

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCv2020/0031

BETWEEN:

JESSY JAMES KHOULY

SANDY-ANN KHOULY

**Administrators of the Estates of Wafaa Khouly nee Hadeed a.k.a.
Waffa Khouly nee Hadid a.k.a Wafaa Khouly**

Claimants/Respondents

and

MOUNT ST. JOHN'S MEDICAL CENTRE BOARD

Defendant/Applicant

Appearances:

Mr. Kendrickson Kentish and Ms. Cherise Archibald for the Claimants/Respondents
Mr. George Looby IV for the Applicant/Defendant

2023: July 27th
September 11th

DECISION ON SUBMISSIONS

1. **BYER J**; The Defendant filed an application to set aside a judgment in default on 12th July 2023 and sought the following orders:
 - a. The Judgment in Default of Defence entered the 26th day of June 2023, in favour of the Claimants be set aside;

- b. The Defendant/Applicant be granted leave to file their Defence within twenty-eight (28) days of the making of the Order.
2. The Application is grounded in rules 13.2(1) (b), 12.5 and 13.3(1) of the Civil Procedure Rules 2000.

BACKGROUND

3. The Claimants are the administrators of the estate of their deceased mother, Mrs. Wafaa Khouly. Proceedings were initiated alleging negligence in the care and treatment of the Claimants' mother by the Defendant hospital resulting in her death.
4. The sequence of court filings up to this point are as follows:
 - a. The Claimants filed their Claim Form and Statement of Claim on 10th February 2020;
 - b. The Defendant filed an Acknowledgement of Service on 21st February 2020;
 - c. The Defendant filed an application to strike out the Claimants' claim on 11th March 2020;
 - d. The application to strike out the Claimants' claim was granted by Master Carlos Michel on 1st December 2021;
 - e. The Claimants filed a Notice of Appeal on 14th December 2021, appealing the decision of the Learned Master ;
 - f. The Court of Appeal gave a decision on 8th March 2023 setting aside the order of the Learned Master and ordered that the issue raised by the Defendants in their application to strike out was to be remitted for trial of the substantive claim in the High Court;
 - g. There was no further order as to the filing of the Defence by the Defendant;
 - h. The Claimants filed a Request for Default Judgment on 12th April 2023 and judgment was entered on 26th June 2023;
5. The Default Judgment entered on 26th June 2023 is now being challenged by the Defendant who is seeking to have it set aside.

THE AFFIDAVIT EVIDENCE

6. The Defendant filed the affidavit of Mr. Shamair Edwards in support of the application on 12th July 2023. Mr. Edwards is a legal clerk in the chambers of Counsel for the Defendant.
7. In his affidavit Mr. Edwards says that his office received no notification from the E-Litigation Portal that the Claimants filed a Request for Judgment.

8. He also states that when the Court of Appeal allowed the Claimants' appeal on 8th March 2023 no date was set for the filing of the Defence with the matter being remitted to the High Court for the issue on whether the Defendant could rely on the issue of limitation to be determined at the trial of the matter. The High Court did not set a date for the filing of the Defence.
9. He goes on to state that Counsel for the Defendant was waiting for the Court office to set a date for the parties to appear and order the filing of the Defence. As a result, Counsel for the Defendant is of the view that there was no failure to file a Defence within the required time which would entitle the Claimants to a judgment in default.
10. He also states if the Court grants the Application and hears the case on the merits no prejudice will be caused to the Claimants but that it may occasion an injustice to the Defendant to allow the Judgment in Default to stand due to no fault of the Defendant.
11. A supplemental affidavit in support was filed on 15th August, 2023 by Shamair Edwards.
12. In this further affidavit, the affiant deposed that Counsel for the Defendant's first indication that judgment had been obtained was when through the E-litigation portal they received a notification on 26th June, 2023 with the description "Settled Judgment in Default" with the file type indicated as "Correspondence (Internal)". The office later that day received a notification of the filing of the Judgment in Default.
13. The affiant went on further to state that the office did not receive any notification indicating that a Request for Judgment in Default had been filed by the Claimants.
14. In fact, the affiant further stated that prior to receiving the email notifications on 26th June, 2023, the office of Counsel for the Defendant was unaware that the Claimants had requested the Judgment in Default either through the E-litigation portal or by direct correspondence from Counsel for the Claimants.

