannot be over emphasized that Rules exist to provide guidance and should be followed. This is even more glaring in the case of the fourth Defendant who is himself an attorney-at-law. I recognise and like my sister in the **Adrian Samuda** case would never suggest a wholesale disregard for the Rules however in the circumstances of this particular case I feel obliged to consider the justice of the case. I feel obliged to consider the overriding objective of the Rules which is to deal with cases justly.

[44] Although the delay in filing the application for an extension of time is of itself a serious issue to be contended with especially because of the failure to provide any reason for it, the fact that the Defences were filed within a short space of time and there has been some reason provided for the delay in filing the Defences has served to balance the effect of the inordinate and unexplained delay in the filing of the application.

[45] It is clearly a balancing act for the Court to consider whether the mere fact of the unexplained delay should trump any other factor such as what could be even more than just an arguable case. In conducting a balancing act, justice must be the primary objective. There has been a trend in several of the cases mentioned to place paramountcy on the merits of the Defence.

[46] The first, second and fourth defendants have demonstrated what I would consider to be a good and more than arguable defence. If the court were to deny the application, the court would no doubt go on to enter judgment for the claimants. The claimants would therefore stand to succeed in a case where it would be difficult for them to deny that they acted fraudulently. Would this have the ring of what is just, what is fair and what is right? The court would be loathed to assist a claimant to obtain judgment in a case which has the potential to result in that party obtaining the fruits of their wrong doing. That could not be the intention of the Civil Procedure Rules when it speaks about dealing with cases justly. Taking into account the overriding objective, if the claimants were to succeed in this way there would be no opportunity for these very serious issues to be ventilated and the veracity of the allegations tested.

[47] The main prejudice that has been occasioned to the claimants is that of the time it has taken to have the matter reach this stage which I think could be ameliorated by an order for cost in their favour.

[48] In summary, despite the failure to provide any or any good reason for the delay in filing the application, taking into account the reasons given for the delay in filing the Defence, when that is weighed with the good and arguable defence, the Court will permit the application for extension of time made on behalf of the first, second and fourth defendants and allow the Defences filed to stand as if filed within time.

[49] The court also heard the claimant's application for judgment to be entered against the 1st, 2nd, 3rd and 4th Defendants. It was made on the following grounds:

1. In respect of the first and second Defendants, that they have failed to file a Defence…;

2. In respect of the third Defendant that she has failed to file an Acknowledgement of Service and Defence…; and

3. In respect of the fourth Defendant that he has failed to file an Acknowledgement of Service and Defence.

[50] The Claimants relied on their written submissions filed. There was no response on behalf of any of the Defendants. The first, second and fourth Defendants were precluded from responding because they failed to comply with an order to file written submissions with authorities as ordered by the Court on December 2, 2021. The Order was followed by an order that if they failed or neglected to comply strictly with this and other Orders they shall not be heard at the hearing of the application. Consequently, they were not heard.

[51] The third defendant, although she had counsel representing her did not respond either by way of affidavits or otherwise.

[52] The Court is still required to consider firstly whether in respect of the first, second and fourth defendants, the claimants have satisfied the requirements for the Default Judgment to be entered. I have considered the written submissions filed on behalf of the claimants. I will not repeat the submissions here except to say that counsel for the claimants reminded the Court of its power under Part 12 of the CPR, in particular Rule 12.1 which states -

> ***"(*1) This part contains provisions under which a Claimant may obtain judgment without trial where a defendant -**

a. **Has failed to file an acknowledgement of service giving notice of intention to defend in accordance with Part 9; or**

b. **Has failed to file a defence in accordance with Part 10.**

(2) Such a judgment is called a "default judgment".

[53] Rule 12.5 sets out the conditions to be satisfied before a Default Judgment can be entered which includes proof of service of the claim form and particulars or an acknowledgement of service of the claim form and particulars of claim filed by the defendant against whom judgment is sought; that the period for filing a defence and any extension agreed by the parties or ordered by the court has expired and that the defendant has not filed a defence within time or has not filed any admission in case of a claim for a specified sum of money or has satisfied the claim. Finally, there ought to be no pending application for an extension of time. The claimants would have no challenge proving all of the limbs except for the fact of the application for extension of time in respect of the first, second and fourth defendants. I have already dealt with that application and have found that the application for extension of time should succeed. In light of those findings the conditions for default judgment to be met would not be satisfied in respect of the first, second and fourth defendants.

[54] The position is different in respect of the third defendant. No such application for extension of time was filed and the claimants have satisfied all the conditions for the Default Judgment to be entered. I therefore order that Judgment in Default be entered against the third defendant. The Claim against the third defendant is for Damages for Negligence and/or breach of fiduciary duty. The matter against her is therefore to proceed to an Assessment of Damages hearing.

[55] My Orders are as follows:

1. The first and second defendants' application for an extension of time to file their Defence is granted.

2. The first and second defendants' Defence filed on May 18, 2020 is permitted to stand as if filed within time.

3. The fourth defendant's application for an extension of time to file his Defence is granted.

4. The fourth defendant's Defence filed on August 2, 2019 is permitted to stand as if filed within time.

5. The claimants' application for judgment to be entered in default against the first, second and fourth defendants is denied.

6. The claimants' application for judgment to be entered in default against the third defendant is granted.

7. Costs to the claimants against the first, second, third and fourth defendants to be agreed or taxed.

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Stephane Jackson-Haisley
Puisne Judge