SUBMISSIONS

15. Counsel for the Applicant/ Defendant filed written submissions in support of his application on 15th August, 2023.
16. Counsel submitted that CPR 12.5 provides conditions which must be satisfied for the court to enter judgment in default for failure to defend. He posited that the presence of the word "and" before paragraph "d" in rule 12.5 is a clear indication that the conditions of rule 12.5 are conjunctive and therefore each requirement must be satisfied in order for judgment in default to be properly entered. He contended that 12.5(b) having not been satisfied in that there had been no period for the filing of

the defence nor had the parties agreed to any extension meant that at the time of the Claimant's request for entry of judgment in default, the Claimant was in fact not entitled to judgment being entered in their favour.

17. He further submitted that in any event, time would have stopped running when the Defendant filed its application to strike out the claim and that when the Court of Appeal allowed the Claimants' appeal, there was no automatic resumption of time running against his client.
18. Counsel for the Applicant/Defendant also argued in the alternative that in any event, even without him having relied on the provisions of Part 9.7 CPR 2000 and disputed the Court's jurisdiction on the Application to Strike out the Claim, the Court of Appeal should have inferred that that was the position and made specific orders under Part 9.7 (7) (b) and make an order as to the period for filing a the defence. In this regard Counsel relied on the case of **St. Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited**¹. In his submission Counsel contended that in the **Caribbean 6/49 Limited case**, there had been no mention of CPR 9.7 at all in the application that was being considered by the Court, however the Court having regard for the substance of the application over its form, treated the strike out application before it on the ground of abuse of process as being a 9.7 application in substance.
19. In furtherance of this argument, Counsel submitted that indeed the Court's having determined that slavish adherence to form, sacrificing substance, defeated the overriding objective of the CPR, he also relied on **Intrust Trustees (Nevis) Limited v Haim Samet Steinmetz Haring & Co and Naomi Darren**.²
20. Counsel therefore argued that since in the case at bar that the Applicant had argued on the strike out application that either the Court had no jurisdiction to hear the claim as the limitation period expressed in the Public Authorities Protection Act CAP 352 ("PAPA") had passed, or that the Court should decline to hear the claim as the limitation period expressed in PAPA had passed, the substance of the application was in fact captured by the provisions of Part 9.7.
21. Therefore, since the Court of Appeal effectively denied to declare that the High Court did not possess jurisdiction to hear the claim, the Court of Appeal's decision, triggered Part 9.7 (7) (b), whereby it was mandated to set a period for the filing of the defence.
22. Having not done so, it was incumbent upon the High Court Office to have given notice of a case management hearing wherein a date for the filing of the Defence could have been given. There having been no such action taken, it could not be said that the Claimants/ Respondents had in fact

¹ Civil Appeal No. 6 of 2002

² Civil Appeal No. 1A of 2009

satisfied the requirements of Part 12.5 and therefore the judgment in default had been wrongly entered.

23. In the premises Counsel submitted that pursuant to CPR 13.2(1) (b), the judgment in default must be set aside.
24. Counsel for the Applicant/Defendant also argued in the alternative that the Court also had the discretion under Part 13.3 to set aside the judgment once the parameters to do so had been met by the applicant. In that regard Counsel contended that the application had been filed 15 clear days after having notice of the judgment having been entered, a time frame that had been accepted by the court in other matters to be considered to satisfy the terms of “reasonably practicable” in Part 13.3(a) .
25. Under Part 13.3(b) Counsel for the Applicant /Defendant contended that they did have a good explanation for not having filed the defence, mistaken though it may have been. The Applicant had an honestly held belief that action would have been taken by the court office to facilitate the defence having been filed once the Court of Appeal determination had been handed down. Therefore, the explanation for failing to file the defence was good and could avail the Applicant in the circumstances. Further in relation to Part 13.3(c) the Applicant/Defendant submitted that having filed their draft defence which shows that they are clearly relying on the provisions of PAPA, which is applicable to the claim, this showed something that was more than merely arguable before the court but a contention that had a real prospect of defeating the claim, not just merely defending the claim. In any event, the Applicant/Defendant also pleaded that there was no negligence on the part of the Defendant institution, they having done all that they needed to do when the Deceased was discharged.
26. On the basis of either of the arguments, the Applicant/Defendant submitted that they were entitled to have the judgment set aside and the matter to proceed to trial.
27. Counsel for the Respondents/Claimants filed their submissions in opposition on 15th August 2023.
28. Counsel submitted that the Defendant had not exhibited any evidence or cogent reason why the court should consider the setting aside the judgment in default of defence as a matter of right under the provisions of Part 13.2 CPR 2000.
29. Counsel contended that the facts of the matter were that, once the Court of Appeal had issued its decision in April 2023, time begun to run and the matter was intended to take its natural course with the applicable timeframes under the provisions of the Rules of Court. In fact, the Court of Appeal having directed that the issue of limitation was to be dealt with at trial, intrinsically meant that for the matter to proceed to trial, the pleadings had to be closed, case management would have to be undertaken and then the matter would be on the trial track. There was therefore an obligation on the

Defendant to file their defence and having failed to do so, and there having been no defence at the time that the Request for Judgment in Default was filed, the Claimants were entitled to apply and obtain their judgment in default.³

30. Therefore, the Defendants not having satisfied the requirements for the judgment to be set aside as of right, the Respondents/ Claimants also contended that the Applicant had not met the threshold to invoke the discretion of the court to have the judgment set aside. Indeed, having recognised that the provisions of Part 13.3 (1) are conjunctive, the Respondents/Claimants submitted that the Applicant had not satisfied the first two requirements and as such the application should be dismissed. In this regard the Respondents/ Claimants submitted that the period that had elapsed before the filing of the application was 17 days. They contended that given the history of the matter, there would have been no need for the Applicant to have issued new instructions or to have a member of the Applicant swear to the evidence and in fact the employee of Counsel for the Applicant/ Defendant was the person who in fact swore to the evidence. In that regard the 17-day period was excessive. However, the argument of the Respondents/Claimant was that the Applicant's reason for having not filed a defence was entirely inadequate. The reason proffered of awaiting directions held no substance when there was no provision in the CPR that prohibited a defence being filed out of time. What such a defence had to be accompanied by was an application for an extension of time as there was no sanction attached to the late filing. Indeed, if the Applicant was unaware of what should have transpired after the Court of Appeal decision, they were to have either filed their defence and application or file an application for directions. Not just do nothing. In that regard the Respondents/Claimants submitted that the Applicant could not surmount this failure. On this basis they therefore asked for the application to be dismissed.

COURTS CONSIDERATIONS AND ANALYSIS

31. When this court considers the arguments raised by the Applicant/ Defendant it is clear to the court that some misconceptions raised by the Applicant/Defendant in relation to the judgment in default and applications to strike out in general need to be cleared up before the court considers the substantive complaints on the application.
32. Firstly, there is no requirement for notice to have been given to the Applicant/Defendant on the filing of the Request for Judgment in Default that was filed by the Respondents/Claimants on the 12th April 2023, some 6 days after the passage of 28 days from the decision of the Court of Appeal dated the 8th March 2023. The Request was made pursuant to Part 12.10(1) (b) for an unspecified sum of money to be decided by the Court. This was not a request that required the permission of the court to be entered and therefore requiring the application and the evidence in support to be served.⁴There

³ **Glenford Rolle v Stephen Lander** DOMHCVAP2013/0025A

⁴ Part 12.10(2) and (3)

was therefore no requirement of notice having to be given to the Applicant/Defendant and a perusal of the court records by this court made it clear that the Request was filed ex parte. The court therefore finds no merit in this claim made by the Applicant/Defendant that they had no notice of the application.

33. Secondly, I turn now to Counsel for the Applicant/Defendant's submissions regarding the applicability of Part 9.7 to the present case and in particular the correlation to strike out applications.
34. The contention of Counsel for the Applicant/Defendant that the case of **St Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**⁵ is authority that strike out applications by necessity are in fact Part 9.7 applications is wholly misconceived and in this court's view a simplistic view of that case and the findings of the Court of Appeal.
35. When this court in fact examines that case, it does indeed deal with the similarity between a strike out application and a Part 9.7 application where the jurisdiction of the court is being disputed. In fact, Saunders JA (as he then was) did make the statement that a striking out application "*such as this one*" would fall within the parameters of Part 9.7. In this court's mind this was not a statement to be taken as general application that strike out applications were in substance Part 9.7 applications. In fact, in the **Caribbean 6/49** case the strike out application had been amended to include specific reference to and reliance on Part 9.7, even though that was not mentioned by Saunders JA in his reasoning.
36. Indeed the Court as it was constituted in **Caribbean 6/49** all agreed that the appeal should be allowed and the judgment in default should be set aside but Barrow JA (as he then was) took an even more in-depth consideration of this issue of the correlation between Part 9.7 and strike out applications and had this to say: "*I have been much exercised by the question whether Part 9.7 was intended to apply to a strike out application. There are two limbs to this part and it seems that the first limb which speaks to a defendant disputing the existence of the court's jurisdiction to try the claim, indicates the intention of the second limb, which speaks to a defendant urging the court that although as a matter of law it possesses jurisdiction as a matter of discretion the court ought not to exercise its jurisdiction....I can therefore, see the merit in the argument that Part 9.7 is sufficiently ample to subsume a strike out application such as the one filed by the defendant and that is the way how it was worded as originally filed did not display the mantle of that provision, nonetheless the substance of the application was sufficient to bring it within Part 9.7 . On this point it should be noted that there is considerable overlap in the scope of the various provisions dealing with striking out, summary judgment and refusal to exercise jurisdiction. [35] Having noted the overlap however, I should also note that a strike out application falls distinctly within the ambit of Part 26.3 ...the text book examples given of abuse of process include issue a claim after the expiry of the limitation period...striking out*"

⁵ Supra n1

for abuse of process will usually be a distinct application from an application asking the court to refuse to exercise a jurisdiction that the court possess.”

37. I have purported to quote so extensively from the **Caribbean 6/49** case in this instance to clearly indicate the fallacy of the argument of Counsel for the Applicant that the Court was mandated to deal with the appeal on the application as having included an inference to Part 9.7 and that there was therefore the need to include a date for the filing of the defence upon the finding of the Court that the appeal would be allowed.
38. That being said, and this court not agreeing with Counsel for the Applicant on those preliminary issues, Counsel has also sought to invoke Part 13.2 which invokes the Court’s mandatory power to set aside a default judgment where judgment was wrongly entered when the conditions of 12.4 or 12.5 were not satisfied.
39. In this regard Counsel for the Applicant has contended that the Claimant/ Respondent had not satisfied the requirements of Part 12.5 as in his argument these requirements were in fact conjunctive and therefore all of the preconditions had to be satisfied.
40. The rule reads as follows:

“Conditions to be satisfied – judgment for failure to defend

12.5 The court office at the request of the claimant must enter judgment for failure to defend if –

- (a) (i) the claimant proves service of the claim form and statement of claim; or*
- (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;*
- (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;*
- (c) the defendant has not –*
 - (i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or*
 - (ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or*
 - (iii) satisfied the claim on which the claimant seeks judgment; and*
- (d) (if necessary) the claimant has the permission of the court to enter judgment.”*

41. Counsel for the Applicant sought to rely on the insertion of the word “and” before subsection (d) to connote a conjunctive reading of the Rule. This court is of the view that a proper reading of the rule does not lend itself to the interpretation that the requirements listed are conjunctive by the mere

inclusion of the word 'and'. In fact, when this court considers the actual conditions for the entry of default judgment, in this court's mind reading this rule as conjunctive would make a mockery of the application of the rule, if the claimant had to prove not only that the period for filing a defence had passed, any agreed extension had passed AND also failed to file a defence. In this court's mind the drafters of the rule could not have intended to have the same read in this way. Additionally when this court considers Part 13.2(1) (b) it is clear that "*the court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because in the case of ... (b) judgment for failure to defend - **any conditions in rule 12.5 was not satisfied.***" (my emphasis added) Thus having read rules 12.5 and 13.2(1) (b) together, it is clear that a default judgment may be entered where any **one** of the conditions in 12.5 has been satisfied.

42. Therefore, the only basis upon which this court may in fact entertain this application is on the discretionary powers under Part 13.3 where the court may set aside a default judgment where the applicant has applied to the court as reasonably practicable after finding out that judgment had been entered, that there is a good explanation, and that the defendant has a real prospect of successfully defending the case. All of these conditions must be met, and, in this instance, they are cumulative, severely limiting the discretion of the court to ensure the satisfaction of each condition⁶.

As soon as reasonably practicable after finding out that the judgment has been entered

43. Under Part 13.3 there is nowhere stated what would be the period of time that would be considered "*as soon as reasonably practicable*". Rather this is considered in light of all the circumstances and the evidence before the court.
44. In this case at bar, the Applicant would first have had notice of the judgment in default that was filed in draft on the 26th June 2023, the perfected order was not uploaded until the 5th July 2023 and the application to set aside was filed on the 12th July 2023.
45. When this court therefore considers that at the minimum the application was filed some 7 days after the perfected order and some 17 days after first having notice, this court is not of the opinion that the period of delay in the filing of the application was inordinate. In this court's mind, the period of 17 days does not offend the requirement for the court to deal with cases expeditiously and justly.⁷
46. In this court's mind therefore, the Applicant has met the first requirement.

⁶ **Kenrick Thomas v RBTT Bank Caribbean Limited** Civ App 3/2005 per Barrow JA at paragraph 7

⁷ **Earl Hodge v Albion Hodge** BVIHCV2007/0098 per Hariprashad J at paragraph 12

Good explanation for the failure to file a defence

47. In determining whether the Applicant has met this condition, the court must consider the reasons proffered by the Applicant for this failure. The court has already dealt with the issue raised of notice being given to the Applicant. The other issue raised on the affidavit evidence of the Applicant was that the Court of Appeal having not given the time frame for the filing of the defence, the Applicant was awaiting the scheduling of the matter by the Court office to facilitate an order being made for the further progression of the claim.
48. Similar to the provision as Part 13.3(1) (a) the Rules of Court do not set out what would be considered a good explanation. However, in the case of **Sylmord Trade Inc v Inteco Beteiligungs AG** ⁸ the Court of Appeal by Michel JA agreed with the dicta of The Judicial Committee of the Privy Council in **The Attorney General v Universal Projects Limited** ⁹ that *“if the explanation for the breach ...connotes real or substantial fault on the part of the defendant then it does not have a good explanation for the breach.”*
49. In the case at bar, the Applicant did not need an order of the court to file a defence. Before the filing of their application to strike out, and if the application had not been successful the Applicant knew that they would have had to have filed a defence to the proceedings. However, this court must consider that in light of the order of the Court of Appeal that it would have been quite within the Applicant’s range of decisions available to them to await the matter being reassigned to a judicial officer of the High Court for the matter to be brought back on the trial track that the Court of Appeal had placed it on. Indeed, this court does not disagree that this could also have been done by the Applicant seeking directions, but the fact that they did not, in this court’s mind does not amount to there being no good explanation on the part of the Applicant. I therefore find that the Applicant has also met this condition.

Has a real prospect of successfully defending the claim

50. The draft defence that has been filed by the Applicant seeks to rely on the limitation point contained within the provisions of the PAPA and to defend the negligence as claimed as to the steps that were taken by the Applicant’s employees in relation to the Deceased, Wafaa Khouly.
51. It has been said that *“once a defence on the merits to the requisite standard is identified, it must take some very special feature for the court to conclude that the default judgment should not be set aside.”*¹⁰ However the question must be asked, what does amount to a real prospect of success.

⁸ BVIHCMP2013/0003 per Michel JA at paragraph 23

⁹ [2011] UKPC 37

¹⁰ **Earl Hodge v Albion Hodge** Supra at paragraph 23

52. In **International Finance Corporation Ute Africa S.p.A.**¹¹ Moore – Bick J had this to say about what this term meant , “to say that the case had a realistic prospect of success suggests something better than it is merely arguable....there are good reasons for that. A person who holds a regular judgment has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside....in this context means a case which carries a degree of conviction.”
53. In the case at bar the defence in this court’s mind raises an issue that is more than arguable. The presumption must be that the provisions of the PAPA apply to these proceedings and the limitation period set therein would oust the Claimants/ Respondents claim. That was clearly what the Court of Appeal’s finding that this be a matter dealt with at trial was based on. It is for the Claimant to show otherwise but in this court’s mind, it is a defence that carries real conviction with a more than arguable case for success. Additionally this court is also satisfied that having raised the issue in the defence that all relevant protocols were met in the treatment and the discharge of the Deceased, that unless the Claimants/ Respondents are able to produce cogent and clear evidence that the treatment of the Deceased was below the required standard of care of a medical institution given the circumstances of the particular case and what has been averred as the consent of the Deceased to leave the institution, there is also a real prospect of successfully defending the case on this limb of the defence.
54. To be clear at this stage this court is not in any way pre-determining the matter but simply having assessed what was pleaded in the defence, I am satisfied that the Applicant has shown that the defence “...has merit to which the court should pay heed...”¹²

CONCLUSION

55. As a result of the foregoing, this court is satisfied that the Applicant has met the conditions under the Rules and that the application to set aside the judgment in default filed on the 12th July 2023 is granted.

Order of the court

- a. The application to set aside the Judgment in Default entered on the 26th day of June 2023, in favour of the Claimants is granted.

¹¹ [2001] EWHC 508 (Comm)

¹² **Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co. Inc** [1986] 2 Lloyd’s Rep 221

- b. The Defence is to be filed within 7 days of the date of this judgment, failing which the Judgment in default obtained on the 26th June 2023 will be reinstated and take effect without further order of the court.
- c. Upon the filing of the defence the matter will proceed pursuant to the provisions of the CPR (Revised Edition) 2023
- d. The Defendant is to have carriage of this order.
- e. No order as to costs.

Nicola Byer

High Court Judge

By the Court

Deputy Registrar